

IN THE HIGH COURT OF SINDH, KARACHI

Before:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi

Criminal Appeal No. 630 of 2021

Appellant : Kamran Mirza son of Mirza Riaz Baig,
through Mr. Shamshad Ali Qureshi,
Advocate.

Respondent : The State through Mr. Ghulam Sarwar
Baloch, Assistant Attorney, General.

Date of Hearing : 15.11.2022.

Date of Judgment : 30.11.2022.

J U D G M E N T

ZULFIQAR ALI SANGI--J., Appellant Kamran Mirza was tried by the learned Special Court (Offences in Banks) Sindh at Karachi in Case No. 64 of 1999, Crime No. 31 of 1999 registered at PS FIA (CBC), Karachi for the offence under Sections 409, 468, 471 and 477-A PPC and was convicted under section 409 PPC and sentenced to suffer Ten (10) years Rigorous Imprisonment with fine of Rs.4,218,000/- and in default whereof to suffer Rigorous Imprisonment for Thirty (30) months more; under section 468 PPC to suffer R.I for Seven (07) years with fine of Rs.100,000/- and in default whereof to suffer rigorous Imprisonment for Six (06) months more; under section 471 PPC to suffer Rigorous Imprisonment for Three (03) years with fine of Rs.100,000/- and in default whereof to suffer Rigorous Imprisonment for Three (03) months more and under section 477-A PPC to suffer Rigorous Imprisonment for Five (05) years with fine of Rs.100,000/- and in default whereof to suffer further Rigorous Imprisonment for Four (04) months. All the sentences were ordered to run concurrently with the benefit of section 382-B Cr.P.C.

2. Brief facts of the prosecution case as per FIR are that on 26.07.1999 Complainant Abdul Razzak Regional Manager (North) MCB

Ltd. Modern Motors House, Beaumont Road, Karachi came to the police station and stated that the Account holder of Ibne-e-Sina road Branch bearing Account No.2446-2 namely Ehtesham Ali Naseer, reported to the Branch Manager that he has issued a cheque for Rs.1,00,000/- for encashment but the same was dishonoured by the branch due to insufficient funds, while he had deposited cash of Rs.230,000/- and Rs.4,00,000/- on 06.02.1999 and 03.05.1999 respectively, such slips of funds deposit were issued to him duly stamped and signed by the cashier of the bank however the same amount was not credited in his account. Another application dated 26.07.1999 was also submitted to the Branch Manager MCB, Ibn-e-Suba road branch by another account holder bearing Account No. PLS-3317-2, namely Mrs Naseem Begum, stating that she has deposited an amount of Rs.200,000/- and Rs.300,000/- on 31.03.1999 and 03.05.1999 respectively, such slips of funds deposit were issued to her duly stamped and signed by the cashier of the bank however the amount was not credited in her account. When she presented a cheque on 20.07.1999 for Rs.500,000/-, it was dishonoured, therefore, she also requested to the bank that her money be paid to her and also submitted pay-in-slips of the bank duly stamped and signed.

3. Upon receipt of the above complaints, the investigation was started and during the preliminary investigation it was discovered that Kamran Mirza (Cashier) who was posted at the MCB Ibne Sina road Branch constantly used to receive cash from different customers and affixed his signatures and the bank's seal on the pay-in-slips and pocketed the Bank's money instead of depositing it in the bank. Kamran Mirza has pocketed a total amount of Rs.930,000/- on receipt of cash and he has also misappropriated cash on different dates after receiving from the customers/consumers with regard to the Utility Bills totalling Rs.979,000/- as such, he fraudulently and dishonestly defrauded and caused financial loss to the bank amounting to Rs.19,09,000/-, hence, this FIR was lodged against him.

4. After completing the investigation case was challaned before the court having jurisdiction. After completing the legal formalities charge against the appellant was framed to which he pleaded not guilty and claimed trial. At the trial, the prosecution examined thirteen (13)

witnesses including the complainant, mashirs of arrests and recovery so also the Investigating Officers etc., who produced certain documents and other items in support of the case of the prosecution.

