

# IN THE HIGH COURT OF SINDH AT KARACHI

## **Criminal Misc. Application No. 372 of 2020**

1. For hearing of Main Case.
2. For orders on M.A No.9301 of 2020

Applicant Noman Ahmed : through Mr. Muhammad Bilal Rashid, Advocate

The State : through Mr. Muhammad Ahmed, Assistant Attorey General, for Pakistan along with Inspector Muhammad Saleem, FIA, SBC, Karachi.

Date of hearing : 06.09.2024

Date of judgment : 18.09.2024

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### JUDGMENT

**MUHAMMAD SALEEM JESSAR. J-** By means of instant Criminal Misc. Application under Section 561-A Cr. P.C. the applicant Noman Ahmed has assailed the order dated 01.10.2020 passed by leaned District and Sessions Judge, Karachi South in FER No.09/2020 vide FIR No.07/2020 registered at PS FIA State Bank Circile, Karachi under section 23 of FER (Amended) Act, 2020 R/w section 109 PPC, whereby application under section 265-K Cr.P.C moved by applicant was dismissed.

2. Brief facts giving rise to filing of instant Cr. Misc. Application, are that on credible information received by FIA SBC, Karachi that prviously accused Noman Ahmed was involved in the Crime of Hawala/Hundi in his office / shop situated at 3rd Floor, Jillani Market, Mariot Road, Boulton Market Karachi and FIA CBC Karachi had lodged FIR No. 14/2018, under

Section 4(1)5-23 FER Act 1947 read with Section 109 PPC and said person was facing trial in the Court of VIII-Additional Sessions Judge, Karachi South. However, after registration of the FIR, said Noman has changed his place of business and was continuously doing illegal business of Hundi/Hawal at another place i.e. Shop No. 39, Ground Floor, Yousuf Plaza, Boulton Market, Karachi. Accordingly, Inquiry No.17/2020 was registered at FIA SBC, Karachi and raiding party consisting of Inspector Javed Hussain and other staff conducted raid at the shop of the accused and arrested him. The accused admitted of doing illegal business of Hundi/Hawala and during his personal search and that of his premises, one mobile phone set "Realme-5" model RMX1911, IMEI No. 867412040763459 and IMEI No. 867412040763443 containing SIM/Cell No. 03360230439 and 03456270704 containing material related to TT & RMB regarding Hundi/Hawal, Pak Rs.445,000/- and Foreign Currencies viz. US\$ 1796, Saudi Riyal 2263 and RMB 4350 were recovered. Thereafter, FIR No.07/2020 was lodged at P.S. FIA SBC, Karachi, against the accused / applicant for committing offence under Section 23 of Foreign Exchange Regulation (Amendment) Act, 2020 R/W Section 109 PPC.

3. During pendency of trial proceedings before the trial Court, the accused/applicant moved an application under Section 265-K Cr.P.C. for his acquittal, on the grounds stated in the application, which was dismissed by the trial vide impugned order, hence the applicant has assailed said order by means of instant Cr. Misc. Application. During proceedings of instant Cr. Misc. Application on the direction of this Court, the trial Court/District and Sessions Judge, Karachi (South)/Tribunal submitted progress report to the effect that after submission of interim challan, I.O. has not submitted final report; however, accused has been appearing before the Court but the trial has not commenced due to non-submission of final report by the FIA.

4. I have heard the arguments advanced by learned counsel for the parties and have perused the material available on the record.

5. Learned counsel for the applicant submitted that FIA had no jurisdiction to conduct raid upon the house or shop of the applicant as they had not obtained any search warrant as required under the law, thus they have violated the mandatory provisions of Section 19 (3) of the Foreign Exchange Regulations Act, 1947; hence, the proceedings initiated on the basis

