

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Acquittal Appeal No.548 of 2023

Date	Order with signature of Judge
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1. For order on office objection alongwith reply as at flag 'A'
2. For hearing of main case

04.12.2023

Appellant present in person
Mr. Saleem Akhtar Buriro, Additional PG alongwith SI Abdul Latif PS
Aziz Bhatti Karachi
Respondent No.1 present in person

The appellant Syed Zafar Hussain has assailed the legality of the order dated 05.09.2023 passed by the learned Civil Judge/Judicial Magistrate-IX Karachi East in Criminal Case No. 1721 of 2018 (*re-The State v Salman Hasin*) whereby, he was acquitted from the Crime No.135 of 2018 punishable for offenses under Section 406/420/468/471 and 34 PPC of PS Aziz Bhatti.

2. It is inter alia submitted by the appellant who is present in person that impugned order is perverse and against the law; that the appellant proved his case by producing the cogent evidence, however the Trial Court discarded his evidence in a slipshod manner. Appellant referred to various documents attached with Memo of Appeal and other bunch of documents and attempted to convince this Court that the acquittal of the respondent No.1 was/is illegal on the premise that the he cheated the appellant by inducing him to deliver the money for the aforesaid purposes and issued fake documents of the property thus caused criminal breach of trust thus committed fraud and forgery and was/is liable to be convicted for the offenses under Section 406/420/468/471 and 34. The appellant further submitted that his evidence was not appreciated by the learned Trial Court, and the respondent-accused was acquitted without appreciation of evidence; that the learned Trial Court has committed material illegality while acquitting the respondent No.1, whereas there was huge evidence for conviction of respondent. He prayed for setting aside the impugned order and prayed for conversion of acquittal appeal into conviction of respondent No.1.

3. The Addl. P.G assisted by the respondent No.1, who is present in person has supported the impugned order passed by the learned Trial Court and prayed for dismissal of the instant Criminal Acquittal Appeal on the premise that there was/is no sufficient material evidence to award conviction to the respondent No.1. It is contended by the respondent No.1

who is present in person that from the bare perusal of the FIR as well as the evidence of the complainant, no offence whatsoever is made out against him; that he stands implicated in the instant case on the basis of a general allegation without attribution of any act, which may attract the mischief of any offence defined under Pakistan Penal Code; that in the instant case, appellant is using the process of a criminal court for achieving the positive ends in the civil; he added that the impugned order passed by the court below reflects that the same is in consonance with the facts and circumstances of the case; that in the given circumstances even if the proceedings before the learned trial court are permitted to continue the same are not likely to end in his conviction, hence being abuse of process of court this Appeal is liable to be dismissed.

4. I have considered the above submissions of the parties and perused the record.

5. The facts in brief are necessary for the disposal of the instant acquittal appeal are that the appellant-complainant lodged the FIR No. 135 of 2018 for offenses punishable under section 406/420/468/471/34 PPC against respondent No.1, alleging therein that on 25.09.2008 at about 4.00 p.m. one associate of the applicant met with residents of Hasin's residency Block 13-A Gulshane-e-Iqbal Karachi and demanded Rs. 50,000/- for installation of Electric meters, which amount was paid by the residents, except Complainant on the premise that he had purchased subject Flat, inclusive of all facilities. It is also alleged that the applicant usurped Rs. 6,75,000/- of the residents. It is further alleged that respondent No.1 and his associates had executed a fake lease in favor of the Complainant for the subject Flat. As per the appellant/complainant, he filed a case against respondent No.1 in that proceedings, and the construction over the subject property was declared illegal. As per the appellant, the associates of respondent No.1 extended threats to the appellant/complainant and asked him not to pursue the cases against respondent No.1. Such a report of the incident was given to Aziz Bhatti Police Station and FIR No. 135 of 2018 under section 406/420/468/471/34 PPC., was registered against the respondent No.1 before the trial Court and thereafter formal charge against respondent No.1 was framed to which he pleaded not guilty and claimed trial.