5. The statement of the accused under section 342 Cr. P.C. was recorded wherein he denied the prosecution allegations and pleaded his innocence. He, however, neither examined himself on oath nor led any evidence in his defence. After hearing the counsel learned trial Court convicted and sentenced the appellant through impugned judgment as stated above.

6. Learned counsel for the appellant mainly contended that the appellant is innocent and has been falsely implicated in this case; that the impugned judgment passed by the trial Court is bad in law and is not in consonance with the evidence on record and law applicable thereto as such is liable to be set-aside; that the witnesses who were examined by the prosecution were never posted at the time of alleged offence at the concerned branch nor were in knowledge but their evidence is relied upon by the trial court; that the complainant and its witnesses failed to produce any trustworthy evidence to prove the charge against the appellant which fact was totally ignored by the learned Court; that the prosecution has not produced the account holders before the trial court for recording their evidence directly involving the appellant; that at the time of submission of challan, another complaint came on record against co-accused namely S.M. Haider, who was acquitted by the learned trial Court on the same set of allegations and evidence; that there are material contradictions in the evidence of P.Ws but same was ignored by the learned Court; that the prosecution has not been able to prove the case against the appellant beyond the shadow of reasonable doubt. He has prayed for the acquittal of the appellant by extending him the benefit of the doubt. In support of his contentions he has relied upon the cases of ***Talat Mehmood Vs. Additional Sessions Judge, Rawalpindi (2022 P.Cr.L.J 'Lahore Rawalpindi Bench' 649)***, ***Ashfaqe Ahmed and 4 others Vs. The State (2022 P.Cr.L.J 'Sindh' 38)***, ***Ulfat Hussain Vs. The State (2018 SCMR 313)***, ***Zafar Vs. The State (2018 SCMR 326)***, ***Imtiaz alias Taj Vs. The State and others (2018 SCMR 344)*** and ***Muhammad Ilyas, chief Manager/Attorney, Allied Bank Ltd Vs. Shahid Ullah and others (PLD 2009 Supreme Court 446)***.

7. On the other hand, the learned Assistant Attorney General, has contended that the prosecution has successfully proved its case by examining the P.Ws, who have no enmity with the appellant. There is no major contradiction in the depositions of the complainant and P.Ws; the prosecution produced oral as well as documentary evidence against the appellant as such the impugned judgment does not call for any interference by this court and as such the appeal be dismissed.

8. We have heard learned counsel for the parties and perused the material available on record with their able assistance.

9. In the first round of the trial, co-accused S.M. Haider was acquitted whereas the appellant was convicted vide judgment dated 14.09.2011, which was assailed by the appellant before this court in Cr. Appeal No.383/2011 and vide order dated 22.10.2020, this court remanded back the case to the trial court with directions to record evidence of the six P.Ws afresh giving right of cross-examination to the defence counsel and thereafter record the statement of appellant u/s 342 Cr. P.C. affording an opportunity to produce a defence witness if he so desires and then render a fresh judgment within six months from the date of the order. After the remand of the case, only three P.Ws, namely P.W.1 Deedar Ali Shaikh, P.W.2 Muhammad Shahzad Akhtar and P.W.3 Muhammad Nasir Umar were examined whereas the rest of the three were not examined as one of them had expired and the two others had moved abroad and could not be served.

10. The prosecution examined PW-7 to 13 as the victims whose amount was misappropriated. PW-7 did not depose a single word against the appellant nor he handed over any amount to the appellant even though he does not know how his amount was misappropriated. During cross-examination, he stated that ***“It is correct that I cannot say that I had given amount to deposit in my account to accused Kamran Mirza. Voluntarily says, now I cannot recognize as I cannot see properly.”*** The PW-8 had deposed that he was depositing installments on behalf of his brother and was handing over the amount to the cashier; the slip through which he had deposited the amount was exhibited in evidence as Ex. 10-I which bears his signature. He has not deposed a single word that it was signed by the cashier of the bank but admitted that it was signed by him. However,

