

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No.77/ 2019

Zafar Majeed
Versus
Umer Asghar and others

Appellant by: M/s Syed Wasif Kazmi, Ch. Najam ul
Hassan and Shahid Shabbir, Advocates.

Respondent No.1 & 2 by: Hafiz Asif Ali Tamboli, Advocate.

State by Mr. Hammad Saeed Dar, State counsel
alongwith Sajjad, Sub-Inspector.

Date of Hearing: 08.09.2020.

Ghulam Azam Qambrani, J.:- Through this appeal, the appellant (*Zafar Majeed*) seeks setting aside of impugned order dated 14.03.2019, passed by the learned Judicial Magistrate, Section-30, Islamabad-West, whereby respondents No.1 & 2 (hereinafter be called as respondents) were acquitted under Section 249-A, Cr.P.C.

2. Briefly, the prosecution case is that the complainant/appellant got registered F.I.R No.451 dated 29.10.2018 under Section 406 P.P.C, with Police Station Ramna, Islamabad, stating therein that deceased sister of the appellant/ complainant namely Mst. Balqees Majeed was running a girls hostel and his vehicle i.e. Suzuki Bolan Carry bearing Registration No.BR-673 Model 2012, Engine No.PKT-852027 Chassis No.SV308PK968940 was being hired in order to provide pick and drop service to hostel girls; that on 31.01.2018, his sister died and her partner/ respondent No.2 and her brother respondent No.1 dishonestly misappropriated said vehicle and converted the same to their own use and when the complainant/ appellant asked them to return his vehicle, they extended life threats to him, hence, the above said F.I.R.

3. After registration of F.I.R, the investigation was carried out and on conclusion of investigation; report under Section 173 Cr.P.C was submitted before the learned trial Court and during the said proceedings respondents moved an application under Section 249-A, Cr.P.C., which was allowed vide order dated 14.03.2019, hereinafter be called as the impugned order. The appellant/ complainant being aggrieved of the impugned order has challenged the same through the instant appeal.

4. Learned counsel for the appellant contended that under the facts and circumstances of the instant case, offence under Section 406 P.P.C was attracted inasmuch as the vehicle in-question was entrusted to the respondents and the same was under their dominion; that the learned Trial Court failed to appreciate that the vehicle is owned by the appellant and the respondents have misappropriated the same deliberately in order to cause wrongful loss to him; that the impugned order has been passed in haste without affording opportunity to the prosecution to prove its case; that acquittal of accused/respondents is not in accordance with law and facts of the case. Further contended that the impugned order is unreasonable, perverse and manifestly wrong, as such, the same is liable to be set-aside.

5. Conversely, learned counsel for the accused/ respondents submitted that the accused/ respondents are totally innocent and have falsely been implicated in this case and that the offence of criminal breach of trust is not attracted against the accused persons and that no documentary evidence was led by the complainant in support of his claim; that respondent No.2 has already filed a civil suit for cancellation of registration of the disputed vehicle and a status quo order has been passed. The learned State counsel supported the impugned order passed by the learned Trial Court.

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

7. For ready reference, Section 405 of Pakistan Penal Code is reproduced hereunder:-

"Criminal breach of trust: 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 use 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."

A bare reading of the provision of law reproduced above shows that a person can only be guilty of committing an offence under section 406 P.P.C if some property is given on trust and the same property is not returned to its original owner.

8. In the instant case, as per version of the appellant/ complainant, his sister namely Mst. Balqees Majeed was running a girls hostel and his vehicle i.e. Suzuki Bolan Carry was being hired in order to provide pick and drop service to hostel girls and when his sister died on 31.01.2018, respondent No.2 and her brother respondent No.1 dishonestly misappropriated the said vehicle and converted the same to their own use and when he asked them to return his vehicle, they extended life threats to him and as per this version, it is clear that the vehicle in-question was not entrusted to the respondents therefore, the ingredients of Section 406 P.P.C are prima facie missing in the instant case.

