

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

“Criminal Appeal No.131 of 2016”

Brig (Retd.) Kamal Rasool
Versus
James Rollins and others

State by: Mr. Nazar Hussain Shah, A.A.G.

Date of Hearing: 27.08.2020

Ghulam Azam Qambrani, J.:- This appeal has been directed against the impugned judgment dated 23.05.2016, passed by the learned Additional Sessions Judge-III, Islamabad- West, in case F.I.R No.07 dated 25.07.2013, under Sections 36 and 37 ETO, 2002, read with Sections 468, 471, 419, 420, 109 P.P.C registered at Police Station FIA/ SIU, Islamabad, whereby respondents No.1 & 2 were acquitted.

2. Brief facts of the case are that the complainant, Brig (Retd.) Kamal Rasool, are that he had received an email from Director HAZELET Robert Earl @lgu.net, introduced himself as Mr. Robert Earl Hazlette and claimed to be Director of Debt Redemption Treasury Department and provided certain phone numbers mentioned in the alleged F.I.R. Through his email, he asked about the complainant's willingness to accept a consignment containing US \$ 900,000 for investment in Pakistan and on next day, he asked him to pay consignment clearing charges Rs.509000- to Dr. Karim G. Kofi telephone No.0322- 5443036 and stated that Mr. Roberts bank staff of Mr. Sam Martins Mobile No.0342-7111729 and 0335-8 139205 will deliver the consignment to him in Rawalpindi. That on 06.06.2013, an amount of Rs.5,00,000/- was paid to Dr. Karim G Kofi Diplomatic Agent through bank A/C No.018245662 1005617 of Muhammad Bakhtiar Imadi maintained at MCB F-10 Markaz Islamabad, by his wife Mrs. Hamsheeda Begum on line. After that

06.06.2013 Mr. Sami Martinz delivered a bag at complainant house and when it was opened, there were only black papers of size of 100 U.S \$. He washed 04 black papers in front of him, which were converted into U.S Dollars. Mr. Sami Matinz stated that to wash the other black papers a chemical is required and he will have to buy it from US Embassy in Islamabad. In this way, all these accused connived with each other and deprived him of Rs.31428000/- as complainant directly gave US \$ 1,21,000/- to one David at his residence, 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 02.12.2013. Formal charge was framed against the accused/ respondents on 04.11.2015, to which, they pleaded not guilty and claimed trial. Therefore, the prosecution evidence was summoned. In order to prove the case, prosecution examined the following witnesses;-

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| (i) | PW.1 | Omomolesho S/o Ola Adeyi, |
| (ii) | PW.2 | Muhammad Bakhtiar Amadi S/o Muhammad Yousaf Amadi, |
| (iii) | PW.3 | Muhammad Safdar HC F.I.A, SIU, Islamabad, |
| (iv) | PW.4 | Saeed Islam, |
| (v) | PW.5 | Kamal Rasool/ Complainant, |
| (vi) | PW.6 | Hassan Iftikhar, Forensic Expert, F.I.A, Islamabad, |
| (vii) | PW.7 | Sh.Ejaz Ahmed, Assistant Director (Investigation), F.I.A, Islamabad. |
| (viii) | PW.8 | Farooq Latif, Inspector F.I.A HQ, Islamabad, |
| (ix) | PW.9 | Asghar Ali Baloch, Inspector F.I.A SIU, Islamabad, |
| (x) | PW.10 | Muhammad Sarfaraz S/o Allah Dad |
| (xi) | PW.11 | Muhammad Safdar HC, F.I.A/SIU, Islamabad. |

4. Statements of the accused/ respondents No.1 & 2 under Section 342 Cr.P.C., were recorded, wherein all the incriminating evidence recorded in their presence was put to them. They claimed innocence, however, they did not opt to get record their statement on oath under Section 340 (2) Cr.P.C or to produce defence witnesses.

5. On 28.02.2020, it was brought into the notices of this Court by the learned counsel for the appellant that the appellant had

been passed away. Death certificate of the appellant has also been brought on record, but, thereafter, despite repeated process, neither learned counsel for appellant nor legal heirs of the appellant have put appearance, therefore, this Court is left with no other option, but to decide this appeal after hearing arguments of Assistant Attorney General and to peruse the available record.