of FIR and cognizance taken by the Tribunal, are *coram non judge*, therefore, the applicant deserves his acquittal. He next submitted that in case, trial is commenced, according to him, even then there is no probability of his conviction and he would be acquitted in view of legal flaws / lacunas in the case. Learned counsel for the applicant further submitted that FIA had no jurisdiction to lodge the FIR as, according to the relevant provisions of the law i.e. Section 23 of the Act, 1947, a complaint in writing was required to be submitted by the authorized person and then upon issuance of the warrant by the concerned Magistrate, they were supposed to enter or seize the property in question, therefore, by not following the procedure, they have committed a gross illegality, thus the application under Section 265-K Cr. P.C. was maintainable. He, therefore, submitted that by allowing instant Cr. Misc. Application, impugned order may be set-aside and the proceedings pending before the trial Court/ Tribunal vide FER. No.09 of 2020 (re-Noman Ahmed Versus The State through FIA, State Bank Circle) may be quashed and the applicant may be acquitted of the charge. In support of his contentions, learned counsel placed reliance upon the cases (i) MUHAMMAD ASLAM (AMIR ASLAM) and others Versus DISTRICT POLICE OFFICER, RAWALPINDI and others (2009 SCMR 141), (ii) MUHAMMAD SALEEM Versus DEPUTY DIRECTOR, FIA/CBC, MULTAN and another (2000 MLD 357), (iii) GHANI-UR-REHMAN Versus The STATE through Additional Advocate-General and another (2015 MLD 1438), (iv) GHULAM SARWAR Versus THE STATE (2013 P.Cr. L.J 12), (v) SHAMIM AHMED KASHMIRWALA Versus THE STATE (1988 P.Cr.L.J 136), (vi) ALAM JAN Versus FIA POLICE STATION, GILGIT (2017 P.Cr.L.J 69), (vi) SAJJAD AHMED Versus FEDERATION OF PAKISTAN (2018 YLR 2668) and (vii) ABDUL RAZZAQ and another Versus The STATE (2020 MLD 1921), Syed SHOAIB AHMED BUKHARI versus THE STATE (PLD 2001 Karachi 279), MUHAMMAD ASHRAF versus RIZWAN NAZIR, EXECUTIVE MAGISTRATE 1ST CLASS, DASKA and another [2000 P.Cr. L J 1324], MUHAMMAD SALEEM versus DEPUTY DIRECTOR, FIA/CBC, MULTAN and another [2000 MLD 357], GHULAM SARWAR versus THE STATE (2013 P Cr. L J 12] and GHANI-UR-REHMAN versus The STATE through Additional Advocate General and another [2015 MLD 1438].

6. Conversely, learned Assistant Attorney General for Pakistan, argued that the impugned order does not suffer from any illegality or infirmity, which

may require interference by this Court. He further submitted that it will be appropriate for the applicant to face the trial and prove his innocence before the trial court by adducing his evidence, He, therefore, submitted that by dismissing instant application, case may be remanded to trial Court with directions to expedite the same and conclude it within a shortest possible time.

7. The main stress laid down by learned counsel for the applicant, is upon the fact that under Section 23(3) of the Act, 1947, the cognizance is to be taken on the basis of a complaint to be submitted by a person authorized by the Central Government or the State Bank in this behalf; however, in instant case no such complaint has been filed, therefore, registratin of FIR by the FIA and then initiation of proceeding before the trial Court / Tribunal against the accused / applicant is nullity in the eye of law.

8. It seems that Section 23 (3) of the Foreign Exchange Regulation Act, 1947, provides that a Tribunal, constituted under the Act *ibid*, shall not take cognizance of any offence, except upon complaint having been made in writing by a person authorized by the Central Government or the State Bank in this behalf. Apparently, the legal objection raised by learned counsel for the applicant in respect of jurisdiction of the trial Court / Tribunal is based on subsection (3) to Section 23 of the Act, 1947, which is reproduced as under:

**“(3) A Tribunal shall not take cognizance of any offence punishable under this section and not declared by the Central Government under the preceding sub-section to be cognizable for the time being, or of an offence punishable under section 54 of the Income-tax Act, 1922, as applied by section 19, except upon complaint in writing made by a person authorized by the Central Government or the State Bank in this behalf:”**

9. However, second proviso to subsection (3) of Section 23 of the Act, 1947 which was added / inserted through Foreign Exchange Regulation (Amendment) Act, 2020, provides:

**“Provided further that if a person not authorized under section 3, 3A or 3AA is found involved in illegal foreign exchange business the complaint as required in this subsection shall not be required.”**

10. From bare perusal of above-quoted second proviso to Section 23(3) of the Act, 1947, it is crystal clear that requirement of filing a complaint in writing by a person authorized by the Central Government or the State Bank is only in respect of alleged commission of offences by those persons who are duly authorized under Section 3, 3A or 3AA of the Act, 1947. However, if a

person is not authorized under above said provisions of law, then there shall be no need of filing any such complaint.

11. It may be clarified that Section 3 of the Act is in respect of **Authorised Dealers in Foreign Exchange** and provides that *the State Bank may, on application made to it in this behalf, authorize any person to deal in foreign exchange*, Section 3A of the Act is in respect of **Authorized money changers in foreign exchange** and provides that *the State Bank may, on application made to it in this behalf, and on payment of a fee prescribed by it, from time to time, authorize any person to deal in foreign currency notes and coins*, while Section 3AA of the Act is in respect of **Exchange Companies** and provides that *the State Bank may, on application made to it in this behalf, and on payment of such fee as it may, from time to time prescribe, authorize any company to deal in foreign currency notes, coins, postal notes, money orders, bank drafts, travellers cheques and transfers*.

