

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

**“Criminal Appeal No. 18 /2011”**

Muhammad Shafiq  
*Versus*  
Muhammad Ijaz Abbasi and another

Appellant by:	Mr. Muzammil Din Choudhry, Advocate.
Respondents by:	Mr. Zahid Asif Chouhdry, Advocate.
State by:	M/s Zohaib Hassan Gondal and Hamaad Saeed Dar, State Counsel alongwith Shahid- A.S.I.
Date of Hearing:	25.08.2020

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**Ghulam Azam Qambrani, J.:** This appeal under Section 417 Cr.P.C. has been filed against the impugned judgment dated 23.11.2010 passed by the learned Judicial Magistrate, Section 30, Islamabad, in case F.I.R 172 dated 11.04.2008, under Section 406 Pakistan Penal Code, 1860 (hereinafter referred to as “***P.P.C***”) registered at Police Station Margallah, Islamabad, whereby respondents No.1 (hereinafter be called as “***respondent***”) was acquitted.

2. Briefly stated, facts of the case as narrated by the complainant, Muhammad Shafiq, in the complaint are that in April 2007 the accused, Muhammad Ijaz Abbasi son of Mehran Khan, asked him to purchase plot No.42-D measuring 25 X 50, situated at Sector G-10/2, Islamabad, which was yet to be allotted to the accused; that it was agreed between the complainant and accused that after allotment of proprietary rights, the said plot shall be transferred in the name of complainant. That agreement to sell was executed in consideration of Rs.20,00,000/- out of which an amount of Rs.11,00,000/- was paid to the accused, but subsequently, the said plot was not transferred in his favour, 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 20.02.2009. Formal charge was framed against the respondent on 09.06.2009, to which he 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, Muhammad Shafiq (complainant),
- ii. PW-2, Farooq Khan S/o Shoiab Khan,
- iii. PW-3, Rashid Ali Abbasi S/o Abdul Ghafoor,
- iv. PW-4, Ishtiaq Hussain- A.S.I,
- v. PW-5, Abdul Star, Sub-Inspector,

After closure of the prosecution evidence, the accused/respondent was examined under Section 342 Cr.P.C wherein he denied the allegations leveled against him. The accused did not opt to record his 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 23.11.2010, (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 *ratio decidendi* and the main thrust of the learned Court below in the impugned Judgment is that the part payment or the earnest money of Rs.11,00,000/- paid by the appellant to the respondent for the purchase of the plot cannot, within the scope and meaning of the section 406 of P.P.C, be called as entrustment of property so as to constitute criminal breach of trust on default of not honouring the agreement to sell dated 21.04.2007; it is submitted that plot No.427-D measuring 25 X 50 Sqf situated in Section G-10/2, Islamabad, for which part payment was made or earnest money of Rs.11,00,000/- was paid in advance as consideration vested in the appellant firstly, on contingent basis before allotment and then on vested interest basis immediately on its allotment to the respondent by the C.D.A. It is further submitted that the definition of the property include vested

interest and vested interest is also a property; that the said plot belonged to the appellant with a vested interest while its possession was with the respondent obviously as a trust, as such, the sale of the said plot by the respondent to the third person was clearly a criminal breach of trust by the respondent for which he is liable to be convicted and punished. Further contended that the impugned judgment is the result of non-reading and mis-reading of evidence available on the record, which fully connects the respondent with the commission of offence; that the impugned judgment is based on misinterpretation of entrustment and is not sustainable in the eyes of law; that it turned out clearly that the respondent has entered into agreement to sell fraudulently and dishonestly; that the respondent was supposed to hold the plot in-question as an entrustment and was precluded from transferring the same to a third person and by transferring to a third person he committed criminal breach of trust rendering himself liable to conviction and punishment. It is also submitted that judgment of acquittal passed by the learned trial Court is not in accordance with law and facts of the case; therefore, the same is liable to be set aside.

6. Conversely, learned counsel for the accused/ respondents submitted that the appeal is barred by seven days; that reason mentioned for condonation is not justifiable; that payment of earnest money does not come within the definition of entrustment; that two witnesses were required to be produced to prove the agreement to sell; that no amount was given to the respondent; that no offence is made out against the respondent; that the appellant has not challenged the agreement and that the appellant has failed to produce any evidence to prove entrustment; that the accused/respondent is totally innocent; that there is no evidence of inducement, whereas the appellant with his free will and consent entered into the agreement to sell dated 21.04.2007; that there is no entrustment of any amount to the respondent, 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 specific performance of contract against the respondent before the learned Civil Court at Islamabad. 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 the accused, Muhammad Ijaz Abbasi son of Mehran Khan, asked him to purchase plot No.42-D measuring 25 X 50, situated at Sector G-10/2, Islamabad, which was yet to be allotted to him and it was agreed between the parties that after allotment of proprietary rights, the said plot shall be transferred in the name of complainant and in this regard, an agreement to sell dated 21.04.2007 was executed in consideration of Rs.20,00,000/- out of which an amount of Rs.11,00,000/- was paid to the respondent, but subsequently the respondent failed to transfer the said plot in his favour, as such, the respondent has misappropriated and misused the amount of the appellant, which was entrusted to him as a result of the agreement to sell.