6. Contentions raised by the appellant in the appeal are that the learned trial Court has failed to appreciate the evidence produced by the appellant with regard to commission of the offence and the accused have been acquitted on the basis of presumption and assumptions; that there was express admission of Francis Onyisi/ accused No.2 in his recorded audio conversation with Mr. Bakhtiar Imadi, but the said audio cassettes were not played in the Court in spite of the request made by the appellant. He further contended that the learned trial Court also failed to examine the supplementary challan of F.I.R No.7/ 2013 and complete challan of F.I.R No.6/2015 wherein, it is stated that the accused James Rollins/accused No.1 had received an amount of Rs.37,55,500/- from the appellant posing himself as representative of George, Ezekiel. That the learned trial Court also failed to appreciate that James Rollins was living illegally in Pakistan at the time of his arrest on 25.07.2013; that there was sufficient evidence available on record for conviction of the accused but the learned trial Court failed to examine the same in its true perspective; that the impugned judgment is arbitrary and illegal, therefore, the same is not sustainable in the eye of law, and is liable to be set-aside.

7. Conversely, learned Assistant Attorney General contended that the prosecution has proved the case against the respondents/ accused persons through cogent evidence; that sufficient evidence is available on record to connect the accused persons with the commission of the offence; that the accused persons have committed the offence under Sections 36 & 37 of ETO, 2002 read with Sections 419, 420, 468, 471 and 109 P.P.C., as such, they are liable to the awarded maximum punishment.

8. I have heard the arguments of learned Assistant Attorney General and have perused the material available on record.

9. The case of the appellant is that he was cheated and deprived of Rs.3,14,28,000/- by the accused persons. In support of his version, the complainant, who is the star prosecution witness, himself appeared as PW-5 and deposed that on 04.06.2013, a persona namely Robert contacted him through SMS impersonating himself a banker, asked the complainant that he wished to invest 900,000.00 US\$ in Pakistan and when the appellant asked him why he had selected the appellant for investment in Pakistan, he replied that a Navel Ship Captain landed at Togo, who asked him that the appellant is a reliable person in Pakistan through whom he could made investment thereupon the appellant was told to pay 5,000 US \$ to Dr. Karim G. Kofi as consignment charges. PW- 5 further deposed that on 06.06.2013, he contacted Dr.Karim G.Kofi who told him that the said amount of 5000 US \$ be deposited in the bank account of Muhammad Bakhtiar Imadi; that the appellant deposited the said amount in the MCB account of Muhammad Bakhtiar Imadi. On the same day, representative of Robert namely Mr. Sami Matinz brought a consignment at this house, which was opened in his presence. He further deposed that the said Robert cleaned four notes with chemical cotton soaked and stated that it is a practice for transfer of cash from one country to another through diplomatic bag that the real notes are dyed and then cleaned at destination using SSD chemical and now that the bottle containing cleaning chemical has broken during transit, therefore, they will have to buy a new chemical from U.S Embassy and demanded the price of the chemical from the complainant which he paid and brought a new bottle to his house which burst while keeping in the fridge and in this way, said Robert got money for three times on the pretext of purchasing the said chemical bottle. He further deposed that Robert asked him to go to United Kingdom for some assignments and stated that a person namely David Hubber will take him on this project further, the said David contacted him for

