

Stereo. HCJDA-38
JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Criminal Appeal No.15248 of 2020
(Afzal Nazir **versus** Collectorate, Taxation & Anti-Smuggling, Lahore etc.)

JUDGMENT

Date of Hearing	27.09.2022
Appellant by	Mr. Maqbool Hussain Sheikh and Mian Talat Mahmood, Advocates along with the appellant Mr. Muhammad Faisal Nawaz, Advocate for the applicant in Crl. Misc. No.1 & 2 of 2022
State by	Ms. Amna Parveen, Special Prosecutor for Customs

Syed Shahbaz Ali Rizvi, J: - Through this appeal, Afzal Nazir, appellant has assailed the judgment dated 06.02.2020 passed by the learned Special Judge (Customs, Taxation and Anti-Smuggling), Lahore in case FIR No.40 dated 15.12.2018 registered for offence under Sections 2(s), 16, 139, 156(1)(8)(i)(70) and 157 of the Customs Act, 1969 at Police Station I & P Cell, MCC, Customs House, Lahore whereby, he was convicted under Sections 156(1)(8)(i) and (70) of the Customs Act, 1969 and was sentenced to rigorous imprisonment of five years with fine of Rs.55,00,000/- and in default thereof, to further undergo simple imprisonment for six months. He was however, extended the benefit of Section 382(b) of the Code of Criminal Procedure, 1898.

2. Per prosecution's case, as disclosed by Mazhar ul Haq, Inspector Customs, complainant (PW-2) in his complaint (Exh-PA/1) on the basis of which formal crime report (Exh-PA) was registered, the allegation against the appellant is that on 15.12.2018 at about 01.00 a.m. he was going to Hong Kong through flight No.TG346, Thai Air Line and during scanning of his luggage, 39100 US Dollars were recovered and he was apprehended at the spot.

3. After completion of investigation, report under Section 173 of the Code of Criminal Procedure, 1898 was submitted. The learned trial court, after observing pre-trial codal formalities, framed the charge against the appellant on 19.02.2018 to which he pleaded not guilty and claimed trial.

4. The prosecution, in order to prove its case, produced as many as six witnesses during the trial. Saleem Ahmad Malik, Inspector Customs (PW-1), on receipt of complaint (Exh-PA/1), drafted formal FIR (Exh-PA). Mazhar ul Haq, Inspector Customs (PW-2) is the complainant. Ch. Bashir Ahmad, Inspector Customs (PW-3) is the recovery witness. Muhammad Yousaf Khan (PW-4) is the Incharge of Customs State Warehouse, Lahore. Riaz Ali Shah, Inspector Customs (PW-5) and Syed Muhammad Ali, Inspector Customs (PW-6) are the Investigation Officers. Learned Special Prosecutor for Customs gave up Arshad Dub, Sepoy Customs being unnecessary and closed the prosecution evidence.

5. After completion of prosecution evidence, statement of the appellant under Section 342 of the Code of Criminal Procedure, 1898 was recorded wherein, he refuted the allegations levelled against him and asserted his innocence. He further deposed that when he approached the Customs counter, his entire luggage including hand pouch was scanned and during his body scan, he informed Mazhar ul Haq (PW-2) that he had US \$ 39100 with him. He also produced two receipts, one issued by M/S United Exchange Company based in Hong Kong according to which he got exchanged 54600 Australian Dollars into 310,128 Hong Kong Dollars and the second was issued by United Exchange Forex Company, Hong Kong whereby, he got exchanged Hong Kong Dollars into US \$ 39,900 which he was allowed to take out of Pakistan but he was arrested and this false case was got registered against him. He did not opt to appear as his own witness as provided under Section 340(2) of the Code of Criminal Procedure, 1898 in disproof of the allegation

levelled against him however, he did produce certain documents in his defence.

