JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Criminal Appeal No.173 of 2019

Ehtasham ul Haq
Vs.
The State & another

Date of Hearing:	31.01.2020
Appellant By:	Azhar Naveed Shah & Shafaq Abid, Advocates.
Respondent No. 2 By:	Ch. Muzammil Din Gujjar, Advocate Accused in person.
State By:	Mr. Zohaib Hassan Gondal Advocate. Javaid Iqbal ASI, P/S Shalimar.

Ghulam Azam Qambrani, J.: This appeal has been directed against the order dated 19.04.2019 passed by the learned Judicial Magistrate Section 30-West, Islamabad, whereby the accused/ respondent No.2 (hereinafter be called as respondent) was acquitted under section 249-A Cr.P.C.

2. Briefly a case was registered against the respondent vide FIR No.632, dated 25.09.2011 under sections 406, 34 PPC with Police Station Shalimar, District Islamabad, on the written application of the appellant Ehtasham ul Haq with the assertion that he is Chief Executive/Director, M/S ELC Acetone (Pvt.) Limited. They provided diesel/fuel to BTS (Base Transmission Station) of M/S Telenor Pakistan and Telenor Pakistan issued 200 PSO fleet cards, each card being for 5000 liters diesel. Another Director of M/S ELC Acetone (Pvt) Limited namely Khalil Ahmad introduced the accused Ahmad Kamal and Abdullah to the complainant and tried to convince him to give the PSO cards to Abdullah for supply of diesel to Telenor BTS and a total of 68 PSO cards were given by the

complainant to said Abdullah who obtained 1173141 liters diesel, but provided 877648 liters of diesel and thus misappropriated 295453 liters of diesel, hence the instant FIR.

3. After registration of FIR, investigation was carried out and thereafter report under section 173 Cr.P.C. was submitted before the learned trial Court. After fulfilling codal formalities, charge was framed against the accused/ respondent on 26.4.2014 to which he pleaded not guilty and claimed Trial. The learned Trial Court exercising suo moto powers under section 249-A Cr.P.C acquitted the accused/ respondent in the above mentioned case vide impugned order dated 19.4.2019. Hence the instant appeal.

4. Learned counsel for the appellant contended that impugned order of acquittal is manifestly and grossly against the law and facts of the case; that the impugned order was passed without any notice to the complainant and without providing opportunity of being heard in spite of the fact that the appellant was duly represented. Further contended that on 19.04.2019, learned counsel for the appellant advanced arguments on the application under section 94 Cr.P.C, but on the same day, suo moto order of acquittal of respondent No.2 was passed although the case was fixed for arguments on the said application. Next contended that the learned Trial Court erred in law in ordering acquittal of the respondent, without disposing of the application under section 94 Cr.P.C filed by the complainant/appellant, therefore, the impugned order is nullity in the eye of law as the same is based upon surmises and conjectures.

5. On the other hand, learned counsel for the respondent contended that prosecution failed to produce any evidence against Ahmed Kamal, respondent since 26.4.2014, when the charge was framed against the accused/respondent, therefore, the learned Trial Court has rightly acquitted the accused/respondent. The learned State Counsel also supported the order of learned Trial Court.

6. Arguments heard, record perused.

7. It is settled principle that under the Criminal Procedure Code, a Magistrate is bestowed with powers to acquit an accused at any stage of the proceedings if the charge appears to be groundless or there is no probability of his conviction. It is also cardinal principle that normal procedure of trial should not be allowed to be deflected and the power under section 249-A Cr.P.C. is required to be exercised sparingly in exceptional cases. Guidance is sought from case law cited as " Muhammad Muslim & another Vs Muhammad Iqbal & 2 others" **[PLJ 2004 S.C. 2]** wherein it has been held as under:-

> *" Section 249-A Cr.PC is an exception to normal rule that acquittal takes place after full trial. Tins provision reflects a compromise between collective good of society and rights of an individual offender. Idea is to spare offender rigors of full trial if Court at any stage finds that charge is groundless and prosecution is not likely to succeed."*

8. The examination of the impugned order on the touchstone of principles on the subject leads to draw inference that the accused/ respondent was acquitted mainly on two grounds i.e. that the matter is civil in nature regarding which civil litigation was already going on and that no criminal liability could be attributed to the respondent as there was no allegation of entrustment against the respondent, constituting offence under section 406 PPC.

