

**ORDER SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

**CRL. APPEAL NO. 28 /2020**

**Haider Ali vs Sher Afzal, etc.**

<b>Serial No. of order/ proceeding</b>	<b>Date of order/ proceedings</b>	<b>Order with signatures of judge, and that of parties or counsel, where necessary.</b>
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01	31.01.2020	Mr. Muhammad Ishfaq, Advocate for appellant.
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**GHULAM AZAM QAMBRANI, J**

Appellant (Haider Ali) seeks setting aside of impugned order dated 17.12.2019, passed by the learned Judicial Magistrate Section 30-East Islamabad, whereby the accused/respondents No. 1 to 6 (hereinafter be called as respondents) were acquitted.

2. Briefly a case was registered against the respondents vide FIR No.173 dated 01.04.2013 under sections 406 PPC with Police Station Shahzad Town, District Islamabad with the assertion that the complainant entered into sale agreement with the accused Sher Afzal qua a plot measuring 5-marlas situated in khasra No.1562, khewat No. 641, khatooni number 983, Islamabad, against total consideration of Rs 9,50,000/- and the complainant paid advanced amount of Rs 8,00,000/- in the shape of Toyota Hiace bearing No. 3800- RPT and the remaining amount of Rs 1,50,000/- was agreed to be paid at the time of execution of registered sale-deed on 18.4.2008. Thereafter Sher Afzal s/o Muhammad Afzal got registered a sale-deed of 5-marlas land belonging to Muhammad Riaz s/o Kala Khan, which was a forged deed, as neither there was land nor he was given possession of the said land and in all this process, Haroon Masih s/o Anayat Masih, Shahbaz Masih s/o Rasheed Masih and Raja Altaf s/o Muhammad Afzal were associated as commission

broker and when the complainant came to know that there was not enough land remaining, he protested with the accused persons but they postponed the matter on one pretext or the other and the complainant did not receive back his Toyota Hiace nor he was given any plot, 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/ respondents, to which they pleaded not guilty and claimed Trial. After repeated summoning of all PWs, none of the prosecution witness appeared before the Court. The accused/respondents submitted an application Under Section 249-A Cr.P.C for acquittal of the accused/ respondents in the above mentioned case which was allowed vide impugned order dated 17.12.2019. Hence the instant appeal.

4. Learned counsel for the appellant contended that the learned Trial Court has passed the impugned order by not applying judicial mind, hence, the same is liable to be set aside. He further contended that the learned trial court while passing the impugned order has committed grave irregularity and illegality, which has caused miscarriage of justice. Further contended that the learned Trial Court has not exercised its discretion judiciously and the reason for acquittal of respondents is not in accordance with law and the impugned order is based on surmises and conjectures.

5. Arguments heard, record perused.

6. Perusal of record reveals that the complainant entered into an agreement of sale qua a plot measuring 5-marlas with the accused Sher Afzal, with the total consideration of Rs 9,50,000/- and he paid the advance amount of Rs 8,00,000/- in the shape of Toyota Hiace No. 3800-RPT and handed over the same to the respondent Sher Afzal in the presence of

witnesses as such the said transfer of vehicle was not a trust, but it was in the shape of advanced amount with regard to the above said transaction. To constituted an offence under section 406 PPC following ingredients are necessary:-

- (i) Entrustment,
- (ii) Dishonest misappropriation or conversion to his own use by the person in whom the confidence reposed.
- (iii) Dishonest use or disposal of property in violation of any direction of law.
- (iv) Dishonest use or disposal of property in violation of any legal contract.

7. The prosecution has to prove the guilt of an accused beyond all reasonable doubts. For the commission of offence Under Section 406 PPC, the entrustment, grant of possession or dominion over the property is the most essential and in the absence of the same, breach of trust cannot follow. In the instant case, the prosecution was to prove that the accused was entrusted with the Toyota Hiace and the accused has misappropriated the same or he has converted it to his own use, but the same are missing in the instant case. As the complainant himself handed over the Toyota Hiace to the accused Sher Afzal as advanced amount, therefore, the ingredients of Section 406 PPC are not attracted in the instant case. Further, at page 102 of the file, it is mentioned that on 23.04.2008 land measuring 4-1/2 Marlas had been transferred in favour of Ch. Haider Ali son of Ch. Riaz Hussain, (complainant) on behalf of Muhammad Riaz son of Kala Khan, accused/respondent No.4, whereas the land at site was not enough remaining; as such, it is a matter of civil nature and the complainant has tried to convert the civil matter into criminal litigation.

8. The Hon'ble Supreme Court of Pakistan in the case reported as "*Muhammad Nawaz Vs SHO, P.S Sabzi Mandi, Islamabad & others*" [2017 P.Cr.LJ 133], has held as under :-

“ Payment of earnest money did not fall within the purview of entrustment of property in terms of Section 406 PPC. If the seller, after receiving sale consideration or part of sale consideration refused to transfer property or failed to abide by terms of agreement, it was not a misappropriation. Such failure or breach of terms could not be equated with dishonest use. Disposal of property, violation of any legal contract and any breach of such agreement had remedy under Specific Relief Act, 1877.”

In the case reported as “Messers Adam Sugar Mills Ltd & two others Vs Trading Corporation of Pakistan & eight others” [2006 P Cr.LJ 263], it was held as under:-

“For the commission of offence under Section 406 PPC the entrustment, grant of possession or dominion over the property was most essential and in absence of the same the breach of trust could not follow.”

9. In the instant case, plain reading of the FIR did not disclose the commission of an offence under section 406 PPC. Even otherwise, the FIR being the result of alleged breach of terms of the agreement of sale, the complainant has tried to settle the civil dispute through initiation of criminal proceedings, which abuse cannot be allowed to perpetuate. The parties have entered into an agreement of sale of 5-marlas plot and the dispute between the parties is purely of civil nature and as per record, the complainant had already filed a suit for recovery of vehicle and mense profit, and the same is pending adjudication.

10. The considerations for interference in an appeal against acquittal and in an appeal against conviction are altogether different, because presumption of double innocence is attached with the former case.

11. For what has been discussed above, I have come to the conclusion that the learned Trial Court has rightly acquitted the accused/respondents No. 1 to 6 through a well reasoned order, as there was no probability of the accused being convicted in the instant case, even if the prosecution witnesses were summoned and their evidence recorded, because the essential ingredients of Section 406 PPC, i.e entrustment, grant of possession or dominion over the Toyota Hiace being one of the post essential part of the offence are missing in the instant case.

12. In view of the above, the prosecution has failed to establish extra ordinary reasons and circumstances, whereby the acquittal order of respondents No. 1 to 6 recorded by the learned trial Court can be interfered with by this Court. The learned Trial Court has rightly acquitted the respondents under section 249-A Cr.P.C. I find no illegality or irregularity in the impugned order warranting interference by this Court. Hence, the instant appeal having no force, is **dismissed in limine.**

(GHULAM AZAM QAMBRANI)  
JUDGE

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