

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Sardar Tariq Masood
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Amin-ud-Din Khan

(AFK) (D.J.)

CRIMINAL PETITION NO.209 OF 2018 AND
CRL. MISC. APPLICATION NO.392 OF 2018

(On appeal against the judgment dated 07.12.2017 by the
Islamabad High Court, Islamabad, in Crl. Appeal No.152/2017)

Model Customs Collectoratc, Islamabad ... Petitioner

Versus

Aamir Mumtaz Qureshi ... Respondent

For the petitioner : Mrs. Misbah Gulnar Sharif, ASC
Syed Rifaqat Hussain Shah, AOR

For respondent : Qazi Shehryar Iqbal, ASC
a/w respondent in person.

Date of hearing : 18.05.2022

JUDGMENT

SARDAR TARIQ MASOOD, J.-

Crl. Misc. Application No.392/2018 For reasons set out in the instant application for condonation of delay, the same is allowed and the delay in filing of the petition is condoned because the trial court judgment and the impugned judgment are patently illegal and against the record.

2. The petitioner department has impugned the judgment dated 07.12.2017 of the Islamabad High Court whereby it uphold the order dated 28.04.2017 of acquittal of respondent, passed by the Special Court (Customs, Taxation & Anti-Smuggling), Rawalpindi/Islamabad Capital Territory under section 265-K Cr.P.C., in case FIR No.49/2016, registered on 29.07.2016 at Police Station I&P Branch, MCC Islamabad under sections 2(s), 156(1), 8, 70 and 157 of the Customs Act 1969, read with section 8 of the Foreign Exchange Regulation Act, 1947 (FER ACT).

3. We have heard the learned counsel for the petitioner as well as the learned counsel for the respondent and perused the available record alongwith the impugned judgment with their assistance.

4. Admittedly, the respondent Aamir Mumtaz Qureshi was apprehended at Benazir Bhutto International Airport, Islamabad when he was taking away heavy currency of about 400,000 (four hundred thousand) Saudi Riyals to Saudi Arabia and the said foreign currency was recovered from his exclusive possession which he was smuggling abroad and this fact is not denied but he was acquitted by the trial court under section 265-K, Cr.P.C. and appeal filed against his acquittal was dismissed by the High Court through the impugned judgment, hence this petition for leave to appeal. On 24.02.2018 notice was issued to the respondent.

5. As respondent was acquitted by the trial court under section 265-K Cr.P.C. hence section 265-K Cr.P.C. and allics section 249-A Cr.P.C. are reproduced as below: -

"249-A. Power of Magistrate to acquit accused at any stage: *Nothing in this Chapter shall be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if after hearing the prosecutor and the accused and for reasons to be recorded, he considers that the charge is groundless or that there is no probability of the accused being convicted of any offence.*

265-K. Power of Court to acquit accused at any stage: *Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused at any stage of the case, if, after hearing the prosecutor and the accused and for reasons to be recorded, it considers that there is no probability of the accused being convicted of any offence."*

Under section 249-A, the Magistrate is empowered to acquit any accused on two grounds i.e. charge is groundless and there is no probability of conviction, whereas under section 265-K Cr.P.C., the court during the trial is empowered to acquit an accused, when there is no probability of conviction indicating that when there is no evidence on the record and even there is no remote probability of conviction and if there is remote probability of conviction then the court is required to record the evidence and then decide the case on evidence brought on record during the trial. From the above sections, it is also clear that application under sections 249-A and 265-K Cr.P.C. can be filed or taken up for adjudication at any stage of proceeding of trial i.e. even before recording of prosecution evidence or during recording of evidence or when recording of evidence is over.

Although there is no bar for an accused to file application under the said sections at any stage of proceeding of the trial, yet the fact and circumstance, the prosecution case will have to be kept in mind and if there is slight probability of conviction then off course, instead of deciding the said application should record the evidence and allowed the case to decide on its merit after appraising the evidence available on recorded.

6. Although learned counsel for respondent contended that respondent himself delivered the said currency to the authorities while travelling to Saudi Arabia but this fact has not been established by the learned counsel for the petitioner through documents except the statement of the respondent himself but this fact further confirms that he was apprehended at the Airport and huge currency, which he was trying to smuggle to the Saudi Arabia, was recovered from him. The argument of the learned counsel that respondent had filed application before the State Bank of Pakistan for permission to take away the currency to Saudi Arabia, has no force because mere filing of an application for permission by itself is not sufficient to allow him to smuggle the currency out side the country, until the permission was granted and in this case admittedly, no permission was ever granted by the State Bank of Pakistan. At this juncture learned counsel for the respondent took a summersault and contended that the respondent was not aware of the fact that foreign currency amounting to more than US\$ 10,000 (US dollars ten thousand) cannot be taken away from the country. This assertion is also not getting support from any corner, because on one hand the respondent claimed that he had filed an application for permission to take the huge foreign currency out of the country and on the other hand he was not aware of the fact that he could not take huge foreign currency outside the country.

7. The argument of the learned counsel for the respondent that he was a Hajj Tour Operator and has not committed any offence of taking away/smuggling foreign currency from the country, has no force because being a Hajj Tour Operator he has no license to smuggle the foreign currency outside the country. There was sufficient material available on record connecting the respondent with the commission of the alleged crime and it was incumbent upon

the trial Court to record the evidence but instead of recording the evidence to prove the guilt or otherwise of the respondent, the trial Court in a slipshod manner, acquitted him under section 265-K Cr.P.C.. The trial Court acquitted the respondent for the reason that there is no probability of conviction, whereas, from the material available on record, it is quite clear that he was apprehended at the airport while leaving for Saudi Arabia with the above said huge foreign currency.