6. To establish the case, the prosecution examined the appellant/complainant, who produced FIR, memo of the place of incident, pictures of the place of incident, photocopy of Sulehnama, photocopy of agreement dated 04.09.2008 along with receipts, photocopy of estimate and challan of K-Electric supply dated 15.01.2018, photocopy of sub-lease deed dated:09.04.2009, photocopy of Special power of attorney for Court

proceedings, affidavit of the owners of the flat and special power of attorney for installing the electric meters. PW-2 ASI/IO Sohail Akhtar was examined who produced a letter dated 18.04.2018 to Sub Registrar Gulshan-e-Iqbal for verification of documents, receiving report of Sub Registrar Gulshan-e-Iqbal, verification from the Microfilming Unit BOR Sindh dated 20.04.2018. PW-3 Athar Ali Khan was examined. PW-4 Qamar Qureshi was also examined. PW-04 Investigating officer Arif Ahmed was examined. PW-05 IP/IO Asadullah PW-06 Mansoor and PW-7 SI/IO Saleem Khan were examined, who produced a photocopy of order No. 201 dated 21.02.2011 of SSP Investigation-I East zone Karachi and application dated 24.05.2018. Thereafter statement of the accused was recorded under Section 342 Cr.P.C., wherein he pleaded innocence and prayed for acquittal.

7. After assessment of evidence of the parties learned trial court has passed the impugned Judgment dated 5.9.2023 which is assailed before this Court through instant Criminal Acquittal Appeal. An excerpt whereof is reproduced as under:-

“14. In this case, the complainant primarily alleges that the accused along with his associates obtained money from the residents of Hasin’s residency for installation of electric meters. From FIR complainant has admitted that he had not paid Rs 50000/- like other residents to the accused or his associates for the installation of electric meters and such fact is also substantiated in the statement of the accused recorded under section 342 Crpc. Apart from the fact that nobody from Hasin’s residency has come forward except the complainant to allege that their amount was usurped by the complainant or his associates rather the complainant has admitted in his cross-examination that residents of Hasin’s residency had filed a case against him in Honorable high court alleging that complainant/Zafar Hussain usurped their amount obtained for installation of electric meters. Unfortunately, the complainant also lost the support of his PWs as PW Athar Ali Khan/a resident of Hasin’s residency went on to say that the accused did not obtain any amount from him for the installation of the electric meter whereas PW Qamar Qureshi in his evidence says that he has no concern with the instant case. Apart from that, the complainant had alleged that one of the associates of the accused designated for collection of the amount from residents was PW Qamar Qureshi and on the other hand complainant has submitted one sulehnama executed between him and Qamar Qureshi placed at Ex 3/D wherein complainant and Qamar Qureshi undertook not to harass each other and also agreed to carry out any work in Hasin’s residency with consultation of entire residents. From the above-discussed scenario/ as per FIR it is quite clear that the prime allegation of the complainant against the accused was with regard to the usurpation of the amount of installation of electric meters which indeed was in no way connected to the complainant as he had never paid such amount to complainant rather he was himself accused by co-residents for taking over their amount collected for electric meters and above that complainant executed Sulehnama with PW Qamar Qureshi for carrying out Hasin’s residency matters with the agreement of all the residents.

15. Secondly complainant has alleged that the accused being the builder of Hasin’s residency issued him a fake lease for flat C-3 but I am afraid this stance also has no force. It is also a fact that FIR does not state regarding issuance of the fake lease by the accused to the complainant but since the complainant has alleged such a fact therefore it’s appropriate to discuss it. IO after investigation initially forwarded the matter to be disposed of under C class on the basis that no such incident as alleged had happened and secondly that the sublease submitted by the complainant was found genuine when verified by the revenue department. The accused has also elucidated in his statement U/S 342 Cr.PC that he being the builder of Hasin’s residency did sell flat C-3 to the complainant and received the entire amount

against it. There seems no denying the fact that the complainant purchased flat C-3 from the accused in Hasin's residency however his stand with regard to the issuance of the fake lease by the accused is not established. As far as mentioning of 2nd floor in the sublease instead of the 3rd floor is concerned same can be rectified from the office of the sub registrar for which the accused is ready to do as opined by him in his statement U/S 342 Cr. PC. No evidence is available on record to show that the accused malafidely got the 2nd floor written in the sublease to extort undue benefit from the complainant.

16. Thirdly the complainant alleges that the accused along with his associates have made illegal construction in the basement area of Hasin's residency for which he has already approached the honorable high court and SCBA appropriate directions have been issued and the complainant is at liberty to approach appropriate forum if his grievance is not addressed as yet.

