

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

“Criminal Appeal No. 86 /2016”

Saba Jamal

Versus

Mrs. Tehmina Khan and others.

Appellant by:	Mr. Ajam Naz Malik, Advocate.
Respondents by:	Muhammad Umer Khan Vardag, Advocate.
State by:	Mr. Khalique Siddiqui, State Counsel alongwith Shehzad- A.S.I.
Date of Hearing:	28.07.2020

Ghulam Azam Qambrani, J.: This appeal has been filed against the impugned judgment dated 19.03.2016 passed by the learned Judicial Magistrate, 1st Class, Islamabad- West, in case F.I.R 339 dated 03.09.2010, under Section 406 Pakistan Penal Code, 1860 (hereinafter referred to as “PPC”) registered at Police Station Kohsar, Islamabad, whereby respondents No.1 & 2 were acquitted.

2. Briefly stated facts of the case as narrated by the complainant, Mst. Saba Jamal, are that she alongwith her husband entered into an agreement to purchase the House No.8-A, street No.70, F-8/3, Islamabad, with the accused, for total consideration of Rs.4,55,00,000/- and paid a sum of Rs.20,500,000/- as earnest money. The accused and co-accused categorically assured that there is no legal bar for transfer of the said house, therefore, she arranged remaining amount to be paid to the accused but it has come to the knowledge of the complainant/appellant that there is a litigation pending in the Court regarding said property. The accused induced the amount from the complainant, committed criminal breach of trust, and concealed the facts regarding the property. Hence, the above said F.I.R was lodged.

3. After registration of F.I.R, the investigation was completed and report under Section 173 Cr.P.C., was submitted on 13.11.2010. Formal charge was framed against the respondents on 20.06.2011 to which they pleaded not guilty and claimed trial, therefore, the prosecution evidence was summoned.

4. In order to prove its case, the prosecution examined the following witnesses:-

- i. PW-1, Mst. Saba Jamal (complainant),
- ii. PW-2, Ibrahim Javed,
- iii. PW-3, Muhammad Kamal Khan, A.S.I,
- iv. PW-4, Muhammad Nazeer- Constable,
- v. PW-5, Munir Hussain Jaffari- Sub-Inspector,

After closure of the prosecution evidence, the accused/respondents were examined under Section 342 Cr.P.C wherein they denied the allegations leveled against them. The accused did not opt to record their statements on oath as envisaged under Section 340 (2) Cr.P.C. The learned trial Court, after hearing the arguments of the learned counsel for the parties, passed the judgment dated 19.03.2016, hereinafter be called as the impugned judgment. The appellant/ complainant being aggrieved of the impugned judgment has challenged the same through the instant appeal.

5. Learned counsel for the appellant has contended that the judgment of acquittal passed by the learned trial Court is not in accordance with law and facts of the case; that the learned trial Court has not appreciated the examination in chief alongwith cross-examination as well as the documents produced in accordance with law; that the learned trial Court relied upon the documents without appreciating the contents of the document whereby respondent No.1 has been attempting to manoeuvre the facts and circumstances of the case and having no relevancy at all and has attempted to win over the evidence; that the respondents willfully and intentionally committed the crime, which is punishable under the law. Further contended that the challan has been submitted by the I.O/ local police under the direct influence of respondent No.1 therefore, they remained negligent in discharging their own duties

for which complainant should not suffer. Next contended that impugned judgment is based upon presumption, surmises and conjectures.

6. Conversely, learned counsel for the accused/ respondents submitted that the accused/respondents are totally innocent; that there is an inordinate and unexplained delay of four months in lodging of the F.I.R, which makes the prosecution case highly doubtful; that there is no evidence of inducement, whereas the appellant with her free will and consent entered into the agreement to sell dated 07.05.2010; that there is no entrustment of any amount to the respondents, as such, the offence under Section 406 P.P.C does not attract; that the matter is purely of civil nature whereas the appellant has tried to convert the civil litigation into criminal proceedings; that the appellant has already filed a civil suit for recovery against the respondents. Further, submitted that the prosecution failed to prove its case beyond any shadow of doubt. As such, the learned Trial Court has rightly acquitted the respondents. The learned State counsel supported the impugned judgment passed by the learned Trial Court.

