JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Appeal No. 67 of 2020

Muhammad Ibrar Khan
Versus
Mian Muhammad Ramzan etc.

Date of Hearing	:	20-05-2022.
Appellant by :		Raja Ahmed Abdul Rafay Advocate
State by	:	Mr. Shahbaz Shah, State Counsel with Nasir Manzoor SI.
Respondent No.1	:	Rao Abdur Raheem Advocate

ARBAB MUHAMMAD TAHIR, J. The instant criminal Appeal under Section 417 (2-A) Cr.P.C is arising out of Order dated 23.01.2020, passed by the learned Judicial Magistrate Section-30 Islamabad-West whereby respondent No. 1 (*Mian Muhammad Ramzan*) was acquitted in terms of Section 249-A of the Code of Criminal Procedure, 1898 (‘**the Code’**) in case FIR No. 372, dated 27.08.2018, under Section 406-PPC registered at Police Station Golra-Sharif, Islamabad.

2. Precisely, the subject FIR stood registered on the written application of petitioner (‘***complainant***’) and one Khalid Mehmood Bhatti, wherein it was alleged that in order to settle the dispute with one Sajid Iqbal, a Jirga was convened with mutual consent that compromised of late Gul Andaz Abbasi, Kashif Chaudhry (co-accused) and Mian Muhammad Ramzan (*respondent No.1*); that pursuant to settlement, they handed over an amount of Rs. Ten Lac, a blank cheque and four cheques of Rs. Twenty Lac to the members of the Jirga, who pronounced their decision on 27th October, 2014; that thereafter the Chairman of the Jirga Gul Andaz Abbasi passed away while their cheques remained in custody of respondent No.1 and Kashif Chaudhry who, as per letter dated 27th March, 2017, committed to return the same together with the amount received; that when they went to respondent No.1 and Kashif Chaudhry to get back the cheques and

amount, both refused and that they apprehend that both of them i.e. Respondent No.1 and Kashif Chaudhry can misuse the cheques by inscribing previous dates upon the same.

3. After the registration of FIR, the local police conducted investigation wherein statements of witnesses were recorded in terms of Section 161 Cr PC. In-addition, the police also got verified the stamp papers from the concerned stamp vendor on 25-10-2018, also recorded statement of stamp vendor, and on the basis of material collected during investigation, recommended to submit report in terms of Section 173 Cr PC against the respondent No.1 to face the trial under section 406 Cr. PC.

4. Record further reveals that the respondent No.1 obtained pre arrest bail while his writ petition for quashing of the subject FIR was dismissed by this Court vide order dated 20.02.2019, passed in Crl Misc. 926 of 2018.

5. After the submission of challan and before framing of the charge and recording any statement of the prosecution witnesses, respondent No.1 moved an application under section 249-A of the Code which was allowed vide impugned order, hence instance criminal appeal.

6. Learned counsel argued that the impugned order has been passed without examining the record as the matter is still under investigation; that the appellant had been prevented to substantiate the allegations against the respondents; that report in terms of Section 512 Cr.P.C. had to be submitted against co accused who is a proclaimed offender and that in presence of sufficient incriminating material, there was no justification with the trial Court to acquit the respondent No.1 at such an early stage, therefore, impugned judgment is liable to be set aside. Learned counsel relied upon case law reported as 2008 YLR 2169 and 2020 P Cr L J 830.

7. Conversely, learned counsel for respondent No.1 repelled the above submissions and prayed for dismissal of the instant appeal.

8. Heard, record perused.

9. The reasons prevailed with the learned Trial Court for invoking the provision of 249-A of the Code had been to the following effect:-

> *"In the present case, challan has been submitted and notice to the prosecution under section 249-A Cr P.C has been served.* ***As per contents of FIR,*** *the complainant entrusted certain amount and cheques to the accused during proceedings of a Jirga for settlement of a dispute. Thereafter, the accused refused to return back the said amount and cheques to the complainant. There is an apprehension that the said entrusted amount (property) does not constitute the offence under section 406 PPC as the essential ingredient of dishonest misappropriation lacks.* ***It appears*** *that there is a dispute of civil nature between the parties, which has been converted into a criminal liability. In the present circumstances, pendency of criminal proceedings against the accused would an abuse of process of law* ***as the contents of FIR reveal*** *the dispute of civil nature, rather than criminal liability and* ***bare reading of FIR does not constitute an offence under section 406 PPC*** *(Reliance is placed on YLR 2006 page 168).* ***Even if contents of FIR are taken as gospel truth, accused cannot be convicted for offence under section 406 PPC*** *as no one is to be prosecuted on the basis of vague and unspecified allegation. Therefore, there is no probability of conviction of the petitioner/accused in this case, even if charge is framed and all the evidence is summoned and recorded."*
> (**Emphases added**)

10. There is no second opinion that in terms of Section 249-A of the Code, a Magistrate is vested with authority to acquit 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.