6. Arguments heard. Record perused.

7. Per prosecution's case, the foreign currency was recovered at the last scanning and body search counter and the appellant was brought to Mazhar ul Haq, Inspector Customs (PW-2) by one Muhammad Arif, Inspector ASF meaning thereby, the appellant had already passed through Customs checking counter without declaring his possession of subject currency and ANF checking counter but the prosecution remained fail to prove that he had passed through the said counters. No immigration stamp of exit from Pakistan on the passport of the appellant could be got proved in evidence. The prosecution was expected to establish the alleged fact and that could be done by producing CCTV footage of relevant lounge and counters as the appellant has taken the stance that he went to the concerned counter and declared his possession, with correct or incorrect legal justification. If it was so, the proper course for the Customs Department was that the appellant should have been provided an opportunity to leave the currency here in Pakistan with any of his relatives if he had to travel on the flight on that day otherwise, he could transfer the money in accordance with law to his destination. Moreover, abovementioned Muhammad Arif, Inspector ASF was never joined with the investigation or produced by the prosecution during the trial. To highlight the relevance of this witness, relevant excerpts from the statement of Mazhar ul Haq, Inspector Customs (PW-2) are reproduced as under: -

“...As soon as the passenger arrived in the International Departure Hall, he passes through the customs declaration counter. It is correct that the luggage of the outgoing passenger passes through the scanning machine. It is correct that everything which is contained in the luggage of passenger is shown in the scanning machine. It is correct that all the outgoing passengers were going through the customs declaration counter and their luggage was being scanned from the scanning machine installed at the customs counter. Yes, I

was present at the customs counter. Volunteers that since 10 PM, I was present there. Ch. Bashir Ahmad, inspector customs Abdul Shakoor Superintendent and Arshad Dub sepoy were present alongwith me at the customs counter...Presently I do not recognize the features of the accused Afzal Nazir and I cannot tell whether he passes through the customs counter in my presence.

I do not know whether the accused Afzal Nazir passes through the customs counter on the said date. I did not search the accused Afzal Nazir at customs counter on 14-12-2018. No recovery was effected from accused Afzal Nazir at customs counter. In my presence, US \$ 39100 was not recovered from the accused Afzal Nazir. I neither prepared the list Ex. PB containing serial wise detail of the seized currency / US \$ nor it was prepared in my presence...I mentioned in my complaint Ex. P.A/1 that Muhammad Arif inspector ASF came to me and informed me (Confronted with Ex. DA/Ex.PA/1) where it is not mentioned to who the information was given by the said inspector Muhammad Arif. I did not mentioned in complaint Ex. P.A/1 regarding receiving of US \$ from Muhammad Arif, inspector ASF and delivering him a written receipt thereof. It is correct that I did not mention in complaint Ex.P.A/1 regarding the list prepared by the ASF carrying detail / serial number of US \$. It is correct that the said list was not prepared in my presence. It is correct that I did not mention the complaint Ex. P.A/1 qua handing over of the aforementioned list containing detail of serial number..."(underlining is for emphasis)

These parts of statement of PW-2 in very clear terms reveal that Muhammad Arif, Inspector, Airport Security Force is the most relevant and necessary witness with regard to the alleged recovery of subject foreign currency and also to prove the spot where the same was allegedly recovered. Moreover, being scribe of the list (Exh-PB), he was the person who could get it proved in evidence. So, withholding most material witness who, in the circumstances, is not at all unnecessary requires that an adverse inference under Article 129(g) of the Qanun-e-Shahadat Order, 1984 be drawn against the credibility of prosecution case. Reliance in this respect is placed on the esteemed judgments passed by the Hon'ble Supreme Court of Pakistan in the cases of Lal Khan v. The State (2006 SCMR 1846) and Muhammad Rafique and others v. The State and others (2010 SCMR 385). In the case of Muhammad Rafique and others,

supra, the Hon'ble Supreme Court of Pakistan was pleased to observe as under: -

“33. ...It is well-settled that if any party withholds the best piece of evidence then it can fairly be presumed that the party had some sinister motive behind it. The presumption under Article 129(g) of Qanun-e-Shahadat Order can fairly be drawn that if P.W. Amir Ali could have been examined, his evidence would have been unfavourable to the prosecution...”

The prosecution also could not produce Air Ticket or the luggage tag to prove the allegation that the appellant had passed the Customs counter without declaring his possession of US\$ 39100. Reading of recovery memo (Exh-PD) pertaining to the items taken into possession on personal search of the appellant also evinces that no luggage tag, boarding card or ticket was taken by Airport Security Force or the Customs authorities i.e. PW-2 from the appellant. This rather further strengthens the stance of the appellant to the effect that he never crossed the Customs counter without declaring the currency in his possession. Because of non-availability of Air Ticket, Boarding Card, Exit stamp as well as the luggage tag in prosecution evidence, in view of this Court, the prosecution remained unable to prove the alleged fact that the appellant on that day was destined to take flight from Allama Iqbal International Airport to Bangkok. Even travel history of the appellant could not be brought on record.

