

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD,
(JUDICIAL DEPARTMENT).

Criminal Appeal No. 146 of 2020

Asif Fahim Malik through his Special Attorney Muhammad Akif Khan

Versus

The State and another.

Appellant by: Syed Javed Akbar, Advocate.

Respondents by: Sardar Muhammad Ashfaq, Advocate.
Mr. Kashif Hussain, learned State
Counsel.
Muhammad Asghar, S.I.

Dates of hearing: 22.09.2020, 24.02.2021, 25.10.2022,
22.12.2022 & 24.01.2023.

TARIQ MEHMOOD JAHANGIRI, J: Through the instant criminal appeal filed under Section 417 Cr.P.C, the appellant has impugned judgment dated 29.02.2020, passed by learned Judicial Magistrate Sec.30, West-Islamabad, whereby respondent No. 2 / accused has been acquitted in case F.I.R No. 570/2015, dated 04.12.2015, offence U/S 420 P.P.C, registered at P/S Margalla, Islamabad.

02. Brief facts narrated in the instant appeal are that complainant namely Asif Fahim Malik, alleged in instant F.I.R that his late father namely Col. (Retd) Mian Muhammad Khan, who lastly resided in the United States, opened an account No.

173910055206, maintained with UBL Bank, F-8 Markaz, Islamabad. Due to old age and shaky handwriting, father of the complainant authorized brother of the complainant namely Waqar Naeem Malik, to operate said account with his signatures but the same was done under the strict observation of his father. The father of the complainant died on 05.02.2015, leaving behind four sons namely Akhtar Saleem Malik, Shahid Atiq Malik, Waqar Naeem Malik (accused) and Asif Fahim Malik, (complainant). That at the time of death, father of the complainant had an amount of Rs. 3,77,30,977.70/- in his above mentioned account, which was the rental income of different properties. After the death of complainant's father the authority of Waqar Naeem Malik to operate account with his signatures had ceased and the said amount was to be devolved upon all the legal heirs equally but despite knowing all legal position, the accused, Waqar Naeem Malik came to Pakistan from the U.S.A and by concealing the fact of death of his father from the concerned UBL Bank, he withdrew an amount of Rs. 2,00,000/-, Rs. 3,70,00,000/- and Rs. 5,33,700/- on 11.03.2015, 12.03.2015 and 19.03.2015, respectively from the said account and dishonestly put the said amount to his own use without any legal or moral justification that when the complainant came to know about

the misappropriation committed by Waqar Naeem Malik, he came to Pakistan.

03. After conclusion of the investigation, complete report / challan in the matter within the meaning incorporated in section 173, Cr.P.C was submitted by the prosecution. Copies of statement of allegations were supplied to the accused as required U/S 241-A, Cr.P.C. Thereafter, charge against the accused was framed on 29.03.2017. After recording the evidence and fulfilling all legal and codal formalities, learned trial Court has acquitted respondent No. 2 / accused vide judgment dated 29.02.2020.

04. Learned counsel for the appellant / complainant *inter alia* contends that the impugned judgment is not sustainable under the law; sufficient evidence was produced on the basis of which respondent No. 2 / accused was liable to be convicted; the impugned judgment has been passed on mis-reading and non-reading of evidence; delay in filing of appeal is liable to be condoned due to spread of Coronavirus Pandemic; no notice regarding preparation of the certified copy was issued by the copy branch to the appellant, so the delay in filing of appeal was neither willful nor intentional, hence impugned judgment is liable to be set-aside. Learned counsel has relied upon the cases titled as **Shehnaz Akhtar**

another Vs. Mst. Zeenat Tariq and others (2022 PLD 360 Islamabad), Muhammad Akram Vs. DCO, Rahim Yar Khan and others (2017 SCMR 56), Board of Governors, Area Study Centre for Africa & North America, Quaid-e-Azam University Islamabad & another Vs. Ms. Farah Zahra (PLD 2005 SC 153), Sarwar Khan Vs. Mir Ali & 10 others (1980 CLC 110), Sikandar Hayat Vs. (1) Ata, (2) Waryam, (3) Noora, (4) Hashmat, (5) Akbar and (6) The State (PLD 1970 SC 224).