9. Muhammad Shafiq while appearing as PW-1 deposed that he met with the respondent in the office of Ehtisham Mehmood, Advocate, where the respondent induced him to purchase his plot; that he entered into an agreement to sell dated 21.04.2007 with the respondent regarding plot, which was to be allotted to the respondent under the C.D.A scheme for sale consideration amount of Rs.20,00,000/- and paid Rs.11,00,000/- as earnest money to the respondent in presence of the witnesses; he further admitted that he has also filed a suit for specific performance of contract before the civil Court at Islamabad. The appellant also admitted that he did not produce Mr. Ehtisham Mehmood, Advocate before the Investigation Officer in support of his version. Muhammad Farooq, while appearing as PW-2 deposed that agreement to sell was executed between the complainant and the accused in his presence. He

further deposed that complainant paid an amount of Rs.11,00,000/- to the respondent as earnest money; that he is also the marginal witness of the said agreement to sell. Abdul Sattar, Sub-Inspector while appearing as PW-5 admitted that he has not interrogated Mr. Ehtisham Toor, Advocate because he did not join the investigation.

10. Perusal of the record reveals that as a result of the agreement to sell, the appellant paid an amount of Rs.11,00,000/- to the respondent as earnest money and it is not proved that it was an entrustment. With regard to the said agreement to sell the appellant has also filed a suit for specific performance before the civil court at Islamabad.

11. 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 the 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 is 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 plot, for sale whereas the other party accepted the same against the sale consideration of Rs.20,00,000/- and out of the said amount, Rs.11,00,000/- was paid as earnest money and an agreement to sell was executed between the parties on 21.04.2007.

12. In view of the above, it is crystal clear that there were certain agreed terms for a lawful consideration between the parties for the purchase of the above said plot against an amount of Rs.20,00,000/- and out of the said amount, Rs.11,00,000/- 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, refused to transfer the plot 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.

13. The learned trial Court did not acquit the respondent/ accused on the sole ground of non-production of prosecution evidence but also on the ground that there seemed no breach of trust as alleged by him (appellant).

14. From perusal of the record it reveals that the matter at hand seemingly does not fall within the concept of breach of trust as defined in Section 405 of the P.P.C.,. Section 405 *ibid* deals with

entrustment of property upon a person who commits criminal breach of trust by dishonestly misappropriating the property entrusted to him or converting it to his own use. For comprehending the scope of the offence stipulated it is expedient to reproduce the provisions of section 9(x) of the Ordinance and Section 405, P.P.C. to which reference has been made in the former provision; these read as under:--

*"9(x) if he commits the offence of criminal breach of trust as defined in section 405 of the Pakistan Penal Code, 1860 (Act XLV of 1860) with regard to any property including money or valuable security entrusted to him by members of the public at large.*

**Section 405: 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 of 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."

15. The punishment for the said offence has been prescribed under Section 406 P.P.C. The above provision of Section 405 P.P.C clearly shows that there must be some entrustment of property and dishonest misappropriation or conversion of the same to one's own use to make out an offence under the same. From the allegation of the appellant, it has not been proved that there was any entrustment by the appellant to the respondent/ accused. Even otherwise the F.I.R being the result of alleged breach of terms of the agreement, the complainant has tried to settle the civil dispute through initiation of criminal proceedings, which abuse cannot be allowed to perpetuate.

16. Without adverting to the truthfulness or otherwise of his such allegation, one thing is very much clear that there had been no entrustment of the property by complainant to the respondent/ accused which he had misappropriated or converted to his own use. Hence, the commission of the offence punishable under section 406,



P.P.C definitely was not there on the part of respondent/ accused.

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

18. 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/ respondent. 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 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.

19. In the case in hand, there is no incriminating evidence available on record against the accused/ respondent No.1 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.

20. 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].

21. 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."*

22. 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.

23. 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.

24. Further for some inexplicable reason, the appellant belatedly elected to file the instant appeal. Although the appellant has filed an application for condonation of delay yet the learned counsel for the appellant has failed to put forth any plausible justification for the delay caused in filing the instant appeal. The delay of each and every day has to be explained which has not been done by filling the this appeal, therefore, the appeal is also liable to be dismissed being barred by seven days. In this regard, reliance is placed upon the case reported as "Federation of Pakistan through Secretary, Ministry of National Food Security and Research, Islamabad, versus AgriTech Limited and others" (PLD 2016 SC 676). In this regard, I am also fortified by the law laid down by the Hon'ble Supreme Court of Pakistan in "Food Department, Gujranwala through its Deputy Director and others Versus Ghulam Farid Awan" (2010 SCMR 1899).

25. 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.

26. For what has been discussed above, this appeal is **dismissed** on merit as well as being barred by time.

**(GHULAM AZAM QAMBRANI)**  
**JUDGE**

Announced in open Court on this 2<sup>nd</sup> day of September, 2020.

**JUDGE**

*Rana. M. Ift \**

**"Approved for reporting."**

*Uploaded By : Engr. Umer Rasheed Dar*