ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Acquittal Appeal No.573 of 2019

| Date | Order with signature of Judge |
| --- | --- |

For hearing of main case

**08.12.2023**

Mr. Shoukat Iqbal advocate for the appellant
Nemo for respondent No.1.
Mr. Saleem Akhtar Buriro Addl. PG.
Mr. Sharafudin Jamali, AAG, along with
PI Asmatullah, PS Clifton Karachi

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## **O R D E R**

Through instant Criminal Acquittal Appeal filed by the appellant Ashfaque Ahmed Shaikh under Section 417, Cr.P.C. against the acquittal of respondent No.1 vide Judgment dated 20.08.2019 passed by learned III Civil Judge/Judicial Magistrate, Karachi South, in Criminal Case No.3086 of 2018, arising out of FIR No. 40/2014, punishable for the offenses under Section 39/39-A, Electricity Act 1910 read with Section 379/109 PPC of PS FIA EGOA at NR3C Karachi, an excerpt whereof is reproduced as under:-

> ***"I have given due consideration to the arguments of learned AD Legal and counsel for complainant carefully gone through the material available before me and applied my judicial mind.***
>
> ***Perusal of the record, reveals that accused was challaned under section 39/39A of Electricity Act r/w 379 PPC and charge was framed under section 39 Electricity Act r/w 379 PPC.***
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> ***Undeniably as per Criminal Law (Amendment) Act 2016 Chapter XVII B has been inserted and the same deals with offenses relating to electricity Section 462 (O PPC and 462 PPC of Chapter XVII-B PPC are reproduced for sake of brevity as under 462-0 PPC of Chapter XVII PPC***
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> **"Notwithstanding anything contained in the Code of Criminal Procedure 1898 or any other law for the time being in force, the court shall not take cognizance of an offense under this chapter except on a complaint made, with reasons to be recorded in writing along with a full particulars of the offence committed under this chapter by the duly authorized officer (not below the rank of 17) of the Government of the distribution company as the case may be."**
>
> **Section 462-P PPC of Chapter XVIIH PPC –**
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> **"Overriding effect -The provision of this chapter shall have effect notwithstanding anything contained in any other law for the time being in force."**
>
> ***Thereby in the light of sections 462-O of PPC and 462 of PPC, it is evident that Chapter XVII-B which deals with electricity has an overriding effect, and proceeding with trial under section 39 of the Electricity r/w379 PPC will be a futile exercise and sheer waste of court's time as there is no probability of accused be convicted and hence accused he is acquitted. His bail bond stand canceled and surety discharged."***

2. The case of the appellant is that on 17.06 2014, he lodged FIR No 40 of 2014, under sections 39/39-A, Electricity Act 1910 read with Section 379/109 PPC of PS FIA EGOA at NR3C Karachi on the premise

that one complaint regarding two meters having consumer No. LA 363796 & LA 366083 were installed at Columbus Tower situated at Plot No. FT-3, Ch. Khaliq-u-Zaman Road Frere Town Clifton Karachi; these two meters (Holes in the meter body) used electricity by tempering the meter thus causing revenue loss to K-Electric. The learned Judicial Magistrate acquitted respondent No.1 from the aforesaid charge vide impugned Judgment dated 20.08.2019 and the legality of the same is under challenge.

3. At the outset I asked the learned counsel for the appellant that in the light of section 462-O PPC, cognizance is to be taken on a complaint made by the duly authorized officer (not below Grade 17) of the Government or the distribution company, therefore, registration of FIR was/is barred. Learned counsel for the appellant has contended that the offense stands cognizable and F.I.R. has rightly been registered. Learned counsel further argued that a complaint was received by the F.I.A. regarding two meters having consumer No. LA 363796 & LA 366083 were installed at Columbus Tower situated at Plot No. FT-3, Ch. Khaliq-u-Zaman Road Frere Town Clifton Karachi; that these two meters (Hole in the meter body) and used electricity by tempering the meter thus caused revenue loss to K-Electric, action was taken against respondent No.1 by lodging such FIR No 40 of 2014, under sections 39/39-A, Electricity Act 1910 read with Section 379/109 PPC of PS FIA EGOA at NR3C Karachi. Learned counsel submitted that an amendment was made by way of notification dated 12-02-2016 but the learned Trial Court has acquitted the accused based on the said amendment which pertains to the year 2016 Per learned counsel, the actual position is that the crime took place in the Year 2014 but by way of such amendment the learned trial Judge has acquitted the accused based on the above amendment which could not be applicable in the present case, retrospectively. Learned counsel further submits that the impugned order is not sustainable under the law as there was sufficient evidence available on record against the accused person but the trial Court brushed aside the same, more particularly, the accused was acquitted under section 249-A Cr. P.C. without assigning any valid reason.