11. One of the pre-requisite as highlighted is that there should be reasons to be recorded. And when the reasons are sine qua non,

it should be rational with the material collected by prosecution and should base upon examination and result thereof. In the present case, the learned Trial Court as reveals through the impugned order, had explicitly placed reliance upon the contents of FIR alone and not the other incriminating material that includes statements of ten prosecution witnesses recorded under section 161 Cr PC and the stamp papers taken into custody during investigation.

12. It is settled principle that First Information Report is meant for laying information regarding commission of a cognizable offence and in no way can be termed and taken into consideration as a conclusive piece of evidence. It is meant to set the law in motion while before making an order in terms of Section 249-A Cr.P.C. the Court is under obligation to take into consideration the incriminating material collected by the prosecution during investigation and its impact upon the fate of the case viz-a-viz the nature of the offence alleged. Mere contents of FIR would not be sufficient to accept the plea of innocence at such an early stage particularly when the investigation recommended challan of an accused on considering him guilty on the basis of material collected during investigation. The impugned order is short of reasons even remotely on the prosecution evidence, to be tendered during course of trial.

13. The observations on the status of the dispute as '*civil*' are also tentative in nature as it was mentioned "***it appears***". No reference of any civil litigation had been mentioned in the order to substantiate observation that it was/is a civil dispute. Such dispensation, in no way, can be termed '*judicious*', in accordance with the spirit of natural justice rather offends right of fair trial envisaged in Article 10-A of the Constitution.

14. As mentioned above, while dealing with an application under section 249-A of the Code, it is mandatory for the trial court to take into consideration the material collected during the course of investigation which, in the present case, is lacking. The exclusive

reliance upon contents of FIR in exclusion of other prosecution evidence is unjust, erroneous and arbitrary. The reasons, made basis to acquit an accused even at initial stage by invoking provision of 249-A of the Code should base on reasons and that reasons should flow from the analysis of the prosecution evidence besides the law on the subject.

15. The respondent No.1 is accused of offence '*criminal breach of trust'*. The co accused is still at large and has also been declared a Proclaimed Offender. The prosecution, in order to substantiate the allegations, relied upon statements of about ten witnesses besides the stamp paper taken in possession during the course of investigation and also got the same verified by the concerned stamp paper, whose testimony in terms of statement under section 161 Cr PC is also being relied.

16. On legal premises, Section 405 PPC defines *criminal breach of trust* as follows:

> **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 uses or disposes of that property, in violation of any direction of law 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 willfully suffers any other person so to do, commits criminal breach of trust.

17. The essentials to constitute offence of criminal breach of trust under section 405 PPC are that (*i) the accused must be entrusted with property or dominion over it*; and that (ii) *he dishonestly misappropriated the property or converted it to his own use or disposes it of in violation of any trust or willfully suffers any other person to do so.* There are three important components i.e. entrustment, dominion and property. By *"entrustment*" means handing over possession of something for some purpose without conferring the right of ownership while "*dominion"* refers to the

right of control or possession over something. The term *"property"* has been used without any qualification so it must be understood in the wider sense. The word "*property*" must be read in conjunction with *"entrustment"* and "*dominion*". A trust contemplated by Section 405 PPC would arise only when the property belongs to someone other than the accused.

18. The prosecution has to show that the *mens rea* of an accused. Section 24 PPC defines "*dishonestly*" as the doing of an act with the intention of causing wrongful gain to one person or wrongful loss to another person. Thus, in the context of section 405 PPC the property must be lost to the owner or he must be wrongfully kept out of it. A *dishonest misappropriation* may sometimes be inferred from the circumstances if there is no direct evidence.

19. The impugned order, if seen in the context of legal position, is short of reasoning as even by contents of FIR itself, delivery of possession and control over the property of the accused persons is quite obvious while in order to ascertain *mens rea,* the prosecution relied upon ample incriminating material which went unnoticed while deciding application under section 249-A Cr P.C.

20. The respondent No.1 was acquitted in terms of Section 249-A of the Code and not after full length trial. The Hon'ble Apex Court in the case of "***The State through Advocate-General, Sindh High Court of Karachi versus Raja Abdul Rehman" (2005 S C M R 1544***) has gracious held that:-

> "In appeal or revisional 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 to acquittals under section 249-A, Cr.P.C would not be applicable."

21. It has also been held by the Supreme Court of Pakistan in numerous cases that the normal rule is that an accused be acquitted only when proved innocent after facing trial and section 249-A Cr.P.C is an exception to the rule only when the Court at any stage comes to the conclusion that the charge against the accused is groundless and there is no chance for the accused to be convicted and the trial is a futile exercise. Reliance is placed upon **"Muhammad Muslim and another vs Muhammad Iqbal and 2 others" (P L J 2004 Supreme Court 2**).

22. In view of above discussion, impugned order dated 23.01.2020 is not legally sustainable. Consequently, it is set-aside. The application under section 249-A of the Code, filed by the respondent No.1 shall be deemed pending, which shall be decided afresh in accordance with law on the subject after giving due audience to the parties.

23. The instant appeal is accordingly allowed in above terms.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in an open Court on __08.2022.

JUDGE

ISLAMABAD | 08.2022
APPROVED FOR REPORTING

//*Kamran*//