

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Appeal No.337/2019

Syed Yousaf Mubashir

versus

The State & 2 others

Appellant by: Mr. Nadeem Mukhtar Ch., Advocate for appellant.

Respondents by: Mr. Saad Ahmed Rajpoot, Ch. Najam-ul-Haque
and Mr. Shahid Shabbir, Advocates for
Respondent No.2
Mr. Hasnain Haider Thaheem, State Counsel.
Shah Nawaz, S.I., P.S. Kohsar, Islamabad.

Date of Decision: 20.08.2020.

MOHSIN AKHTAR KAYANI, J: Through this criminal appeal, the appellant has called in question order of the learned Judicial Magistrate Section-30 (West), Islamabad, dated 23.09.2019, whereby application under Section 249-A Cr.P.C. filed by Mst. Naila Sharif (Respondent No.2) seeking her acquittal from case FIR No.128, dated 04.04.2016, under Sections 420, 468/471/380 PPC, P.S. Kohsar, Islamabad has been allowed.

2. Brief facts referred in the instant appeal are that Syed Yousaf Mubashir (appellant) has filed a complaint against Respondent No.2 and one Khalid Mahmood (co-accused) with the allegations that said accused persons while posing themselves as employees of Norway Embassy had taken on lease one portion of appellant's house i.e. House No.1, Street No.33, Sector F-7/1, Islamabad vide lease agreement dated 02.01.2016. The said lease agreement was subsequently altered by the accused persons making the appellant liable to pay back an amount of Rs.75,000,000/- with 50% profit and failure thereof would compel the appellant to transfer the said house in favour of accused persons. After registration of above mentioned FIR, charge against Khalid Mahmood (co-accused) was framed by the learned trial Court while Respondent No.2 remained

absconder till 23.11.2018, when she filed an application for grant of pre-arrest bail, which was accepted on 09.02.2019. Later on, Respondent No.2 filed an application under Section 249-A Cr.P.C. seeking her acquittal of the charge and same was allowed by the learned trial Court vide impugned order dated 23.09.2019. Hence, the captioned criminal appeal.

3. Learned counsel for appellant contends that the learned trial Court has not properly appreciated the facts available on record as well as the allegations specifically leveled against Respondent No.2; that the learned trial Court has not taken into account the fact that Respondent No.2 had *mens rea* and *actus reus* while committing the offences mentioned in FIR; that the learned trial Court has passed the impugned order in a slipshod manner, which is not sustainable in the eyes of law and same is liable to be set-aside.

4. Conversely, learned counsel for respondent No.2 opposed the filing of instant criminal appeal on the grounds that Respondent No.2 has falsely been implicated in this case as Respondent No.2 has no role whatsoever with the commission of offence alleged in the complaint filed by the appellant; that no recovery has been effected from the possession of Respondent No.2, as such, there is no probability of conviction of Respondent No.2, even otherwise, the case as established by the prosecution so far lacks solid material to link Respondent No.2 with the commission of offence; that the learned trial Court has rightly appreciated all the material available on record and passed the impugned order, which is well within four corners of law.

5. Arguments heard, record perused.

6. Perusal of record reveals that appellant has lodged the criminal case FIR No.128, dated 04.04.2016, U/Ss 420, 468, 471, 380 PPC, P.S. Kohsar, Islamabad against respondent No.2 and her husband Khalid Mehmood Raja, whereby respondent No.2 absconded while her husband was arrested in that case and had

subsequently been tried by the competent Court, as a result of the said trial Khalid Mehmood Raja was acquitted vide judgment dated 09.12.2017, passed by Judicial Magistrate (West), Islamabad, however, respondent No.2 later on joined the proceedings after confirmation of her pre-arrest bail by the Court of Additional Sessions Judge, Islamabad, but trial Court has acquitted respondent No.2 vide impugned order dated 23.09.2019, in terms of Section 249-A Cr.P.C. on the following reasons:-