4. I have heard the parties present in court at a considerable length and have perused the impugned order passed by the trial Court.

5. During arguments, learned counsel for the appellant could not show the specific part of the order wherein the learned trial Court has committed any gross illegality or irregularity. It is noted that the criminal case has been pending since 2014 and almost 9 years have passed, the accused had already faced the agony of a protracted trial and was then acquitted by the trial Court having competent jurisdiction. The appellant

has also failed to produce any convincing evidence before the trial Court for conviction against the respondent, even though they failed to show that the respondent was the consumer of K. Electric to attract Section 39-A of the Electricity Act and 379 PPC and now the appellant is only claiming that since the offense occurred in the year 2014 as such the amendment brought in criminal law amendment Act, 2016 ( Offenses and Penalties relating to electricity that amendment in the PPC and CR. P.C) has no retrospective effect, however in the present case, they have ignored that in the present case, the alleged offense occurred in the year 2012 and reported to FIA Police on 17.06.2014 and thereafter the FIA failed and neglected to submit chargesheet in time and waited till they submitted final chargesheet No. 04 of 2018 dated 15.05.2018 when the amendment in the law had already taken place on 21.01.2016. In such circumstances, they are precluded from taking advantage of the law due to their apathy in the intervening period.

6. It is not out of context to make here necessary clarification that an appeal against acquittal has a distinctive feature and the approach to deal with an appeal against conviction is distinguishable from an appeal against acquittal because the presumption of double innocence is attached in the latter case. Order of acquittal can only be interfered with when it is found on the face of it as capricious, perverse, arbitrary or based on a misreading, non-appraisal of evidence, or is artificial, arbitrary, and led to a gross miscarriage of justice. Mere disregard of technicalities in a criminal trial without resulting injustice is not enough for interference. Suffice it to say that an order/judgment of acquittal gives rise to a strong presumption of innocence rather double presumption of innocence is attached to such an order. While examining the facts in the order of acquittal, substantial weight should be given to the findings of the lower Courts whereby the accused was exonerated from the commission of a crime. The acquittal would be unquestionable when it could not be said that acquittal was either perverse or that acquittal judgment was improper or incorrect as it is settled that whenever there is doubt about the guilt of the accused, its benefit must go to him and the Court would never come to the rescue of the prosecution to fill the lacuna appearing in evidence of prosecution case as it would be against established principles of the dispensation of criminal justice.

7. To appreciate the proposition put forward by the learned counsel for the appellant, it is noted that the Ambiguity about taking cognizance of offenses under Sections 462-H to 462-M of the Pakistan Penal Code,1860 relating to theft of electricity is soaring the system which is required to be set at naught. A new Chapter XVII-B was inserted in the Pakistan Penal Code, 1860 through “The Criminal Law (Amendment) Act, 2016” to deal

with such offenses, and Schedule II of the Code of Criminal Procedure, 1898 was also amended to make offenses mentioned in the above Chapter as cognizable and non-bailable, which means that for cognizable offense, registration of FIR is permissible. However, a conditional cognizance under section 462-O of PPC was introduced in this chapter in the following words;

> ***"Cognizance. --(1) The Court shall try an offense punishable under this Chapter. (2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 or any other law for the time being in force, the Court shall not take cognizance of an offence under this Chapter except on a complaint made, with reasons to be recorded in writing along with full particulars of the offence committed under this Chapter, by duly authorized officer (not below Grade 17) of the Government or the distribution company, as the case may be."***
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> **11. Above conditional cognizance has produced a match between cognizance and cognizable offence or taking cognizance and registration of FIR. I know that both are different phenomena as held by Supreme Court in cases of "<u>Muhammad Nazir Versus Fazal Karim, etc</u>." (2013 PSC Criminal 24); therefore, FIR is not barred in these offences as being cognizable. Further reliance is placed on cases of "<u>MUHAMMAD NAZIR Versus FAZAL KARIM and others</u>" (PLD 2012 Supreme Court 892) "<u>INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN and others Versus Mian ASIM FAREED and others</u>" (2006 S C M R 483).**

8. The Supreme Court has declared that when offenses are cognizable, registration of FIR is not barred. Reference is made to the case of "*<u>Mian HAROON RIAZ LUCKY and another versus The STATE and others</u>*" (**2021 SCMR 56**).