05. Conversely, learned State Counsel assisted by learned counsel for the respondent No. 2 / accused has stated that the appeal against acquittal has been filed by Asif Fahim Malik, complainant of the F.I.R through his Special Attorney namely Muhammad Akif Khan, hence same is not competent; the appeal has been filed after inordinate delay of 176 days, hence on the point of limitation the appeal is liable to be dismissed. Learned counsel has relied upon the cases titled as **Mian Muhammad Sabir Vs. Malik Muhammad Sadiq through Legal Heirs & others (PLD 2008 SC 577), Khalid Mehmood & 3 others Vs. Safdar Iqbal & another (2017 PCr.L.J 1104), Quaid Johar Vs. Murtaza Ali & another (PLD 2008 Karachi 342)** and **Khan Vs. Sajjad &**

2 others (2004 SCMR 215).

06. Arguments advanced by learned counsel for the parties have been heard and record has been perused with their able assistance.

07. It is important to decide the following two objections raised by learned counsel for the respondent No. 2 / accused;

- i. Competency of appeal against acquittal, filed through special attorney.
- ii. Delay of 176 days (06-Months approximately) in filing of appeal.

08. The concept of filing of criminal appeal through attorney is not provided in criminal law. There is neither any section of the Criminal Procedure Code (Cr.P.C) nor any other provision of law on the basis of which criminal appeal can be filed through special attorney. Learned counsel for the appellant has completely failed to point out any law to show that any person can prosecute on behalf of attorney. Reliance in this regard is placed on the following cases:

- i. **Quaid Johar Vs. Murtaza Ali and another (PLD 2008 Karachi 342)**
- ii. **Ghazanfar Ali Vs. M. Zahid Hussain and others (PLD 2011 Lahore 179).**
- iii. **Khalid Mehmood and 3 others Vs. Safdar**

Iqbal and another (2017 PCr.L.J 1104).

09. As far as second objection with regard to filing of appeal with a delay of 176 days is concerned, for the convenience Section 417(2-A), Cr.P.C is reproduced as under:

417. Appeal in case of acquittal:

(2-A) A person aggrieved by the order of acquittal passed by any Court, other than a High Court, may, within thirty days, file an appeal against such order.

10. The limitation for filing of appeal against acquittal is provided as 30 days in the section *supra*, as far as the argument of learned counsel for the appellant regarding condonation of delay is concerned, Section 5 of the limitation Act (IX of 1908) for condonation of delay is not applicable to section 417 of the Criminal Procedure Code (Act V of 1898) as clearly laid down under section 29 of the Limitation Act (IX of 1908) which is reproduced as under:

"(1) Nothing in this Act shall affect section 25 of the Contract Act, 1872.

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or

application by any special or local law:

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply.”

11. Hence it is clear that if there is a special provision of limitation provided under the relevant law then section 5 of the Limitation Act, 1908 will not be applicable for condoning the delay. Reliance is placed upon a case titled as **Muhammad Sharif and others Vs. The State and others (2005 MLD 1333).**

12. As far as arguments made by learned counsel for the appellant that no notice was sent by the copying agency, informing that the certified copy has been prepared, in this regard law has been laid down by the Hon'ble Supreme Court of Pakistan in a case titled as **Mian Muhammad Sabir Vs. Malik Muhammad Sadiq through Legal Heirs and others (PLD 2008 Supreme Court 577),** which is as under:

“We have heard the learned counsel for the parties and examined the material available on record. Even according to the narrative furnished by

the learned counsel, (viz. the appellant applied for the certified copy on 12-2-1998, it was prepared and ready for delivery on 21-2-1998 and the petition was filed on 30-10-1998) the petition was barred by 8 months and 9 days. The stance of the learned counsel is that is if the time is computed from date of delivery of the certified copy of the impugned judgment, then the petition is within time. Learned counsel when asked as to why chit/receipt issued by the copying branch was not placed on record stated that he is not aware as to whether chit or receipt was issued by the copying agency or not as the certified copy was applied by the appellant. The learned counsel has also not been able to disclose about the date, which was given by the copying agency or indicated on the receipt issued by the copying agency to obtain certified copy. It is a matter of common knowledge that when a person applied for certified copy, the copying agency issues a receipt/chit indicating tentative date of preparation of certified copy and on that date and applicant is obliged to enquire from the copying agency as to whether the requisite copy is prepared or not. Interestingly, the appellant in his application for condonation of delay even did not mention the date given by the copying agency to the appellant for obtaining the certified copy of the judgment. This Court in a case reported as Fateh Muhammad and others v. Malik Qadir Bakhsh (1975 SCMR 157) has held that the time "requisite" for obtaining copy of order within the meaning of section 12 of the Limitation Act, 1908, means only the interval between the date of application for supply of copy and the date when it is ready for delivery and that the time between the date on which the copy