17. Fourthly issuance of threats in the absence of clinching evidence whereof, suffice to demolish the edifice of the entire warp and woof of the complainant's story. It is deemed apt to observe that in the absence of any strong *corroborative piece of evidence* accused cannot be connected with the commission of the offence and mere allegation of issuing threats cannot be taken as gospel truth holding the accused guilty of the alleged offence

18. Additionally, this Court observes that it is enjoined upon Court(s) to assess *evidence* in a lawful fashion to reach at just conclusion whereof, more particularly nearer to truth and probability, in the absence of whole truth, the court must not feel persuaded by incompleteness of the tale from drawing inference from evidence and circumstances that prosecution story is probable and is credible worth awarding conviction to accused.

19. As a result of the above legal discourse, this Court finds the Prosecution unsuccessful in proving/establishing the charge beyond a shadow of reasonable doubt, let alone nexus with the accused in a laid down manner, specifically the way the investigation was undertaken and the prosecution proceedings handled do not inspire confidence, therefore, prosecution edifice is teeming with DOUBT.

Point No.2

20. All the above-narrated facts and circumstances, when evaluated on the yardstick of judicial prescription, laid down in judgment titled as RiazMashi @ Mithoo v. The State (1995 SCMR 1730), Tariq Pervez v. The State (1995 SCMR 1345), GhulamOadir and 2 others v. The State (2008 SCMR 1221) and Muhammad Akram v. The State (2009 SCMR 230). It reflects that the prosecution has absolutely failed to prove beyond a shadow of reasonable doubt that the accused has committed the alleged occurrence, therefore, by extending such benefit of doubt, the accused namely Salman Hasin S/O Muhammad Hasin Khan is acquitted of the charge against him under section 245 (i), Cr.P.C. He is present in Court on bail; his bail bond and those of surety is canceled and surety discharged."

8. It appears from the record that the issue between the parties cropped up on the demand of Rs. 50,000/- for the installation of Electric Meters in Hasin's Residency Block 13-A Gulshan-e-Iqbal Karachi as well as Sale and purchase of the subject Flat, whereby the appellant was allegedly cheated by the Associates of the respondent No.1 who also executed a fake lease Deed in favor of the appellant, which triggered the cause to the appellant to lodge FIR No. 135 of 2018 under Section 406/420/468/471 and 34 PPC with PS Aziz Bhatti.

9. The main thrust of the submission of the appellant is that respondent No.1 committed cheating, fraud, and forgery as well as Criminal Breach of Trust by executing a fake lease deed of Flat No. C-3, 3rd Floor, Hasin's Residency Gulshan-e-Iqbal Karachi, and usurped Rs. 6,75,000/- on account of the installation of an Electric meter. The

matter was contested between the parties before the Trial Court which culminated into the Acquittal of respondent No.1 vide judgment dated 05.09.2023.

10. The question arises in the present proceedings whether the respondent can be convicted based on the testimony brought on record by the appellant.

11. For the just decision of the instant Acquittal Appeal, I feel a pressing need to have a look as to how the above-mentioned four offenses stand incorporated in the Pakistan Penal Code. Section 406 PPC provides “Punishment for criminal breach of trust”, whereas section 420 PPC is an offense titled “Cheating and dishonestly inducing delivery of property”. As regards, section 468 PPC, stands for “Forgery for purpose of cheating”, whereas section 471 PPC is defined as “Using as genuine a forged document”. In order to see as to whether any of the foregoing provisions stand attracted to the facts and circumstances of the case, first of all I consider it appropriate to embark upon the applicability of section 406 PPC. The offence of criminal breach of trust is defined in section 405 PPC, the perusal of which shows that in order to attract its mischief the prosecution has to make out the following ingredients:-

- i. Entrustment of a property;**
- ii. Dishonest misappropriation or conversion to his own use that property;**
- iii. Dishonest use or disposal of a property in violation of any direction of law or of any legal contract express or implied;**

12. As far as the offense under Sections 406 and 468 PPC are concerned, it is noticeable that the ingredients of the aforesaid sections have not been met in the trial Court to award a conviction. It has already been clarified by the Supreme Court in the cases of *Shahid Imran v. The State and others* (2011 SCMR 1614) and *Rafiq Haji Usman v. Chairman, NAB and another* (2015 SCMR 1575) that the offenses are attracted only in a case of entrustment of property and not in a case of investment or payment of money.