7. Heard arguments of the learned counsel for the parties and perused the available record.

8. The case of the appellant is that she along with her husband had entered into an agreement to purchase house No.8-A, Street No.70, F-8/3, Islamabad, with the accused/ respondent through an agreement of sale for a consideration of Rs.4,55,00,000/- and she paid an amount of Rs.20,500,000/- as earnest money on the assurance of the respondents that there was no legal bar for transfer of the said house, but later on, she came to know that litigation is pending in the Court regarding the said property, as such, the respondents have misappropriated and misused the amount of the appellant, which was entrusted to them as a result of the agreement to sell.

9. Mst. Saba Jamal while appearing as PW-1 deposed that she along with her husband entered into an agreement of sale with the respondents regarding House No.8-A, Street No.70, F-8/3, Islamabad, and paid an amount of Rs.2,05,00,000/- as earnest money; she further deposed that when she came to know about the stay order on the subject property, she lodged the F.I.R against the respondents whereas in her cross-examination, she admitted that the said money was earnest money and it was not a trust; she also admitted that she had filed a suit for recovery and compensation against respondent No.1. Ibrahim Javed, while appearing as PW-2 deposed that a sale agreement was executed between the complainant and the accused through him. He further deposed that he obtained NOC and Transfer Form from the C.D.A on 12.08.2010 and when they went to the C.D.A office for transfer of the subject property of the instant case, they came to know about a court case over the said property. He further deposed that the accused was asked to transfer the suit property but he failed to do so. During his cross-examination, he admitted that the appellant has already filed a civil suit against the respondent/ accused.

10. For facilitation, Section 406 is reproduced below for ready reference and assistance:-

"Section.406. Punishment for criminal breach of trust. Whosoever commits criminal breach of trust shall be punished with imprisonment of either description of a term which may extend to (seven) years, or with fine, or with both.

The essential ingredients of the offence of criminal breach of trust are as follows:-

- a) Entrustment.***
- b) Dishonest misappropriation or conversion to his own use by the person in whom the confidence reposed.***
- c) Dishonest use or disposal of property in violation of any direction of law.***
- d) Dishonest use or disposal of property in violation of any legal contract.***
- (e) Offence of dishonest misappropriation of conversion to one's own use is not***

contingent upon time spent rather it is the co-incidence of actus rea and mens rea.

In view of above ingredients of criminal breach of trust, breach of any term of agreement to sell does not fall within the above mentioned criteria as the agreement to sell has been created under Contract Act, 1872 where one party signifies his willingness to do or not to do anything against a consideration and if the same has been accepted by the other party, it becomes a promise whereas the said promise if enforceable by law creates the term "contract". It is obvious from the above that an agreement requires an offer/proposal, acceptance, promise, consideration and enforceability, then the same creates the reciprocal obligations agreed between the parties. This concept of contract if applied to the present situation, it simply establishes that one party offered its property i.e. House No.8-A, Street No.70, F-8/3, Islamabad, for sale whereas the other party accepted the same against the sale consideration of Rs.4,55,00,000/- and out of the said amount, Rs.20,5000,000/- was paid as earnest money and an agreement of sale was executed between the parties on 07.05.2010.

11. In view of the above, it is clear that there were certain agreed terms for a lawful consideration between the parties for the purchase of the above said house against an amount of Rs. 4,55,00,000/- and out of the said amount, Rs.20,5000,000/- was paid as earnest money, hence, it was agreed to perform the obligation, whereas payment of earnest money does not fall within the preview of "entrustment" of property in terms of Section 406, P.P.C., even otherwise, there is no misappropriation if the seller after receiving the sale consideration or part of sale consideration, refuse to transfer the property or failed to abide by the terms of agreement, as the said failure or breach of terms could not be equated with dishonest use, disposal of the property, violation of any legal contract, however, any breach of such agreement, has a remedy under The Specific Relief Act, 1877, where one can seek a specific performance of a contract, if the same is enforceable by law and the Court of law has to see which party is responsible for

refusal or failure of performance of the terms of the contract.