Perusal of the record shows that although the accused is nominated in the FIR along with co-accused Khalid Mehmood with specific role of committing forgery of the lease agreement dated 20.01.2016 and theft from the house of the complainant. The record shows that no recovery was effected from the possession of the present accused. Moreover, the record also reveals that no evidence is available on the record, which can warrant the conviction of the accused. Moreover, record also shows that co-accused Khalid Mehmood has been acquitted from this case vide judgment dated 09.12.2017 by the learned Judicial Magistrate Rizwan un Din, which was not challenge by the complainant. Therefore, on mere nomination of the accused person in the FIR, on the statement of the complainant, without any corroboratory material, the accused person cannot be convicted. Therefore, after perusing the record of the case, this court has come to the conclusion that to proceed with the matter is mere wastage of the time, therefore insufficiency or non availability of the material shall bring no other result except the acquittal, and therefore there is no possibility of the accused person being convicted of the charge is hereby acquitted from the instant case u/s 249-A Cr.P.C. his bail bonds stands discharge, file be consigned to the record room.

7. In order to resolve the controversy, I have gone through the entire record appended with this appeal, whereby trial of co-accused was conducted by the learned Judicial Magistrate in which evidence of six PWs was recorded and judgment of acquittal was passed.

8. The primary allegations against respondent No.2 and her husband are that they have entered into lease agreement with the appellant regarding House No.1-A, Street No.33, measuring 622 sq. yards, Sector F-7/1, Islamabad, dated 21.01.2016, against monthly rent of US \$5,000/-, but later on appellant i.e. complainant asserted that respondent No.2 and her husband have interpolated

certain terms of lease agreement and converted into sale agreement while making addition in clause 1 and clause 13 of the agreement in the following manner:-

That the rent of the above said flat has been mutually agreed U\$ 5000/- (Five Thousand U\$ Dollar only) per month and the first party has received Rs.7,50,000,00/- from second party for business purpose.

That the Tenant shall deliver peaceful and vacant possession of the said demised premises after the expiry of the RENT period in good and acceptable condition to the Landlord. NOTE: That the landlord has already received a handsome amount of Rs.7,50,000,00/- in different period from the above said tenant and her husband, for the business purpose. If the landlord fails to pay back the above said amount with profit, of 50% amount to 2nd Party, than the land lord is bound to transfer the said house.

9. The FIR has been lodged on the complaint of appellant and husband of respondent No.2 was arrested in this case, but surprisingly original agreement of lease or the forged agreement was not recovered, rather both the parties have taken categorical stance before this Court that document is not available and same was in possession of other side.

10. Keeping in view the above position, I have gone through the judgment of learned trial Court dated, 09.12.2017, whereby co-accused Raja Khalid Mehmood was acquitted on the following reasons:-

- (a) *Liaquat Ali, S.I/PW-4/I.O admitted before the trial Court that stamp paper of lease agreement No.12963 was not issued by Mujahid stamp vendor rather it was issued by one Syeda Rahat wife of Mujahid, who was not investigated by the I.O.*
- (b) *Lease agreement was not verified by any expert.*
- (c) *Neither the complainant, nor accused provided the original copy of the agreement and forensic of the photocopy is not possible.*
- (d) *Civil litigation between the parties is also pending before the civil Court.*
- (e) *Complainant has not filed any suit for cancellation of alleged lease/sale agreement.*
- (f) *Photocopy of Mark "A" was produced which is not admissible.*

11. While considering the above situation, it is not possible at this stage to settle the primary discrepancy of non-production of original lease

agreement/alleged sale agreement as without the said document the controversy relates to interpolation/amendment in the terms of lease agreement and could not be settled, therefore, learned trial Court while considering all these aspects has rightly held that there is no probability of conviction against respondent No.2, whose principal accused was earlier acquitted by the Court due to such lapse. Even otherwise, it has been stated at bar that suit titled Mst. Naila Sharif Vs. Syed Yousaf Mubashir and others for specific performance, filed by respondent No.2 against the appellant was also dismissed vide judgment & decree dated 27.04.2019, hence, any question relating to settlement of terms is no more alive issue.

12. While considering the above position, it is trite law that trial Court has to consider the probability of conviction in terms of Section 249-A Cr.P.C. and if the same is not visible, there is no requirement to further record any evidence, especially in this case when the primary document is not available on record. Learned trial Court has rightly applied the powers in terms of Section 249-A Cr.P.C. and there is no defect in the impugned order, which otherwise is well within the four corners of law, therefore, instant criminal appeal is misconceived and same is hereby DISMISSED.

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.