Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No. 15 of 2019

Shabih Haider
Vs
The State

APPELLANT BY: Mr. Zia ul Haq Kiani, Advocate.
Appellant in person.

RESPONDENT BY: Mr. Sohail Khursheed, State Counsel.

DATE OF DECISION: 24.06.2021

BABAR SATTAR, J.- Through this appeal the judgment passed by the learned Special Court (Offences in Banks), Islamabad dated 21.12.2018 has been impugned through which the appellant has been convicted for (i) an offence under section 420 of Pakistan Penal Code, 1860 **("PPC")** and sentenced for three years rigorous imprisonment and a fine of Rs.50,000/-, (ii) an offence under section 468 and sentenced for three years rigorous imprisonment and a fine of Rs.50,000/-, and (iii) an offence under section 471 PPC and sentenced for three years rigorous imprisonment and a fine of Rs.50,000/-, which sentences were to run concurrently. The impugned judgment also held that the prosecution had failed to prove the charge under section 380 of PPC and under section 5(2) of the Prevention of Corruption Act, 1947. The benefit of section 382 Cr.P.C was also extended to the appellant.

2. The appellant/accused was charged under sections 420, 468, 471 and 109 PPC read with section 5(2) of the Prevention of Corruption Act, 1947 in case FIR No. 21/1997 dated 13.09.1997 registered at Police Station State Bank Circle, Rawalpindi. The principal accused, Sohail Saleem Sheikh, absconded and was never tried and was declared a proclaimed offender. Co-accused Asif Kamal was acquitted under section 249-A of the Code of Criminal Procedure, 1898 **("Cr.P.C")** by order dated 20.01.2011. The case against the appellant was that Sohail Saleem Sheikh, an officer of National Bank of Pakistan **("NBP")**, stole a book of bank drafts and issued forged bank drafts out of the stolen book in favour of the appellant, Shabih Haider, and the appellant fraudulently encashed two of such bank drafts. The appellant admitted to encashment of one bank draft in the amount of Rs.860,000/- from NBP Main Branch, Islamabad. He denied that he had enchased bank draft in the amount of Rs.915,000/- from NBP Urdu Bazar Branch, Lahore.

3. The challan was submitted against the appellant, Shabih Haider and co-accused Sohail Salim Sheikh and Asif Kamal on 28.02.2000 and the charge was framed on 09.04.2002. The trial lingered on from 2002 all the way through 2018 when the prosecution closed its evidence, after production of eleven witnesses on 19.09.2018 and the statement of appellant under section 342 of Cr.P.C was recorded on 14.11.2018, which then resulted in the impugned judgment being passed on 21.02.2019. The impugned judgment has reproduced details of the testimony of the

prosecution witnesses which also records details of the exhibits that the prosecution relied on to prove its case and need not be recapitulated. The appellant in his statement under section 342 of Cr.P.C denied the preparation of forged bank drafts. He admitted having received one bank draft in the amount of Rs.860,000/- from Sohail Saleem Sheikh on account of business dealings between the appellant and Sohail Saleem Sheikh in relation to poultry business for which he claimed that Sohail Saleem Sheikh owed him Rs.1.5 million. He denied encashment of the second bank draft in the amount of Rs.915,000/- from NBP, Urdu Bazar Branch, Lahore as well as an attempt to encash two other bank drafts in the amount of Rs.860,000/- and Rs. 650,000/-. He claimed that he was hospitalized between 02.09.1997 to 10.09.1997 and consequently he had not been to Lahore to encash bank draft in question in the amount of Rs.915,000/-. The appellant did not prefer to be examined on oath and also did not produce any evidence in support of his statement under section 342 of Cr.P.C.

4. The learned Special Court concluded on the basis of evidence adduced before it that the appellant fraudulently encashed two bank drafts in the amount of Rs.860,000/- and Rs.915,000/- from NBP Main Branch, Islamabad and NPB Urdu Bazar Branch Lahore, respectively. It disbelieved the appellant’s version, that the bank draft in the amount of Rs.860,000/ was given by Sohail Saleem Sheikh to the appellant in view of his services in poultry business, due to his failure to produce evidence in support of such defence. It

also did not find the appellant's contention, that the appellant was hospitalized between 02.09.2017 till 10.09.2017, credible due to lack of proof of such fact and convicted the appellant under sections 420, 468 & 471 of PPC and sentenced him to serve a jail term of three years.