8. Another important aspect of this case noticed by this Court is that Riaz Ali Shah, Inspector Customs (PW-5), the investigation officer of case in hand, during his cross examination, concedes that during investigation, he came to know that the appellant is an Australian Nationality holder and he was given Australian Nationality in the year 2006 which was valid till the registration of this case. By denying the presentation of receipt issued by Pacific Exchange Company at Hong Kong whereby on 20.11.2018, Australian Dollars 54600 were converted into 310,128 Hong Kong Dollars, he however, concedes that during investigation, the appellant informed him that he got converted 54600 Australian Dollars into 310,128 Hong Kong Dollars and later on, he converted

310128 Hong Kong Dollars into 39900 US Dollars from United Exchange Foreign Company. He further admits that the appellant arrived in Pakistan from Hong Kong at Allama Iqbal International Airport on 01.12.2018 and that he was going back to Australia enroute Hong Kong. During cross examination, on 11.11.2019, the said witness, the investigation officer also admits that on 30.01.2019, the appellant moved an application before the learned trial court for return of his personal belonging and that in the said application, at Sr. No.I & J, the appellant requested for return of receipts of conversion of Australian Dollars 54600 into Hong Kong Dollars issued by money changer based in Hong Kong and return of receipt of conversion of Hong Kong Dollars into US \$39,800. He also admits that the learned trial court directed to return the personal belonging of the appellant vide order dated 01.02.2019. To establish the fact of valid possession of subject foreign currency with the appellant, in the light of Clause (e) of SRO No.1017(I)/98 dated 21.07.1998 (Mark-A), the appellant produced printout of E-mail dated 26.03.2019 sent by Pacific Exchange Company Ltd, Hong Kong along with attachment of the Forex Receipt dated 20.11.2018 issued in the name of the appellant (Exh-D-1), original East Bank Statement evincing Banking Transaction of personal account of the appellant (Exh-D-2), electronic printout of E-mail forwarded by the appellant to Mr. Nadeem Noor, representative of United Exchange based in Hong Kong (Exh-D-3). Perusal of paragraph No.21 of the impugned judgment reveals that the learned Judge has erroneously read Clauses ‘d’ & ‘f’ of the said Notification with Clause ‘e’ while Clause ‘e’ is an independent Clause that speaks about the persons not ordinarily residing in Pakistan like the appellant. Similarly, the learned court has also misunderstood the case law reported as 2006 SCMR 1609, facts of which are distinguishable from the circumstances of the case in hand. Money in this case was not got exchanged from Pakistan. It was carried in and was being carried out by the appellant within a few days and the money exchange company was based in Hong Kong which is evident from the

documents produced as Exh.D-1, Exh-D-2 and Exh-D-3. In this view of the matter, if the appellant was carrying the foreign currency brought by him, subject matter of this case on his way back to his ordinary place of residence, out of Pakistan then, in the light of abovementioned SRO available on file as Mark-A, possession of the same with the appellant cannot be considered illegal.

Taking stock of the above facts collectively, this Court is convinced to hold that the prosecution remained fail to prove its case against the appellant beyond the shadow of a reasonable doubt. There remains no cavil about the proposition that if there is a single circumstance which creates reasonable doubt regarding the credibility of prosecution case, the same is sufficient to give benefit of the same to the accused.

9. In the light of above discussion, **Criminal Appeal No.15248 of 2020** is allowed, conviction and sentence awarded to Afzal Nazir, appellant by the learned trial court is set aside and he is acquitted of the charge levelled against him by extending him the benefit of doubt. He is on bail, his bail bonds are discharged and sureties are released. The articles taken into possession by the Customs authorities, available with the prosecution, Passport and the subject foreign currency US \$ 39100 be given to the appellant against a valid receipt. To the extent of articles already given to the appellant, the surety, if any, is discharged.

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10. In view final adjudication of main appeal, there is no need to proceed with these applications, the same are disposed of.

**(Syed Shahbaz Ali Rizvi)
Judge**

APPROVED FOR REPORTING:

Judge

