ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No.69/2015
Dr Awais Kamal
Versus
Syed Junaid and another

S. No. of order / proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	30.09.2019	**Mr. Raja Rizwan Abbassi, Advocate for the appellant** **Mr. Wajid Hussain Mughal, Advocate for respondent No.1** **Mr. Sadaqat Ali Jehangir, learned State Counsel.**

Through the instant appeal under Section 417 (2-A) of Cr.P.C. the appellant impugns the order dated 07.03.2015 passed by learned Judicial Magistrate 1st Class (West), Islamabad whereby respondent No.1 was acquitted from the charge under Section 408 of the Pakistan Penal Code, 1860 ("P.P.C.") in exercise of the powers under Section 249-A Cr.P.C.

2. The facts essential for the disposal of this appeal are that on the complaint of the appellant, F.I.R.No.327, dated 02.10.2012, under Section 408 P.P.C. was registered at police station Shalimar, Islamabad. According to the contents of the F.I.R. respondent No.1 Junaid Imam was employed at "Optiwave Technology", a company owned by the complainant. The accused/respondent No.1 was given a car Honda City 2010 Model 2010 registration No. QS-916 ("the car") for official use which he did not return after his termination from employment. He is alleged to have sold the car. It was further alleged that the complainant believes that the accused also misappropriated the funds of the company and that the audit report was awaited.

3. The accused/respondent No.1 filed a petition for pre-arrest bail before the Court of learned

Additional Sessions Judge-V, Islamabad. During the pendency of the said petition, he returned the car and through a consent order dated 08.12.2012 and ad interim bail already granted to the accused/respondent No.1 was confirmed.

4. The accused/respondent No.1 joined the investigation and report under Section 173 Cr.P.C. was submitted. Thereafter, vide order dated 17.06.2013 learned trial Court while proceeding under Section 241-A Cr.P.C. is said to have supplied the copies of statements and documents to the accused and the case was adjourned to 15.07.2013 for the framing of charge. However, the accused moved an application for supply of documents which was rejected vide Order dated 10.04.2014. The said order was assailed in the constitutional jurisdiction of this Court and on the direction of this Court copies of documents were supplied to the accused under Section 241-A Cr.P.C. In the meantime, before the framing of charge, the accused/respondent No.1 moved an application under Section 249-A Cr.P.C. which was allowed vide impugned order dated 07.03.2015 and the accused was acquitted. The said order has been assailed in the instant appeal.

5. Learned counsel for the appellant submits that respondent No.1 was an employee of the company owned by the appellant; that respondent No.1 was terminated from employment vide letter dated 20.09.2012; that during his service, respondent No.1 was given the use of car which he did not return after termination; that the accused later on denied selling the car and he returned the same; that the learned trial Court before acquitting the accused did not advert to the question as to whether temporary employment does not fall in the ambit of employment within the

meaning of Section 408 P.P.C.; that respondent No.1 could not have been acquitted without the recording of evidence pursuant to procedure laid down under Section 540 Cr.P.C.; that the acquittal was premature prior to framing of charge; that the learned trial Court did not ascertain as to whether from the contents of the complaint offence under Section 406 or 408 P.P.C. is constituted; and that the mere fact that respondent No.1 returned the vehicle does not absolve him from the criminal liability. Learned counsel prayed for the appeal to be allowed and for the impugned order dated 07.03.2015 to be set-aside. In support of his submissions, learned counsel placed reliance in the cases of "OM Parkash Vs Habib Bank Ltd" (1997 PLC 629) and "MCB Bank Ltd Vs Ghulam Mustafa" (2007 PLC 381).

6. Learned counsel for respondent No.1 opposed the appeal by submitting that the accused/respondent No.1 is a director of the company and was not an employee; that the car was purchased through the amount payable to respondent No. 1 against his share out of the company's profits; that respondent No.1 instituted a suit for declaration and injunction against the complainant before learned Senior Civil Judge, Lahore which was dismissed under Order VII, Rule 11 C.P.C and now an appeal is pending; that the termination letter dated 20.09.2012 is fake; that the purported termination letter was never served on respondent No.1; that merely within six days of the termination letter, a complaint was filed on 26.09.2012 and the F.I.R. was registered on 02.10.2012; that the car was returned during proceedings in the bail petition; that no element of misappropriation is spelt from the prosecution story; that retention of the vehicle for sometime

cannot be termed breach of trust; that no *prima facie* evidence is available against the respondent No.1; and that under Section 249-A Cr.P.C. the learned trial Court can acquit the accused at any stage of trial even before the charge is framed. In support of his submissions learned counsel for respondent No.1 placed reliance in the cases of Ajmeel Khan Vs. Abdur Rahim etc (PLD 2009 SC 102), Zahoor Ud Din Vs. Khushi Muhammad (1998 SCMR 1840), Abdul Sattar Vs. The State (1992 P.Cr.L.J 2054 Karachi) and Muhammad Nawaz Vs. The State (1970 P.Cr.L.J 97 Karachi).