5. The learned counsel for the appellant stated that the appellant did not deny encashing the demand draft in the amount of Rs.860,000/-. However, he did not encash any other bank draft as had been claimed by the prosecution. He contended that the complainant, Khalid Hameed, Manager National Bank, Main Branch, Islamabad who stated in the complaint that the appellant fraudulently encashed bank draft in the amount of Rs.860,000/- by giving false identification of Zulfiqar Ali of MCB never appeared before the Court to depose before it. He further submitted that Sohail Saleem Sheikh, the main accused, charged with stealing the blank book of bank drafts was never arrested or tried and consequently there was no evidence led by the prosecution to establish that no amount was due by Sohail Saleem Sheikh to the appellant or that the issuance of bank drafts in question, which had admittedly been done by Sohail Saleem Sheikh, was not part of a *bona fide* transaction between Sohail Saleem Sheikh and the appellant. He further submitted that NBP itself was negligent as it was admitted by Muhammad Raees (PW-1) that a blank book of bank drafts had been stolen by Saleem Sohail Sheikh and this fact was never reported by the bank to police authorities. He further contended that the appellant was admitted in hospital at the time of encashment of second

bank draft in the amount of Rs.915,000/- from NPB Urdu Bazar Branch, Lahore and consequently could not have enchased such bank draft.

6. The learned State Counsel defended the impugned judgment and stated that the prosecution had proved its case beyond reasonable doubt and the impugned judgment suffered from no infirmity.

7. Muhammad Raees (PW-1), an officer of NBP Chountra Branch, Rawalpindi testified that a blank drafts book of NBP with 1000 bank drafts was stolen by Saleem Sohail Sheikh, who issued six drafts from it, out of which two were encashed. He testified that the drafts in question were written and signed by Saleem Sohail Sheikh and that he identified the signatures of Saleem Sohail Sheikh having worked with him. Ishfaq Ahmed (PW-2) testified that he was posted in NBP, Urdu Bazar Branch, Lahore when the appellant accompanied by Asif Kamal came to the Branch for encashment of bank draft (Exh.PW.1/3) in the amount of Rs.915,000/-. He signed the draft for receipt of funds. He identified Shabih Haider in Court. Ghulam Sabir (PW-3) testified that he was posted as an Assistant in NPB, Urdu Bazar Branch, Lahore when the appellant visited the Branch for encashment of bank draft (Exh.PW1/3) in the amount of Rs.915,000/- and he issued the appellant a token in lieu of encashment of the said draft. The signature of Shabih Haider were exhibited as Q14 and the draft was exhibited as Exh.PW.1/3 and the appellant's signatures were sent to the handwriting expert along with his

routine signatures and were found to be a match by report dated 07.10.1997, which was exhibited as Exh.PW.10/14. Hazrat Ali (PW-11) was the Investigating Officer and during cross-examination he admitted that had not investigated whether or not the appellant remained hospitalized from 02.09.1997 to 10.09.1997 during the period in which the bank draft (Exh.PW.1/3) was enchased on 09.09.1997. He acknowledged that no complaint was received from any quarter regarding the theft of blank drafts book of NBP from which the bank drafts in question had been issued.

8. The appellant while recording his statement under section 342 of Cr.P.C, in reply to a question that there existed evidence that the appellant in connivance with Sohail Saleem Sheikh encashed forged bank draft (Exh.PW.1/2), from NBP Main Branch, Islamabad, responded as follows:

> *"It is not denied that I got encashed a bank draft of Rs.860,000/- from NBP main branch Islamabad on 01.09.1997 as the same was given to me by Sohail Saleem Sheikh accused (PO) on account of my services in his poultry business. I use to provide him chick feed for his poultry and he had to pay Rs.15,00,000/- to me. It is not out to place to mention here that on 01.09.1997 when I went to the main branch Islamabad for encashment of draft my CNIC was checked and verified by the branch manager and he pointed out that my name is not correctly mentioned on the draft therefore I need to rectify the same from the same branch which issued that draft therefore I went to the Chontra branch on the same date and got it corrected by the said Sohail Saleem Sheikh accused (PO) who not only made his signature after correction but got the signature of the cashier as well. It is also important to mention here that I did not*

misrepresent myself at the time of encashment of draft as mentioned in FIR."