12. No material has been produced by or on behalf of the applicant to establish that he has been authorized by the State Bank to deal in *foreign exchange, foreign currency notes or foreign coins, postal notes, money orders, bank drafts, travellers cheques and transfers*, as provided in the above said provisions of law. From the language of above-quoted second proviso is quite apparent that requirement of filing a complaint in writing by a person authorized by the Central Government or the State Bank has been exempted in respect of those persons who are not authorized under section 3, 3A or 3AA to deal in foreign exchange, foreign currency notes or foreign coins, postal notes, money orders, bank drafts, travellers cheques and transfers. In this view of the matter, aforesaid legal objection raised on behalf of the accused / applicant is not sustainable and it can safely be held that the trial Court / Tribunal is fully competent to proceed with the case of the applicant.

13. So far as the legal objection raised by learned counsel for the applicant in respect of conducting raid by FIA officials without obtaining search warrant from the concerned Magistrate and other violations of the provisions of Section 19(3) of the Act is concerned, suffice it to observe that the fact as to whether any search warrant was obtained by the FIA officials or not from the concerned Magistrate could be determined only after recording of evidence

and without undertaking such exercise, it would be premature to adjudge this fact.

14. Now, advertng to the facts of present case. It appears that the applicant has filed instant Cr. Misc. Application under Section 561-A Cr. P.C. having become aggrieved by dismissal of his application under Section 265-K Cr. P.C. by the trial Court. Before touching the merits of the case, it would be appropriate to examine the ingredients and preconditions for filing an application under Section 265-K Cr. P.C. For the sake of convenience the contents of Section 265-K Cr. P.C are reproduced hereunder:

*"265-K. Power of Court to acquit accused at any stage: Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused at any stage of the case, if, after hearing the prosecutor and the accused and for reasons to be recorded, it considers that there is no probability of the accused being convicted of any offence."*

15. From perusal of above provision of law, it is clear that under Section 265-K, Cr. P.C., a Court of Sessions during the trial is empowered to acquit an accused, when there is no probability of conviction, meaning thereby that when there is no evidence on the record on the basis whereof there may be any probability of conviction of the accused, in such an eventuality the accused can file such application. Apparently, this would mean that if there is **remote probability of conviction**, then the court is required to record the evidence and then decide the case on the basis of evidence adduced before it during the trial. For this view, I am fortified by a Judgment passed by a Full Bench of Honourable Supreme Court in the case of *MODEL CUSTOMS COLLECTORATE, ISLAMABAD Vs. AAMIR MUMTAZ QURESHI*, reported in **2022 S C M R 1861**, wherein it was held as under:

*"Under section 249-A, the Magistrate is empowered to acquit any accused on two grounds i.e. charge is groundless and there is no probability of conviction, whereas under section 265-K, Cr.P.C., the court during the trial is empowered to acquit an accused, when there is no probability of conviction indicating that when there is no evidence on the record and even there is no remote probability of conviction and if there is remote probability of conviction then the court is required to record the evidence and then decide the case on evidence brought on record during the trial. From the above sections, it is also clear that application under sections 249-A and 265-K, Cr.P.C. can be filed or taken up for adjudication at any stage of proceeding of trial i.e. even before recording of prosecution evidence or during recording of evidence or when recording of evidence is over. Although there is no bar for an accused to file application under the said sections at any stage of proceeding of the trial, yet the fact and circumstance of the prosecution case will have to be kept in mind and if there is 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."*

16. In the same judgment, Honourable Supreme court further held:

*"8. There is no cavil to the proposition that by enacting sections 249-A and 265-K, Cr.P.C., the Legislature provided power to acquit an accused at any stage of the case if, after hearing the prosecutor and the accused and for reasons to be recorded, it considers that the charge is groundless or that there is no probability of the accused being convicted of any offence. But acquittal, under the said sections, could be made only if there was no probability of conviction of the accused. However, each case must be judged on its own special facts and circumstances and the reasons are to be recorded in support of conclusion that charge is groundless or that there is no probability of accused being convicted. If there is remote probability of conviction then of course courts are not empowered to invoke the said provisions i.e. 249-A and 265-K Cr.P.C. Reliance in this regard may be placed on the case of The State through Advocate-General, Sindh High Court of Karachi v. Raja Abdul Rehman (2005 SCMR 1544) wherein it was held that though there is no bar for an accused person to file application under section 249-A, Cr.P.C. at any stage of the proceedings of the case yet the facts and circumstances of the prosecution case will have to be kept in mind and considered in deciding the viability or feasibility of filing an application at any particular stage. The special or peculiar facts and circumstances of a prosecution case may not warrant filing of an application at a stage. This Court in the case of Bashir Ahmad v. Zafar ul Islam (PLD 2004 SC 298) did not approve decision of criminal cases on an application under section 249-A, Cr.P.C. or such allied or similar provisions of law, namely, section 265-K or section 561-A, Cr.P.C. and observed that usually a criminal case should be allowed to be disposed of on merits after recording of the prosecution evidence, statement of the accused under section 342, Cr.P.C., recording of statement of accused under section 340(2), Cr.P.C. if so desired by the accused persons and hearing the arguments of the counsel of the parties and that the provisions of section 249-A, section 265-K and section 561-A of the Cr.P.C. should not normally be pressed into action for decision of fate of a criminal case especially when apparently there is probability of conviction after recording evidence. In the present case, trial court disrupted the normal course of law against the mandate of supra judgment i.e. Bashir Ahmad v. Zafar ul-Islam and others (PLD 2004 SC 298)."*