9. Perusal of record transpires that respondent No.2 has already filed a civil suit for declaration, cancellation, permanent and mandatory injunction along with an application under Order XXXIX Rules 1 & 2 CPC before the competent Court of jurisdiction wherein a restraining order has been passed with regard to the said vehicle. Further, there is no evidence that the respondents/ accused have dishonestly misappropriated or converted the vehicle in-question to their own use and purpose. It was the duty of complainant to justify the miss-appropriation of the disputed vehicle by the respondents.

For proving such allegations against the respondents, two things are essentials to constitute the alleged offence under Section 406 P.P.C., in the first place, there must be a trust of dominion and in the second place dishonesty. Therefore in the case in hand, the prosecution must have proved that the accused was entrusted with the property or with dominion over it; that they misappropriated it or converted it in their own use; unless entrustment is proved, question of mis-appropriation does not arise. The learned Trial Court after appreciation of the material available on record, has rightly come to a conclusion of acquitting the accused/ respondents keeping in view the facts and circumstances of the instant case, as there was no probability of conviction of the respondents even if the entire prosecution evidence was summoned and recorded.

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 nor synonymous with criminal breach of trust without there being a clear case of entrustment".

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:-

"It is well settled principle of administration of justice and rule of prudence stipulates that the prosecution has to prove its case beyond the shadow of any doubt. It is a well-settled rule of prudence that the accused has not to prove his innocence until and unless proven guilty. The golden principle of administration of criminal law under the Islamic Jurisprudence is that benefit of slightest doubt shall necessary be extended in favour of the accused and not otherwise."

10. Jurisdiction under Section 249-A Cr.P.C can be exercised suo motu and no formal application is required when it is found that the charge against the accused is groundless and there is no possibility of his conviction even after recording of evidence; provision of Section 249-A Cr.P.C is meant to decide criminal case without completion of trial and in order to invoke powers under section 249-A Cr.P.C or 265-K Cr.P.C as the case may be, the Court has to fulfill the following three conditions:-

- (i) The Court shall hear the prosecutor;
- (ii) The Court shall hear the accused; and
- (iii) The Court shall take into consideration overall facts and circumstances and the evidence.

No other embargo exist upon the learned trial Court to exercise powers under Section 249-A Cr.P.C. The said provision is meant to prevent rigours of prolonged trial. Moreover, the use of expression at "any stage of the case" is indicative enough of the intention of the

Legislature that to exercise powers under Section 249-A, Cr.P.C or 265-K Cr.P.C, an application in each and every case is not mandatory and any such stage could be the very initial stage, after taking cognizance or it would be a middle stage after recording some proceedings, or even, it could be latter stage as well. Reliance in this regard is placed upon the case reported as "Chairman Agricultural Development Bank of Pakistan & another Vs Mumtaz Khan" (PLD 2010 SC 665) wherein the Hon'ble Supreme Court of Pakistan has held as under:-

"We may observe that prior to introduction of the Islamic provisions in the Pakistan Penal Code, 1860 an acquittal of an accused person could be recorded when the prosecution failed to prove its case against him beyond reasonable doubt or when faced with two possibilities, one favouring the prosecution and the other favouring the, defence, the Court decided to extend the benefit of doubt to the accused person and an acquittal could also be recorded under section 249-A, Cr. P. C. or section 265-K, Cr. P. C. when the charge against the accused person was found to be groundless or there appeared to be no probability of his being convicted of any offence."

11. 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. Mere nomination of the accused person in the FIR, without any corroboratory material, they cannot be convicted. In the instant case, the learned trial Court has properly appreciated the material available on record and acquitted the accused/ respondents through a well-reasoned order. 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].

12. 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:-

"It is well settled principle of administration of justice and rule of prudence stipulates that the prosecution has to prove its case beyond the shadow of any doubt. It is a well-settled rule of prudence that the accused has not to prove his innocence until and unless proven guilty. The golden principle of administration of criminal law under the Islamic Jurisprudence is that benefit of slightest doubt shall necessary be extended in favour of the accused and not otherwise."

13. 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 is placed on 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.

14. I have found no illegality or irregularity in the impugned order warranting interference by this Court. Resultantly, the instant appeal having no force, is **dismissed**.

~~(GHULAM AZAM QAMBRANI)~~
JUDGE

Announced in open Court on 21 Sept, 2020.

~~JUDGE~~