12. In the case reported as Muhammad Nawaz Vs. S.H.O Police Station, Sabzi Mandi, Islamabad, and others (2017 P.Cr.L.J. 133) it has been held by this Court as under:-

"The scheme of law under Specific Relief Act, 1877 provides a mechanism which covers all those contracts between the parties which have been executed in terms of Contract Act, 1872 and their remedies are only provided in Specific Relief Act, 1877 where the ingredients of criminal breach of trust have no space under the said law as the concept of mens rea could only be assessed by the criminal Court. The dispute related to such kind of contracts can easily be categorized under civil rights and their breach has also been remedied under the terms of contract or under Specific Relief Act, 1877 whereby the parties can approach the civil court in terms of section 9 of C.P.C."

In the instant case, the appellant/complainant has already approached the competent civil court by filing a civil suit for recovery and compensation against respondent No.1. When the agreement of sale provides the remedy for breach of any term in the contract as of damages, all other remedies could be seen under the said clause whereas the breach of contract, its enforcement, its remedy has already been defined in the said contract, therefore, the criminal prosecution is just an abuse of process which is apparent on record. Reliance in this regard can be placed upon the case reported as "Badar Ur Islam v. District Police Officer, Faisalabad and 3 others" (2007 YLR 2766) wherein it has been held that:-

"Petitioner besides committing breach of agreement had not returned the earnest money to the purchaser. A perusal of the police record shows that the purchaser was never associated with the investigation of case. The record does not reflect any grievance of the purchaser. The complainant appears to have got the case registered with an ulterior motive. Even otherwise, the payment of Rs.1,00,000 to the petitioner was made as part payment of the sale price. It cannot be termed as entrustment within the meaning of section 406, P.P.C. The allegation levelled by the complainant can be described only-and-only as a breach of contract for which the purchaser alone may approach the civil Court."

Breach of contract cannot be allowed to be made basis for criminal prosecution."

In the case of "Umair Aslam v. Station House Officer and 7 others" (2014 P.Crl.L.J. 1305) it was held that:-

"Even otherwise, the disputed amount of Rs.16,00,000 mentioned in the FIR if at all was given in the backdrop of a property deal and the accused are not ready for execution of the sale-deed, that is only a matter to be resolved by the civil court and the learned counsel for the complainant has frankly conceded that the complainant has not filed any such suit for specific performance against the accused in the FIR".

In the case of "Rafiq Haji Usman v. Chairman, NAB and another" (2015 SCMR 1575) it was held as under:-

"an essential element for making out and establishing a case of criminal breach of trust is the entrustment of property or money or with any dominion over property, which is dishonestly misappropriated or dishonestly used or disposed in violation of any direction prescribed by law or the mode in which such trust was to be discharged or in the context any contract etc., however the promise to sell the property for which consideration/money is paid or an agreement to sell is entered upon and the money has been paid pursuant to such an agreement, it shall not be the same as entrustment of property within the concept of noted provision. In case of entrustment, the money/property received is to be retained for return to the giver at a later time as opposed to a promise or contract where investment is made or money is paid for the purposes of fulfillment of a specific agreed upon purpose/contract. In such a case where money/property has been entrusted to a person, using such amount/property for any other purpose would not attract the penal consequences of section 405 ibid. For the purposes of above view, we draw support from the judgment of this Court reported as Shahid Imran v. The State and another (2011 SCMR 1614), wherein it has been held "The law clearly recognizes a distinction between payment/investment of money and entrustment of money or property as in the former case the amount of money paid or invested is to be utilized for some purpose whereas in the latter case that sum of money or property is to be retained and preserved for its return to the giver and the same is never meant to be utilized for any other purpose...a mere breach of a promise, agreement or contract does not ipso facto attract the definition of criminal breach of trust contained in section 405, P.P.C. and such a breach is not synonymous with criminal breach of trust without there

being a clear case of entrustment".