He was further asked whether he encashed the bank draft (Ex-PW1/3) an amount of Rs.915,000/- from NBP Urdu Bazar Branch, Lahore he stated the following:

" It is incorrect hence vehemently denied. I had neither prepared any forged bank draft in connivance with Sohail Saleem Sheikh accused (PO) nor encashed any amount from the NBP Urdu Bazar Lahore Branch. It is not out of place to mention hence that I remained admitted in hospital since 02.09.1997 till 10.09.1997 during which the alleged transaction has been made (copies of my original medical certificates and perceptions are attached with the court file since 1997).

10. The picture that emerges from evidence adduced by the prosecution is that Sohail Saleem Sheikh stole a blank book of bank drafts as an employee of NBP. He then wrote out various bank drafts and executed them, two of which the appellant is accused of having encashed. The main accused Sohail Sleem Sheikh who is alleged to have stolen the bank drafts book and having issued and executed the bank drafts on behalf of NBP was never arrested and tried and was declared a proclaimed offender. The appellant does not deny receiving one bank draft (Exh.PW1/2) in the amount of Rs.860,000/- from Sohail Saleem Sheikh, but denies that he committed fraud by encashing the said bank draft. He claimed that such draft was issued by Saleem Sohail Sheikh to him in lieu of an amount payable by Sohail Saleem Sheikh to him. And that while encashing the same the appellant indulged in no misrepresentation or fraud. The appellant denied

encashing the second bank draft (Exh.PW.1/3) in the amount of Rs.915,000 and claimed that at the time of such encashment he was hospitalized. On the other hand, two independent witnesses, Ishfaq Ahmed (PW-2) and Ghulam Sabir (PW-3), have testified that they saw the appellant encashing the second bank draft (Exh.PW.1/3) in NBP Urdu Bazar Branch Lahore. While the said PWs are independent witnesses and there is no reason to disbelieve their testimony, Hazrat Ali (PW-11), the Investigating Officer, has also admitted that he did not investigate as to whether the appellant was hospitalized from 02.09.1997 to 10.09.1997 or not. Notwithstanding the discussion as to whether or not the appellant enchased the second bank draft, nothing really turns on such fact. It is not the appellant but Sohail Saleem Sheikh, who is accused of stealing the bank book of drafts of NBP and issuing drafts which were not duly authorized and were forged. The appellant has not been attributed the role of stealing bank drafts or issuing forged bank drafts. The act attributed to the appellant is limited to encashment of forged bank drafts stolen and issued by Sohail Saleem Sheikh.

11. There is nothing on record to establish that the appellant indulged in any misrepresentation or fraud. The only allegation of misrepresentation was made by the complainant, Khalid Hameed, Manager NBP who stated in the complaint that the appellant gave a false identification of Zulfiqar Ali when he sought to encash bank draft (Exh.PW1/2) in the amount of Rs.860,000/-. However Khalid Hameed never deposed before the Court and consequently there is no

evidence in support of the allegation made by him. Other than him all the prosecution witnesses have only testified to the extent that the appellant was involved in encashment of bank drafts which were admittedly issued by Sohail Saleem Sheikh and were declared by the bank to be stolen and forged.

12. There is nothing in the case built by the prosecution that establishes mens rea on part of the appellant. There is nothing to establish that there was no business transaction between Sohail Saleem Sheikh and the appellant or that the appellant's story that Sohail Saleem Shiekh owed him money in lieu of chick-feed provided by the appellant to Sohail Saleem Sheikh in relation to poultry business is false. There is nothing on record to establish that the appellant dishonestly induced NBP to encash the bank drafts for purposes of section 420 of PPC or that the appellant was either involved in forging bank drafts for purposes of sections 468 of PPC or was aware for purposes of section 471 of PPC that the bank drafts he sought to encash were forged documents. The prosecution has led no evidence to establish criminal intent on part of the appellant. The Court can therefore not assume that merely because the appellant was the beneficiary of a bank draft stolen and forged by Sohail Saleem Sheikh criminality automatically attaches to his actions. It is also settled principle that where the principal accused has not been found guilty of a crime, a co-accused cannot be burdened with guilt for such crime either.