bringing new bottles at his home. He further deposed that somebody by the name George (real name as a Ezekiel) asked the complainant that David and the bottle carried by him have to be recovered from police and the police is demanding fine to release them. Again, complainant paid him the money and he said that the bottle while in the custody of police has expired and that they have to change the chemical process to a three-step chemicals. He also deposed that Mr. George asked him to pay 37000 U.S dollars as the same has been demanded by IMF for Anti Money Laundering Certificate and once the complainant paid that amount too through his representative Mr. Kennedy Amasiki (real name James Rollins). He said that the certificate will be issued in a couple of days and after about two days he asked the complainant that United Nations in Pakistan, are asking 39000 US dollars for issuing Anti-Terrorism Certificate, upon this he got suspicious that he is being scammed. Thereafter on 23.07.2013, he reported the matter to the D.G FIA through complaint Ex.PQ; that the FIA authorities arrested three of them namely David (Peter), James Rollins and Ike Chakwu and recovered two Computers, Mobile phones, a number of SIMs and original passport of Peter etc. The said PW further stated that at SIU office Nigerian Embassy staff came and interviewed all four accused and first Secretary of Embassy told the Investigation Officer that two of the accused are accepting their crime while the other two denying to have scammed the complainant; that he recognized three of them and told the Investigation Officer that the accused Ike Chakwu is innocent. Thereafter, he came to know that the FIA has recorded statements of accused and all of them denied to have received any money from the complainant and by giving benefit of doubt to James Rollins, he was released by the FIA. He further deposed that at bail stage, he received an amount of Rs.5,00,000/- from the accused Francis through Investigation Officer, as compromise to the extent of conditional bail.

10. During cross-examination, the complainant admitted that he has not mentioned about his initial contact in his complaint Ex.PQ;

also admitted that he has also not mentioned any reference of accused Francis nor he mentioned the name of Kennedy Amasiki or his description, nor he gave the reference of unknown accused persons in his complaint; but thereafter he got recorded his supplementary statement before the Investigation Officer on 29.07.2013; that he admitted that he has not mentioned the names of Francis or Kennedy Amasiki even in his supplementary statement because their names came to known during the investigation; he admitted that there was no documentary proof with regard to the payment of huge amount to the accused persons except the Email and online payment of Rs.5,00,000/- to the accused persons. He further admitted that he has not challenged the act of the FIA when they allowed James Rollins to leave the SIU and he was not arrested; he admitted that Francis was allowed bail on the basis of his statement before the learned trial Court. All these facts and circumstances show that the complainant made a lot of improvements in his version at different occasions but he failed to show the connection of the accused persons with the commission of the alleged offence.

11. Omomolesho while appearing as PW-1 deposed that he met the accused Francis Onyisi in the FIA Centre where he asked him to bring Rs.5,00,000/- from his wife and paid the said amount to the Investigation Officer. In his cross-examination, he deposed that when he brought the payment of Rs.5,00,000/- from the wife of Francis, he was the president of Nigerian community. PW-2 Muhammad Bakhtiar Amadi deposed that he plied his taxi in the year 2009 and during this period he met with Francis and developed his relations with him due to reason the said Francis hired his taxi time and again and he had been dropping his son and wife to school; that he gave his Summit Bank account number to him because he was a foreigner and had no bank account in Pakistan; thereafter on the asking of Francis he got opened his accounts in Standard Chartered Bank, Silk Bank and MCB; he further deposed that the accused had been handing over the

amount to him for deposit in the banks for which he had promised him to pay 5% on every transaction; he also deposed that he received a call from police informing him about registration of F.I.R against him but the accused Francis asked him not to attend police station or the FIA authorities without consulting with the lawyer and subsequently, after obtaining bail before arrest, he joined the SIU, FIA. The said PW further stated that he came to know that accused Francis was also involved in the cases, he got recorded statement before the Investigation Officer, as he had no proof of payment of the encashed amount to the accused Francis, therefore, he discussed the matter with the complainant/ appellant and recorded two audio cassettes P-1 & P-2 while accused Francis was sitting with him in vehicle, which cassettes were taken into possession by the Investigation Officer; that he also obtained 13 receipts regarding payment of amount to accused Francis which were prepared in the name of Ezekiel, which were also taken into possession by the Investigation Officer; he also stated that he handed over the bank statement Ex.PE to the Investigation Officer. In his cross-examination, he admitted that the Investigation Officer did not seal the said audio cassettes.