7. Learned State Counsel also supported the impugned order and submitted that learned trial Court rightly exercised the power of acquittal under Section 249-A Cr.P.C. because there appears no probability of the conviction. Learned counsel prayed for the appeal to be dismissed and the impugned order of acquittal to be maintained.

8. I have heard the arguments of learned counsel for the parties and perused the record with their able assistance. The relevant facts of the case have been set out in sufficient detail in paragraphs 2 to 4 above, and need not be recapitulated.

9. Fundamentally, there was an allegation against respondent No.1 for criminal breach of trust by dishonest use and misappropriation of the official car after termination of employment. Now, Section 405 P.P.C. sets out four ingredients to constitute the offence of the criminal breach of trust, namely: (i) there must exist entrustment of the property to the accused; (ii) he should have the dominion over the property; (iii) he dishonestly misappropriated or converted that property to his own use; and (iv) he dishonestly used or discharged the property in violation of any

direction of law. Section 405 P.P.C. reads as under:-

> ***"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property, in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."***

10. In order to make out a case of criminal breach of trust under Section 405 P.P.C., it is mandatory that there must exist on element of entrustment which entrustment was alleged to be violated. The Hon'ble Supreme Court in the case of "Shahid Imran Vs The State" (2011 SCMR 1614), held as follows:-

> ***"Recognition of this distinction stands clearly reflected in many cases decided by different courts in the Indo-Pak sub-continent and a reference in this respect may be to the cases of State of Gujarat v. Jaswantlal Nathalal (AIR 1968 SC 700), Punjab National Bank and others v. Surendra Prasad Sinha (1994 PSC (Crl) 768), Shaukat Ali Sagar v. Station House Officer, Police Station Batala Colony, Faisalabad and 5 others (2006 PCr.LJ 1900), Ghulam Ali v. Javid and another (1989 PCr.LJ 507), Nga Po Seik v. Emperor (1917 Indian Cases 824) and Kornai Lal Dutta v. The State (AIR 1951 Cal 206). These precedent cases clearly show that 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 element of entrustment therein which entrustment has been violated."***

11. It is an admitted position that the accused/respondent No.1 was allowed to use the car and in such eventuality where a person is allowed to use a property given to him no trust is created so as to make out a case of entrustment within the meaning of Section 405/408 P.P.C. In

case of "Abdul Karim Vs The Crown" (PLD 1951 Lahore 342) it was held as follows:-

> ***"It will be noticed that the first essential element is entrustment of property. It is said that there was no entrustment of property in this case. The property was leased for a specified period. It is stated at page, 979, Ratan Lal's Law of Crime, 16th Edition that where goods are delivered to a person in pursuance of a contract for their purchase, there is no entrustment which would give rise to a trust and the mere fact that the person denies receipt of goods delivered does not render him guilty either of criminal misappropriation or criminal breach of trust. Similarly, it is argued, where property is let or leased to a person for his use no trust can be said to have been created in respect of that property. In Mani Lal v. Emperor (33 Cr. L. J., p. 866) the petitioner owned a flour mill in Jhansi and took electric current from the Electric Supply Company. The accounts produced by the Company showed that he had used 554 units in February 1931. On 26th March 1931, he sent a letter to the company saying that two servants of the company had removed his meter on 24th March saying that they Would either return it or install another in its place on the following day but they had not done so. The Company made enquiries and found that their servants had not removed the meter and prosecuted Mani Lal for criminal breach of trust. It was suggested that the accused had been tampering-with the meter and fearing discovery he had removed it and falsely reported that the servants of the Company had taken it away. This statement of the case was accepted by the trial Court and the accused was convicted under 406 Penal Code. His appeal was dismissed and in revision it was held by the Allahabad High Court that on the findings of the lower Courts that a meter was installed by the Electric Supply Company in the mill of the accused, that it was not there and that the servants of the Electric Supply Company 'had not removed it the offence under Section 406 Penal Code had not been established. The accused was no doubt responsible for the meter. But he had given a deposit of Rs. 75 to the company and if he was unable to produce the meter its price could be recovered from the deposit. The failure of the accused to produce the meter did not by itself constitute an offence of criminal breach of trust. In order to establish this offence, it must be proved that the accused dishonestly misappropriated or converted to his own use the property entrusted to him or dishonestly used or disposed of that property in violation of any law prescribing the mode in which such trust was to be discharged or of any legal contract, express or implied, which he had made touching the***

*discharge of such trust. **The learned judge deciding the case expressed his inability to see how the words of Section 405 embraced the case of a man who took an article on hire and failed to produce it.** There must be some evidence to show that he had acted dishonestly.*