13. The august Supreme Court in ***Nasir Abbas Vs. The State and another*** ***(2011 SCMR 1966)*** highlighted the need for establishing mens rea to seek the conviction of an accused except in an offence involving strict liability (which is not relevant for our present purposes as we are not dealing with such offence in the instant case). It enumerated what constituted mens rea for purposes of offences under sections 420, 468 and 471 as follows:

> *"The age old Latin phrase epitomizes this concept, "actus non facit reum nisi mens sit rea", which means that the act does not make a person guilty unless the mind be also guilty. Actus reus in simple parlance is the actual act of committing some offence contrary to the law of the land and mens rea is the intent to commit the said offence. If either of the elements is missing, the conduct would not attract a penal provision unless it is a case of strict liability wherein the absence of mens rea may not be fatal to the prosecution. The wording of section 420, P.P.C. indicates that the afore-referred two ingredients are prerequisites for trying and punishing an accused under this provision. For instance 'cheating dishonestly' is indicative of the mens rea whereas inducing a person "to deliver any property to any person, or to make, alter or destroy" constitutes the actus reus. In section 468 of the Pakistan Penal Code, two essential elements of the offence are 'forgery' and 'cheating'. 'Cheating' (section 415 of the Pakistan Penal Code) inter alia includes element of deceiving a person fraudulently or dishonestly with a view to induce the person so deceived to do something or to omit to do something which he would not have done or omitted, if he had not been so deceived. The actus reus under section 468, P.P.C. is the making of a false instrument whereas the mens rea is three fold i.e.:--*
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> > *(i) that the document is used to induce someone to accept it as genuine;*

> *(ii) that the person before whom the document is produced will accept it as genuine and in so doing he will do some act or omit to do something to his own or someone else is damaged or injured or is intended to "support any claim or title" or with an intent to commit fraud; and*
>
> *(iii) that the maker of the false instrument/ document is aware that the document in question is false.*
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> *10. Section 471 of the Pakistan Penal Code is attracted when a person though is not a maker of the forged document uses it as genuine 'fraudulently' or 'dishonestly' about which he knows, or has reason to believe to be a forged document. Thus under this provision the actus reus would be the act of using a forged document as genuine and the mens rea would be his dishonest intent and the knowledge that the document is forged."*

14. In ***Nasir Abbas*** the facts of the case were that a beneficiary of a forged appointment letter had used it to get appointed as a Ward Servant a serve for two and a half years in such capacity in a government hospital. The beneficiary was acquitted for charges under sections 420, 468 and 471 and the august Supreme Court observed that, *"there is no denying the fact that appellant was beneficiary of the document in question and it was considered by the department to be a genuine document but the prosecution ought to have led evidence to show that the appellant knew or he had reason to believe that the said appointment order was a forged one and that he produced it fraudulently with a guilty intent. Merely because he was a beneficiary would not prove in the facts and circumstances of this case that he knew or had reason to believe that it was a forged document. Moreover, since it has not been alleged that he forged the*

document, he cannot be considered to have known that it was a forged document."

15. In the instant case the principal accused Sohail Saleem Sheikh has not been arrested or tried and found guilty. Consequently, the appellant, as a co-accused, and beneficiary of the offence allegedly committed by Sohail Saleem Sheikh, cannot be punished for such offence in the absence of proof of knowledge of such offence attributable to the appellant together with actus reus and mens rea on his part for purposes of sections 420, 468 and 471.

16. For the aforesaid reasons this Court has come to the conclusion that the prosecution has failed to establish charges under section 420, 468 and 471 of PPC against the appellant beyond reasonable doubt. Given that there was no evidence adduced before the learned Special Court establishing mens rea on part of the appellant. And further the principal accused charged for theft and forgery of the bank draft book was never tried and convicted, in the absence of which the appellant could also not be convicted for an offence attributable to Sohail Saleem Sheikh, especially as no charge was leveled and framed against the appellant for abetment of Sohail Saleem Sheikh. The learned Special Court fell into an error in finding the appellant guilty. The appeal is **allowed** and the conviction and sentence awarded to the appellant by judgment date 21.12.2018 is set aside. The appellant is acquitted of the charges. Given that the appellant is on bail,

as his sentence was suspended by order dated 30.05.2019 passed in C.M No. 01/2019, the surety stands discharged.

(MOHSIN AKHTAR KAYANI)
JUDGE

(BABAR SATTAR)
JUDGE

Saeed*