9. In the light of the above discussion, it is held that registration of F.I.R. for offenses under Chapter XVII-B, PPC is not barred, because all the offenses have been shown as cognizable in Schedule II of Cr.P.C. However, later during the process, the requisite complaint is required to be filed with a report under section 173 Cr.P.C. before the learned trial court. Prosecutors are expected to scrutinize such complaints and report under section 173 Cr.PC before forwarding it to the court concerned to make it conformable with the requirement of section 462-O PPC.

10. The question is whether Section 462-P PPC has a retrospective effect, the legislature has unfettered powers to make laws with retrospective effect which include substantive law and law of procedure. Restriction under Article 12 of the Constitution has been imposed on the powers of the legislature to the effect that it cannot make laws to punish acts or omissions of the past which by then were neither declared offenses by law nor any punishment was provided. The only exception created under Article 12(2) of the Constitution, covers the offence of high treason. Giving retrospective effect to any new enactment, which enhanced punishment for an offense from one which was provided for the same

offense under the law prevailing at the time when the offense was committed, has been prohibited under Article 12 of the Constitution.

11. It has been agitated that any amendment in the procedural law would always apply retrospectively. For the reasons, that procedural law would always operate retrospectively unless a contrary intention was expressed. If a matter was merely procedural, it would operate retrospectively, however, if the amendment was of such a nature that it would also affect the existing rights of a substantive nature which could cause inconvenience and injustice, then the Court would not give retrospective effect to such procedural amendment as procedural law should be interpreted in such a manner that it should not obstruct the course of justice, and the court should avoid such interpretation.

12. The question is whether the prosecution had sufficient material/evidence to warrant the prosecution of respondent No.1 or whether there was no probability of the accused being convicted of any offense. In this regard, it is expedient to have a look at section 249-A, Cr.P.C., an excerpt whereof is reproduced as below:-

> **"249-A. Power of Magistrate to acquit accused at any stage: Nothing in this Chapter shall be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if after hearing the prosecutor and the accused and for reasons to be recorded, he considers that the charge is groundless or that there is no probability of the accused being convicted of any offense."**

13. There is no cavil with the proposition that under section 249-A Cr.P.C the Magistrate is empowered to acquit any accused on two grounds i.e. charge is groundless and there is no probability of conviction.

14. From the above section, it is also clear that application under sections 249-A Cr.P.C. can be filed or taken up for adjudication at any stage of the proceeding of trial i.e. even before recording of prosecution evidence or during the recording of evidence or when recording of evidence is over. Although there is no bar for an accused to apply to the said sections at any stage of the proceeding of the trial, the facts and circumstances of the prosecution case will have to be kept in mind and if there is a slight probability of conviction then of course, instead of deciding the said application should record the evidence and allow the case to be decided on its merit after appraising the evidence available on record. However, in the present case, the FIR and charge sheet do not show whether respondent No.1 was involved in tempering with an Electric Meter, as no report from the expert has been placed on record to suggest that the respondent was instrumental in the alleged crime. Even in the list

of witnesses expert has not been shown as a witness. Prima facie prosecution has failed to show that respondent No.1 was a consumer in the building and has been found involved in tempering the Electric Meters in terms of the Electricity Act 1910. The prosecution has shown respondent No.1 to collect the electricity bills only. In such a scenario the Trial Court had no option but to acquit the accused in terms of Section 249-A Cr. PC and there was no likelihood of the accused being convicted of the offense if the case could have proceeded by recording evidence of the appellant no fruitful result in the shape of conviction would have been achieved, thus the prosecution has failed to show the culpability of the accused in the present crime.

15. In view of the above reasoning, more particularly in light of the case law referred to above, I reached the irresistible conclusion that the appellant has miserably failed to prove his case against the accused person beyond a shadow of reasonable doubt, therefore, no interference in the impugned order passed by the Trial Court based on powered conferred under Section 249-A Cr. P.C. is required by this Court.

16. Resultantly, the instant Criminal Acquittal Appeal being devoid of any merit is hereby dismissed along with the listed application.

JUDGE