*The mere failure to return the article hired does not prove dishonesty, nor does the mere failure to deliver possession of the property to the lessor on the expiry of the lease amount to criminal breach of trust. **There is no evidence in this case to show that the lessor or the new allottee ever demanded the return of the engine from the petitioner or that the petitioner ever denied possession of the engine or that he refused to return it.** In Rangi Lal v. Emperor, A. I. R. 1930 Oudh, p. 321, it was observed by Raza J., **that mere retention of money or mere failure to return it does not raise a presumption of dishonest misappropriation**; nor does the mere fact that payment was delayed show a criminal intention. The ingredients of the offence of criminal breach of trust are somewhat broadly stated but there is no doubt as to their meaning. The Sections dealing with this, offence are intended to punish an offence of which dishonesty is the essence".*

(Emphasis added)

12. It is next to be seen as to whether the essential requirement qua 'dishonesty' is spelt out from the contents of the complaint and circumstances emerging from the record. A breach of trust may entail civil remedy in the form of suit for damages but it is the dishonest intention which makes such breach of trust as a criminal offence. In the case of Mazhar Hakeem Vs. The State (1985 P.Cr.L.J 596 Lahore), it was held as follows:-

"Unless the prosecution proves that the accused had the dishonest intention, offence of criminal breach of trust is not made out. Every breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest being really so. Every breach of trust in the absence of mens rea, is not criminal. Offence of criminal breach of trust was intended to punish an offence of which dishonesty is the essence. Every breach of trust gives rise to a suit for damages but it is only when there is an evidence of mental act of fraudulent misappropriation that the commission of embezzlement of amount becomes a penal offence punishable as criminal breach of trust. It is the mental act of fraudulent

misappropriation that distinguishes an embezzlement amounting to a civil wrong from the offence of criminal breach of trust. The court should not be used for enforcing civil claims and the parties should not be encouraged to resort to the criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a civil Court. The tendency on the part of the litigants to do so should be checked by criminal Courts who should be on their guard against lending their aid to such procedure. A clear distinction exists between criminal and civil liabilities."

13. The termination letter was issued on 20.09.2012. In the said letter, a direction for return of the official car was given to the accused and after six days, i.e. on 26.09.2012, the complainant lodged a complaint for criminal breach of trust against respondent No.1. There is absolutely no evidence with the report under Section 173 Cr.P.C. with regard to communication of letter dated 20.09.2012 to the accused/ respondent No.1 prior to lodging of the complaint. In the complaint, it was alleged by the appellant that the car was sold by the accused/respondent No.1, however subsequently on 08.12.2012 the car was returned. Until and unless the element of entrustment and dishonest breach of the trust are available the offence of criminal breach of trust is not made out.

14. In the present case, as already observed, accused/respondent No.1 was allowed to use the car, therefore, this act could not be termed as dishonest till a direction to the contrary was served upon him. Since the period between issuance of termination letter and lodging of the complaint is too short and since respondent No.1 had been making a claim of a partner's status in the company, it cannot be said that he dishonestly converted the car to his own use so as to constitute an offence of the criminal breach of trust as defined under Section 405 P.P.C.

15. As against the allegation that the car was misappropriated and sold by the accused, it is apparent from the record that there had been no evidence of misappropriation of the car. In absence of the proof of misappropriation and lack of *mens rea* amounting to dishonesty, the ingredients of Section 405 P.P.C. are not proved. In case of "Naveed Ahmed Vs Majeedan Bibi" (1988 P.Cr.L.J 1185 Lahore), it was held as follows:-

> *"Furthermore, no ingredients of offence under Section 409/ 406, P. P. C. have been proved by the prosecution. Even if it be assumed that the first payment was made, no evidence as to the mens rea has been brought on the record."*

16. As regards the exercise of power under Section 249-A Cr.P.C. at initial stage before framing of charge, it is trite law that if after hearing the prosecution and an accused and after recording the reasons, a Magistrate considers the charge as groundless, he is empowered to acquit the accused at any stage of the case. As set out herein above, bare perusal of the complaint shows that no case under Section 405/408 P.P.C. was made out against respondent No.1 and there was no probability of conviction at the conclusion of trial. Therefore, the trial Court was not bound to frame the charge before exercising the power under Section 249-A Cr.P.C. Reference in this regard may be made to the paragraph 10 of the judgment in the case of "Zahoor UD Din Vs Khushi Muhammad" (1998 SCMR 1840), wherein it was held by the Hon'ble Supreme Court as follows:-

> *"A bare reading of the law re-produced above shows that Magistrate may deal with the case under this Section at any time irrespective of whether the charge has been framed or not."*

17. In view of above, there was no necessity to subject respondent No.1 to the rigours of the trial when there was no evidence against him. The

impugned order does not suffer from any jurisdictional error or infirmity. Consequently, the instant appeal, being without any merits, is dismissed.

(MIANGUL HASSAN AURANGZEB)
JUDGE

Aamer Baig*