17. In my opinion, more particularly, in view of above discussion in respect of legal objection raised on behalf of the applicant, it is yet to be determined at the trial stage after recording of evidence as to whether the offence alleged against the applicant was, in fact, committed by him or not and before undertaking such exercise, it would be premature to adjudge determination of such fact. In case the applicant's plea is that he is innocent and has been involved in the case falsely and/or with malafide intention, he would be afforded sufficient opportunity to prove his innocence during trial of the case. In this connection, reference may be made to the case of *Noor Muhammad v. The State and others* reported in **PLD 2007 SC 9**,

wherein Honourable Supreme Court held as under:

*"The Court cannot overstretch the proceedings as to convert the preliminary inquiry or the averments made in the complaint to a stage of full-fledged trial of the case. It is quite an initial stage whereafter the accused is having the opportunity, apart from showing his innocence in the case at the final stage, to have a recourse of an intermediary remedy by moving the Court showing the complaint to be false and frivolous one and requesting the Court for his acquittal under section 249-A or 265-K, Cr.P.C. prior to further proceeding in the case to be taken. Mere summoning of an accused by the Court to answer the charges levelled against him does not tantamount to any infringement of any right of a person but rather an opportunity afforded to him to explain his position. During the investigation of a FIR case, where the police is empowered to arrest without warrant i.e., in cognizable case, such a process, i.e., arrest etc. is resorted to by the police, even in a case where the person accused of the charge pleads innocence before the police and he succeeds in his efforts to some extent and the police agrees with him, yet before any recommendation by the police for his discharge, an insistence is made of his surrender before the authorities/court. The possibility of accusation turning out to be false or frivolous at the trial should not overbear the Court from issuing the process if the material available, prima facie discloses the case against the accused. At this stage a protracted inquiry or full-dressed rehearsal of trial is not required."*

18. Besides above, other remedies admissible under the law would also be available to him for initiating appropriate proceedings against the complainant and also for awarding compensation to him, if ultimately it is found and concluded that the complaint was frivolous and vexatious and had been filed with ulterior motives only to victimize the applicant. In the case of *Noor Muhammad* (supra), Honourable Supreme Court held as under:

*"Moreover, section 250, Cr.P.C. also provides sufficient safeguard to an accused against a false and frivolous accusation by the complainant, which envisages that the court while acquitting an accused at the trial stage, holding that the charge brought against him, was false, frivolous or vexatious has sufficient power to award adequate compensation."*

19. So far as the case-law relied upon by learned counsel for the applicant is concerned, it may be observed the F.I.R. of instant case was registered under Section 23 of Foreign Exchange Regulation (Amendment) Act, 2020, whereas all the cases relied upon by applicant's counsel, except the case of **ABDUL RAZZAQ and another Versus The STATE (2020 MLD 1921)**, relate to the period prior to the promulgation of the Exchange Regulation

(Amendment) Act, 2020. So far as the case of Abdul Razzaq (supra) is concerned, from perusal of said judgment it transpires that perhaps neither counsel for the appellant in that case, nor Assistant Attorney General, appearing for the State, had brought to the notice of the Honourable Court about the enactment of the aforesaid Act, 2020. Even otherwise, the judgment, having been delivered by a **Single Judge** of Baluchistan High Court, is persuasive in nature and not authoritative.

20. The upshot of above discussion is that instant Criminal Misc. Application filed by present applicant, having no merits, is hereby dismissed along with pending application vide M.A No.9301 of 2020. Accordingly, the interim order dated 22.10.2020 is hereby recalled. Consequently, the impugned order dated 01.10.2020 passed by learned District & Sessions Judge, Karachi South in FER No. 09 of 2020 (re: Noman Ahmad v. State through FIA, SBC) is hereby maintained. The trial Court / Tribunal is directed to proceed with the case and conclude the trial within shortest possible time preferably within four (4) months under intimation to this Court through MIT-II.

**JUDGE**

Karachi  
Approved for reporting  
18.09.2024