13. Keeping in view all the facts and circumstances of the case, it is clear from the record that ingredient of the offence under Section 406 P.P.C. is not made out against the accused/ respondents. As regard the application of Section 420 P.P.C is concerned, the record shows that PW-2 in his statement admitted that before entering into the agreement to sell, he and the appellant/ complainant, got checked the documents of the house from the concerned C.D.A office, they inquired about any litigation over the disputed house from the C.D.A office as to whether there was any encumbrance; they came to know that except a loan, no Court case is pending with regard to the said house, thereafter, both the parties entered into an agreement of sale with regard to the disputed house. It was subsequently when the earnest money was paid to the accused/ respondent, and at the time of transferring the house in dispute in favour of the appellant/ complainant, the appellant was informed that a civil suit is pending with regard to the said house. Moreover, the appellant/ complainant while appearing as PW-1 admitted that the subject amount, which was given to the accused/ respondent was advance/ earnest money and it was not a subject to any trust, as such, Section 406 PPC is not attracted in the facts and circumstances of the case in hand. Further, the appellant has also filed a suit for recovery and compensation against respondent No.1.

14. In the case in hand, there is no incriminating evidence available on record against the accused/ respondent No.2 because he was just a witness of the agreement to sell dated 07.05.2010. Moreover, there is an inordinate and unexplained delay of about four months in the lodging of the instant F.I.R, which makes the prosecution case doubtful. The learned Trial Court after evaluating the evidence available on record, has rightly acquitted both the accused persons by giving them benefit of doubt.

15. The interference of this Court would be warranted, if the reasoning of the trial Court in acquitting an accused is perverse, artificial or ridiculous. It is only in an exceptional case that this Court will interfere by setting aside the acquittal of an accused. In the instant case, the learned trial Court has properly appreciated the evidence available on record and acquitted the accused/ respondents through a well-reasoned judgment, by giving them benefit of doubt. The learned counsel for the appellant has also not been able to show that there has been any misreading or non-reading of evidence. Reliance is placed on the cases titled as "Muhammad Zaman versus The State and others" [2014 SCMR 749], "Muhammad Rafique versus Muhabbat Khan and others" [2008 SCMR 715], "Jehangir versus Amin Ullah and others" [2010 SCMR 491], "Mst. Askar Jan and others versus Muhammad Daud and others" [2010 SCMR 1604] and "Mst. Sughra Begum and another versus Qaiser Pervez and others" [2015 SCMR 1142].

16. In the case reported as "Sanaullah Vs. The State through Prosecutor General" (2015 P.Cr.L.J. 382 (Balochistan)), it has been held that as under:-

"Rule of prudence, stipulated that prosecution had to prove its case beyond the shadow of doubt. Accused had not to prove his innocence, until and unless proved guilty. Benefit of slightest doubt would necessarily be extended in favour of accused and not otherwise."

17. Keeping in view the above facts and circumstances, it transpires from the record that no material was available on record against the accused/ respondents. The learned trial Court, after proper appraisal of evidence available on record, has rightly concluded that the prosecution has miserably failed to prove its case against all the accused/ respondents, as such, acquitted them.

18. It is important to note that an appeal against acquittal has distinctive features and the approach to deal with the appeal against conviction is distinguishable from appeal against acquittal,

as presumption of double innocence is attached, in the latter case. Reliance in this regard is placed upon the case of "Inayatullah Butt v. Muhammad Javed and 2 others" [PLD 2003 SC 562]. Until and unless the judgment of the trial Court is perverse, completely illegal and on perusal of evidence, no other decision can be given except that the accused is guilty or there has been complete misreading of evidence leading to miscarriage of justice, the Court will not exercise jurisdiction under section 417, Cr.P.C.

19. The learned counsel for the appellant has failed to advance any ground to justify the setting aside of the acquittal judgment. There is no misreading or non-reading of evidence nor the findings of the learned trial Court are patently illegal. The findings of acquittal, by no stretch of the imagination, can be declared as perverse, shocking, alarming or suffering from errors of jurisdiction and misreading or non-reading of evidence.

20. For what has been discussed above, there is no merit in the instant appeal; therefore, the same is hereby **dismissed**.

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court on this 5th day of August, 2020.

JUDGE

M. J. *