12. Saeed Islam while appearing as PW-4 deposed that he is residing in the house of the complainant and the complainant used to discuss routine matters with him as he and the complainant belong to the Kohat District; that the complainant discussed with him the issue that one African banker wanted to invest in Pakistan; that the complainant also informed him that said African namely Sami came to his house with a bag and the complainant paid him certain amount for the purchase of chemical to wash the currency; he further stated that he had seen the said Sami in the house of the complainant where the complainant gave him some more amount for the purchase of chemical; that thereafter another person namely David also met the complainant in his house and the complainant also gave a packet of amount to said David and on the next day the complainant made further payment to the said David for purchase

of chemical; that he along with the complainant thrice made payments to David. He also stated that thereafter, he along with the complainant met with another person namely William, who received the amount from the complainant. The said PW showed his suspicion to the complainant upon which the complainant submitted an application to the FIA, thereafter, on the next day, he and the complainant reached F-10 Markaz near F-9 Park, where FIA officials were already present, where one person namely William came there in a taxi and met the complainant, but the FIA officials arrested the said person, while he was receiving amount from the complainant; he further deposed that the said accused took them to E-11 Khuda Dad Heights, as he had disclosed that the other accused persons are present there, but no other accused was found there. The inhabitants at the first floor informed that few persons had entered his flat and when the FIA officials entered into the said flat, the accused persons were hiding beneath the bed, were arrested. He stated that on the next day, the complainant handed over bag P-3, two bottles of chemical P-4 & P-5, four packets of currency notes P-6 to P-9, Electronic Safe P-10 and a bank receipt Ex.PM, which were taken into possession by the Investigation Officer through recovery memo Ex.PN. This witness in his cross-examination admitted that he had no knowledge that what was inside the said packets; that Francis was not amongst those accused persons, who received amounts from the complainant.

13. Muhammad Sarfaraz PW-10 stated that in the year 2010, one Nigerian namely Kennedy Amasiki, pointing towards James Rollins, present before the Court, had come to him, and he arranged an apartment on rent for him in Sector E-11, Golra Sharif, after execution of a lease agreement, but in the year 2011, a lady namely Mst. Fakhra from Lahore came there along with police of Police Station Shalimar, and arrested him in his presence. During his cross-examination, the said PW failed to provide any license for running the business of Real Estate; he admitted that he did not know whether James left the apartment in the year 2012 or not,

whereas he left the said apartment in the year 2012; he also failed to produce the original documents and only produced photocopies of the documents.

14. Perusal of the record shows that on the basis of the recovery items, the accused persons facing trial, cannot be connected with the commission of the alleged offences. All the documents and items which were sent for Forensic Report are not connecting the present accused with the charges, whereas, the oral evidence as well as their recoveries and the forensic evidence shows that the complainant was cheated upon, but on the basis of these reports, the accused persons cannot be connected with the charges. The other documents with regard to transfer of property by the complainant are only proof of sale of the property by the complainant, but even these documents are not sufficient to connect the present accused respondent No.1 & 2 with the offences leveled against them. Further, the prosecution also failed to prove any payment to the accused by the complainant. The investigation conducted by the FIA authority was of poor quality and on the basis of their investigation, the accused persons cannot be connected with the commission of the alleged offences against them. Further the receipts produced by PW-2 and the audio cassettes are showing signatures of Ezekiel whereas the audio cassettes cannot be relied upon until and unless the voice of the accused has gone through the forensic test. There is no direct or indirect evidence available on record to connect the accused persons respondent No.1 & 2 with the commission of the alleged offences leveled against them. They are not nominated in the F.I.R, nothing incriminating material is available on record against the present accused. All the recoveries were either made through the complainant or from Flat No.B-3, Babu Nawab Apartments, Sector E-11/1, Islamabad. All the prosecution evidence is based on hearsay or mere improvement in the original stance taken by the commission in the F.I.R. Record further shows that the accused Francis himself joined the FIA, SIU alongwith ambassador of his

country and the accused James Rollins was firstly taken into custody by the police but thereafter, he was let to go after initial investigation, which shows that he was not involved in the commission of the alleged offense. On the basis of the above facts and circumstances, the learned trial Court while extending the benefit of doubt, acquitted the accused persons holding as under:-

"The prosecution have failed to prove beyond reasonable Shadow of doubt that the accused persons facing trial gained or attempted to gain access in information system of complainant without having authority to do so or they did are attempted to do any act to alter modify, delete, remove, generate, transmit, or store and information through or in the information of the system of the complainant without having authority to do so or the accused persons committed cheating or cheating by personation, forgery for the purpose of cheating or used some forged documents as original or at least awaited in commission of any one of the above-mentioned offences."