9. It is matter of record that on the basis of same set of evidence/ documents, the learned trial Court proceeded to indict the respondent on 26.04.2014 and then summoned the prosecution evidence. Subsequently, without taking any evidence or dilating upon any document, the respondent was acquitted. At this stage, it is necessary to mention here that the law does not prohibit availing of multiple remedies simultaneously and the civil and criminal motions can run side by side. Guidance in this respect is taken from

the law laid down by the Hon'ble Apex Court in case reported as **Haji Sardar Khalid Saleem Vs. Muhammad Ashraf and others** (2006 SCMR 1192), wherein it has been held as under:-

> "*Criminal proceedings are not barred in presence of civil proceedings and civil and criminal proceedings can be proceeded simultaneously"*.

In another case reported as **Seema Fareed and others Vs. The State and another** (2008 SCMR 839) wherein it has been held as under:-

> *"Criminal case must be allowed to proceed on its own merits and merely because civil proceedings relating to same transaction had been instituted, it had never been considered to be a legal bar to the maintainability of criminal proceedings which could proceed concurrently because conviction for a criminal offence is altogether a different matter from the civil liability."*

10. In addition, it is also noticed that the date, when the crucial order was passed was set for adjudication upon application filed by the appellant/ complainant under section 94 Cr.P.C but instead of dilating upon the same and to advance any reason for rejection of said application, the impugned order has been passed. Non-adherence to the application, filed by the complainant/appellant, prior in time of taking suo moto action not only contravenes the principle of natural justice but also negates cardinal principle of fair trial envisaged in Article 10-A of the Constitution.

11. It is also noticed that the observations rendered by the learned Magistrate is based upon the contents of FIR while the charge framed against the accused/ respondent was to the effect that he along with accused in furtherance of common intention committed

criminal breach of trust in violation of contract agreement entered into between the respondent and the appellant/ complainant, thus it appears that the charge, mainly hinges upon the documentary proof, which the appellant requested to bring on record but the learned trial court instead of entertaining the said application or deciding the same in either way on its own merits, straightaway proceeded to acquit the respondent/ accused, which in the peculiar circumstances of the case amounts to transgression of authority and does not warrant exceptional treatment for want of exceptional circumstances.

12. The acquittal in terms of section 249-A or for that matter 265-K Cr.P.C. cannot be equated with acquittal earned after full length trial and recording of evidence and therefore, principle of double presumption of innocence is not attached to such orders. This view is fortified by the judgment of the august Supreme Court of Pakistan reported as **"The State through Advocate General, Sindh High Court of Karachi Vs Raja Abdul Rehman" [2005 SCMR 1544],** wherein it has been held as under:-

> "Order of acquittal of accused under Section 249-A Cr.P.C would not have the same sanctity as order of acquittal on merits and the principles applicable to second category of acquittal would not apply to first category of acquittal. High Court had not adverted to such very important and material aspects of the case and had decided the appeal in a very cursory and hasty manner and its order was liable to be set aside on this ground alone. Impugned order was consequently set aside with the direction to Magistrate to proceed with the case of accused and that of co-accused together from the stage at which the case stood when the application of the accused under section 249-A, Cr.PC was decided."

13. The sequel of above discussion is that the order of the learned Judicial Magistrate dated 19.4.2019 is not legally sustainable. Consequently, the instant appeal is **allowed**, impugned order dated 19.04.2019, is set aside and the matter is remanded to the learned trial court, which shall proceed with the case from the stage where it has been before passing of the impugned order./

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court on_____.

(JUDGE)

Approved for reporting

Imtiaz*

Uploaded By : Engr. Umer Rasheed Dar

The well settled principles for the appreciation of appeals against acquittal are;-

(i) That with the acquittal, the presumption of innocence of accused becomes double; one initial, that till found guilty he is innocent, and two, that after his trial a Court below has confirmed the assumption of innocence;

(ii) That unless all the grounds on which the High Court had purported to acquit the accused were not supportable from the evidence on record, Supreme Court would be reluctant to interference, even though, upon the same evidence it may be tempted to come to a different conclusion;

(iii) That unless the conclusion recorded by a Court below was such that no reasonable person would conceivably reach the same, the Supreme Court would not interfere;

(iv) That unless the Judgment of acquittal

is perverse and the reasons therefore are artificial and ridiculous, the Supreme Court would not interfere; and

(v) That the Supreme Court, however, would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion, and that too, with a view only to avoid grave miscarriage of justice and for no other purpose.