was ready for delivery, and the date on which the applicant chooses to take delivery thereof is not a portion of time "requisite" for obtaining a copy. Even section 12(5) of the Limitation Act is of no help to the appellant as he failed to produce the chit/receipt issued by the copying agency showing the date for preparation of certified copy, inasmuch as, no such date has been indicated in the application for condonation of delay. Had the appellant produced a chit issued by the copying agency and the copy was not ready on the date indicated in the chit, then the appellant could have taken shelter under section 12(5) of the Limitation Act. This Court under the similar facts and circumstances of the case reported as Zulfiqar Ali v. Superintendent of Police and. others (2003 SCMR 1562) refused to condone the delay of nearly 50 days while in the present case the delay is of 249 days. The case of Zulfiqar Ali (ibid) applies to the facts and circumstances of the case in hand on all fours.

There is another aspect of the case. The appellant applied for certified copy on 12-2-1998 and he waited for a period of nearly eight months to inquire about the copy, as he obtained the copy on 1-10-1998. The appellant after applying for the certified copy of the judgment went into a deep slumber and did not enquire from the copying agency about the fate of his application for the grant of certified copy for approximately eight months. Even if it be presumed that no chit/receipt was issued by the copying agency, the appellant was a prudent person should have acted with reasonable promptitude and diligent and should have approached the copying

agency inquiring about certified copy within a reasonable time. The appellant was extremely negligent in securing the certified copy of the judgment and did not bother to inquire from the copying agency about the preparation of certified copy for nearly 8 months, which was ready for delivery on 21-2-1998. Learned counsel for the respondents has rightly referred para-3 of the application for condonation of delay, in which he appellant stated that he visited the copying branch several times for collecting the certified copy but was told that the same has not yet been prepared. Suffice it to say that the said assertion, on the face of it seems to be erroneous. Had the appellant visited the copying agency after 21-2-1998 he would have definitely got the certified copy as according to him it was prepared on the said date. It leads to the irresistible conclusion that the appellant never visited copying agency during the period from 21-2-1998 to 1-10-1998.”(Emphasis added)

13. The Hon’ble Supreme Court of Pakistan while dismissing the petition for leave to appeal against acquittal filed with a delay of one (01) day has held in a case titled as **Noor Hussain Vs. Muhammad Salim (1985 SCMR 893)**, that:

"The petition is, however, barred by time by one day. The petitioner’s counsel has not been able to explain the delay satisfactorily. It appears that the learned Advocate-on-Record neglected to file the petition promptly after obtaining the copy of the impugned judgment. Notwithstanding the fact that the delay is only of one day, we do not

consider it a fit case for condonation of the delay as Muhammad Salim son of Muhammad Ramzan (respondent No. 1) has acquired the right to live, while others have acquired the valuable right of liberty."

14. In the case in hand neither any application for the condonation of delay was filed nor any plausible explanation was extended by learned counsel for the appellant, with regard to filing of appeal with an inordinate delay of 176 days. As per dictums laid down by the Hon'ble Supreme Court of Pakistan, it is well settled principle of law that delay of each day has to be satisfactorily explained, as after expiry of limitation period a vested right is created in favour of the other party which could not be easily brushed aside as the law always helps the vigilant and not the indolent.

15. It is held by the Hon'ble Supreme Court of Pakistan in a case titled as **Water and Power Development Authority (1988 SCMR 1354)**, that:

"It is well settled that after the prescribed period of limitation has elapsed, the door of justice is closed and no plea of injustice, hardship or ignorance can be of any avail unless the delay is properly explained and accounted for."

Reliance is also placed upon the cases titled as **Khushi Muhammad and others Vs. Mst. Fazal Bibi and other**

(PLD 2016 SC 872) and Muhammad Sarfraz Siyal Vs. Fazal Hussain Khan (2021 CLC 867 [Islamabad]).

16. In view of above discussion, I hold that the appeal in criminal case cannot be filed through special attorney as well as after an inordinate delay of 176 days, hence instant appeal against acquittal of respondent No. 2 / accused is **dismissed** being not maintainable.

**(TARIQ MEHMOOD JAHANGIRI)
JUDGE**

Announced in open Court on this 07th day of February, 2023.

JUDGE

Approved for Reporting

Bilal /-