8. There is no cavil to the proposition that by enacting sections 249-A and 265-K, Cr.P.C., the Legislature provided power to acquit an accused at any stage of the case if, after hearing the prosecutor and the accused and for reasons to be recorded, it considers that the charge is groundless or that there is no probability of the accused being convicted of any offence. But acquittal, under the said sections, could be made only if there was no probability of conviction of the accused. However, each case must be judged on its own special facts and circumstances and the reasons are to be recorded in support of conclusion that charge is groundless or that there is no probability of accused being convicted. If there is remote probability of conviction then of course courts are not empowered to invoke the said provisions i.e. 249-A and 265-K Cr.P.C.. Reliance in this regard may be placed on the case of **The State through Advocate-General, Sindh High Court of Karachi v. Raja Abdul Rehman** (2005 SCMR 1544) wherein it was held that though there is no bar for an accused person to file application under section 249-A, Cr.P.C. at any stage of the proceedings of the case yet the facts and circumstances of the prosecution case will have to be kept in mind and considered in deciding the viability or feasibility of filing an application at any particular stage. The special or peculiar facts and circumstances of a prosecution case may not warrant filing of an application at a stage. This Court in the case of **Bashir Ahmad v. Zafar ul Islam** (PLD 2004 SC 298) did not approve decision of criminal cases on an application under section 249-A, Cr.P.C. or such allied or similar provisions of law, namely, section 265-K or section 561-A Cr.P.C. and observed that usually a criminal case should be allowed to be disposed of on merits after recording of the prosecution evidence, statement of the accused under section 342, Cr.P.C., recording of statement of accused under section 340(2), Cr.P.C. if so desired by

the accused persons and hearing the arguments of the counsel of the parties and that the provisions of section 249-A, section 265-K and section 561-A of the Cr.P.C should not normally be pressed into action for decision of fate of a criminal case especially when apparently there is probability of conviction after recording evidence. In the present case, trial court disrupted the normal course of law against the mandate of supra judgment i.e. **Bashir Ahmad Vs. Zafar-ul-Islam and others** (PLD 2004 SC 298). In the case of **The State through Collector Customs and Excise, Quetta v. Azam Malik and others** (PLD 2005 SC 686) this Court held as under:-

"22. This brings us to the third question i.e. whether the prosecution had sufficient material/evidence to warrant the prosecution of the respondents or there was no probability of accused being convicted of any offence. We have gone through the F.I.R registered against the respondents and the absconding co-accused as also the evidence led before the Court. There were serious allegations that there was tampering/overwriting/cutting of the relevant register of bills of entry, the matter was inquired into at the departmental level and the allegations were found to be correct. Ex facie there was documentary, oral and circumstantial evidence to prove the charges. In the face of this material the Trial Court could not have invoked section 265-K, Cr.P.C. and acquit the respondents."

Reliance may also be placed on the cases of **Muhammad Sharif v. the State** (PLD 1999 SC 1063), **Ghulam Farooq Tarar v. Rizwan Ahmad and others** (2008 SCMR 383),

9. Further, in appellate or revisional proceedings, the same sanctity cannot be accorded to acquittals at intermediary stages such as under, sections 249-A or 265-K Cr.P.C., as available for those recorded and based on full-fledged trial after recording of evidence. In appeal or revision proceedings, the order of acquittal of the accused under section 249-A or section 265-K of the Cr.P.C. would not have the same sanctity as orders of acquittal on merits. Consequently, the principles which are to be observed and applied in setting aside concurrent findings of acquittal or the principle relating to the presumption of double innocence when an accused is acquitted after a full-fledged inquiry and trial, would not be applicable to the acquittals under section 249-A, Cr.P.C. or section 265-K, Cr.P.C..

10. In the instant case, if the allegations levelled in the FIR supported by the preliminary evidence are admitted to be true, it could not be said at that stage by the trial Court that there was no probability of conviction of the respondent-accused. In order to

ascertain the genuineness of the allegations, the trial Court ought to have allowed the prosecution to lead evidence. In the circumstances, we are of the view that the learned trial Court acted in haste in passing the order of acquittal which is, therefore, not sustainable. The learned High Court was also not justified in upholding the order of the trial Court when it is settled that without permission from the State Bank of Pakistan, foreign currency more than ten thousand dollars is not allowed to take away from this country.

11. For the foregoing, this petition is converted into an appeal and allowed. The orders of the trial Court and High Court are set aside and the matter is remanded to the trial Court to record the evidence and decide the case upon the evidence produce before it, without being influenced by the observations mentioned above because the material collected by the prosecution, during trial, will be subject to cross-examination to unearth the truth. The parties, by way of short order of even number passed on 18.05.2022, were directed to appear before the trial Court on **6.6.2022**, which order reads as under:

"For reasons to be recorded later on, this petition is converted into an appeal and allowed. The orders of the trial Court and High Court are set aside and the matter is remanded to the trial Court to record the evidence and decide the case upon the evidence produced before it. The parties are directed to appear before the trial Court on 06.06.2022."

Islamabad
13.07.2022
M. Saeed*

Approved for reporting.