13. The record of the instant case is suggestive of the fact that admittedly, at no point in time, respondent No.1 was entrusted with any property of the appellant or with any dominion over property as the appellant admitted in his cross-examination that the agent of respondent No.1 took the amount of Rs. 50,000/- for the installation of the Electric meter in the building. He also admitted that he did not mention the names of the persons who pointed out pistol at him. He also admitted that he did not produce any proof regarding he amount of Rs. 17,88,400/-. He also admitted that the residents of the building filed a case against him before

this Court for usurping the money of residents of the building by not installing Electric meters. He also admitted that he did not make verification of the sub-lease of the subject flat. In such circumstances, the entrustment of the property is a primary ingredient, which is required to be fulfilled to attract liability under Section 406 PPC, Since the primary ingredient of entrustment is found missing from the prosecution case, hence, in my humble view, respondent No.1 cannot be saddled with any such responsibility from the aforesaid analogy.

14. To see any possibility of the conviction of respondent No.1 under Section 406 PPC, I have minutely gone through the prosecution evidence and have not come across any such probability, even remotely. Likewise, I also noticed that this is not the case of the complainant that he ever interacted with respondent No.1 or made any misrepresentation to give rise to an offense under section 420 PPC.

15. In the case in hand, it is the prosecution's case that the complainant agreed with respondent No.1 about the sale and purchase of the subject Flat, and in lieu thereof, he received the subject payment, and/or purported lease deed was executed such factum and record is missing in the present case to award conviction. I have also given a considered thought to the offenses under Section 468 and 471 PPC. I have not been able to find traces of any documents, which may be termed as forged declared by the competent Court of law, within the meaning of Section 463, 464 PPC. Even, during arguments, the appellant was duly confronted with the situation at hand but he failed to refer to any such material, which may give birth to any possibility of awarding of conviction to respondent No.1 in offenses under sections 468 and 471 PPC.

16. Since the respondent has been acquitted from the subject charge by full-fledged trial, very strong evidence would be required to curtail the liberty of the accused charged, after the culmination of the trial, in acquittal which otherwise is a precious right guaranteed under the Constitution of the country. However, the complainant had also the right to prove his case before the learned trial Court beyond the shadow of a doubt; however, he failed to prove his case which ended in the acquittal of respondent No.1.

17. From perusal of judgment passed by the trial Court it appears that the same is speaking one and does not suffer from any interference by this Court. In these circumstances, the learned trial Court was rightly to record the acquittal of the private respondent by extending him the benefit of the doubt, and such acquittal is not found to have been recorded in an arbitrary or cursory manner, which may call for interference by this Court. In the

case of *The State and Others vs. Abdul Khaliq and others* (PLD 2011 SC-554), it is held by the Apex Court that;

“The scope of interference in appeal against acquittal is most narrow and limited because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty; in other words, the presumption of innocence is doubled. The courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence; such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence which the accused has earned and attained on account of his acquittal. Interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact committed by the Court in arriving at the decision, which would result in a grave miscarriage of justice; the acquittal judgment is perfunctory or wholly artificial or a shocking conclusion has been drawn. Judgment of acquittal should not be interjected until the findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. The Court of appeal should not interfere simply for the reason that on the reappraisal of the evidence a different conclusion could possibly be arrived at, the factual conclusions should not be upset, except when palpably perverse, suffering from serious and material factual infirmities”.

15. I am fully satisfied with the appraisal of evidence done by the learned trial Court and I am of the view that while evaluating the evidence, the difference is to be maintained in appeal from conviction and acquittal appeal, and in the latter case, interference is to be made only when there is gross misreading of evidence resulting in miscarriage of justice, the appellant failed to disclose any misreading and non-reading of evidence.

16. In the case of *Muhammad Zafar and another v. Rustam and others* (2017 SCMR 1639), the Hon’ble Supreme Court of Pakistan has held that:-

“We have examined the record and the reasons recorded by the learned appellate court for acquittal of respondent No.2 and for not interfering with the acquittal of respondents No.3 to 5 are borne out from the record. No misreading of evidence could be pointed out by the learned counsel for the complainant/appellant and learned Additional Prosecutor General for the State, which would have resulted in grave miscarriage of justice. The learned courts below have given valid and convincing reasons for the acquittal of respondents Nos. 2 to 5 which reasons have not been found by us to be arbitrary, capricious or fanciful warranting interference by this Court. Even otherwise this Court is always slow in interfering in the acquittal of accused because it is well-settled law that in criminal trial every person is innocent unless proven guilty and upon acquittal by a court of competent jurisdiction such presumption doubles. As a sequel of the above discussion, this appeal is without any merit and the same is hereby dismissed”

17. In view of the facts and reasons discussed above, the instant Criminal Acquittal appeal is dismissed.

JUDGE