15. The general principle in criminal jurisprudence is that the prosecution is to prove its case beyond doubt and this burden does not shift from prosecution even if the accused person takes up any particular plea and fails in it. Keeping in view all these facts and circumstances, the learned trial Court has rightly held that the prosecution failed to prove the case against the accused persons beyond reasonable shadow of doubt. In totality of circumstances, prosecution case cannot be viewed as entirely free from doubts. Hence, extending the benefit of doubt, the accused persons were acquitted in the case through a well-reasoned judgment. In this regard, reliance is placed upon the case reported as "Muhammad Karim Vs. The State" (2009 SCMR 230) has held as under:-

"in case of doubt, the benefit thereof must be given to convict as a matter of right and not as a matter of grace, for giving the benefit of doubt it is not necessary that there should be many circumstances creating doubts, single circumstance creating reasonable doubt in a prudent mind about the guilt of convict makes him entitled to benefit, not as matter of grace and concessions, but as matter of right."

In the case reported as Muhammad Imran Vs. The State (2020 SCMR 857), it has been held as under:-

"It is by now well settled that benefit of a single circumstance, deducible from the record, intriguing upon the integrity of prosecution case, is to be extended to the accused without reservation; the case is fraught with many. It would be unsafe to maintain the conviction. Criminal Petition is converted into appeal and allowed. The appellant is acquitted from the charge; he shall be released forthwith, if not required to be detained in any other case."

In the case of "Ghulam Akbar and another Vs. The State" (2008 SCMR 1064), it has been held as under:-

"It is cardinal principle of criminal jurisprudence that the burden of proving the case beyond doubt against the convict securely lied upon the prosecution and it did not shift. Similarly, the presumption and probabilities, however, strong may be, could not take the shape of proof."

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. Convict had not to prove his innocence, until and unless proved guilty. Benefit of slightest doubt would necessarily be extended in favour of convict and not otherwise."

16. The scope of interference in appeal against acquittal is most narrow and limited, because in an acquittal the presumption of innocence is significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty; in other words, the presumption of innocence is doubled. The Courts shall be very slow in interfering with such an acquittal judgment, unless it is shown to be perverse, passed in gross violation of law, suffering from the errors of grave misreading or non-reading of the evidence; such judgments should not be lightly interfered and heavy burden lies on the prosecution to rebut the presumption of innocence, which the accused have earned and attained on account of their acquittal. It has been categorically held

in a plethora of judgments that interference in a judgment of acquittal is rare and the prosecution must show that there are glaring errors of law and fact, committed by the Court in arriving at the decision, which would result into grave miscarriage of justice; the acquittal judgment is perfunctory or wholly artificial or a shocking conclusion has been drawn. Moreover, in number of dictums of this Court, it has been categorically laid down that such judgment should not be interjected until the findings are perverse, arbitrary, foolish, artificial, speculative and ridiculous. The Court of appeal should not interfere simply for the reason that on re-appraisal of the evidence a different conclusion could possibly be arrived at, the factual conclusions should not be upset, except when palpably perverse, suffering from serious and material factual infirmities.

17. This Honourable Supreme Court of Pakistan in "Ghulam Sikandar and another v. Mamaraz Khan and others" (PLD 1985 SC 11) has authoritatively ruled that while examining defects about order of acquittal, substantial weight should be given to the findings of subordinate Courts whereby accused are exonerated from committing the crime. Obviously, approach for dealing with appeal against conviction would be different and distinguishable from appeal against acquittal, because presumption of double innocence is attached in the latter case.

18. 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.

19. After going through the entire record, I am unable to dig out any ground, which may 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 imagination, can be declared as perverse, shocking, alarming or suffering from errors of jurisdiction and misreading or non-reading of evidence.

20. For what has been discussed above, the instant appeal having no force is hereby **dismissed**.

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court on this _____, 2020.

JUDGE

"Approved for reporting."

Rana M. Ift