he had deposed that he had handed over the amount to the appellant. PW-9 had also not deposed a single word against the appellant. PW-10 deposed against the appellant that for two slips/transactions he handed over the amount to appellant Kamran Mirza which was misappropriated. During cross-examination he stated that **“I am not conversant with the signature of accused Kamran Mirza.”** PW-11 also deposed against the appellant that he handed over the amount to the appellant which was misappropriated. PW-12 had not deposed a single word that he handed over the amount to the appellant. PW-12 during cross-examination stated that at the time of deposit only one cashier was sitting in the bank. **He also deposed during examination-in-chief that he came to know that the person who received the amount as the cashier was Manzoor Hussain.** PW-13 deposed that he deposited the amount at the cash counter and received slips and **he is unable to say who was sitting at the cash counter at that time.** It reflects that only PW’s 8, 10 and 11 deposed against the appellant that they have deposited the amount with the appellant however they have not provided proof that the amount was handed over by them to the appellant. Though they produced the slips before the investigation officer and the investigation officer had not sent the same to the handwriting expert to confirm that these slips were issued or signed by the appellant.

11. PW-2, Muhammad Shahzad Akhtar deposed that he received an oral complaint from the account holder that an amount of Rs.4,63,000/- had not been accounted for in his account bearing No.KBS-60-8 which he had deposited on 16.1.1999. He verified the record and also the working sheet of that date but did not find any entry of the above amount. Then on 23.8.1999 another account holder Shafiq Kazi also came and claimed that her amount of Rs.53,700/- has not been accounted for in her account bearing No.PLS-1079-9 which she had deposited on 16.01.1999. She also submitted a counterfoil of the deposit pay slip which he verified the record as well as a working sheet of the concerned date but did not find any such entry. Thereafter, on 20.08.1999 another account holder namely Muhammad Sajid having A/c No.2553-6 came and complained that he had deposited a total amount of Rs.261,462/- by way of three deposit slips which has not been accounted for. He provided foil of the deposit slips as proof of deposit which were for Rs.51,462/- dated 20.5.1999 and Rs.95,000/- dated

22.5.1999. These slips showed that amount has been received by cashier/accused Kamran Mirza whereas 3rd for Rs.115,000/- dated 14.5.1999 was showing the amount **received by cashier Manzoor Hussain**. Again on 3.9.1999 another account holder Nasir Mehmood Khan having A/C No.7758-6 appeared and claimed not to account for an amount of Rs.50,000/- which he had deposited on 27.2.1999. He also provided as proof the counterfoil of deposit pay in slip dated 27.2.1999 which shows the amount **received by cashier Manzoor Hussain**. Again on 28.8.1999, Syed Mehtab H. Zaidi complained that his installment of HBFC of Rs.1000/- has not been accounted for which he deposited on 3.4.1999 and he provided the counterfoil of the deposit slip. On 2.12.1999 Amjad Ali account holder of A/C No.2175-1 came and lodged a complaint regarding non-accounting for of his deposit of Rs.150,000/- which he deposited on 25.1.1999. He produced a counterfoil of deposit pay in slip and the said slip is **in the handwriting of S.M. Haider** who was Manager at that time and the amount was received by accused Kamran Mirza. On 11.9.1999 one Mehmood Naqi came and complained that he had deposited the installment of HBFC for a sum of Rs.10,000/- on 11.9.1998 which has not been accounted for and the said **amount was received by Manzoor Hussain** and provided counterfoil of deposit pay in slip. On 11.10.2000 he handed over documents pertaining to the case to the I.O who seized those documents through a seizure memo. No inquiry was conducted by the bank and if any was conducted it was not brought before the trial court. This witness belongs to Bank and he had not produced any evidence in respect of the posting of the appellant at the time of depositing the amount by the persons who made a complaint to him. **As per his evidence, the amount was received and the slips were issued by the accused Manzoor Hussain, S.M. Haider and appellant Kamran Mirza his evidence in respect of accused S.M. Haider was not believed by the trial court and S.M. Haider was acquitted.** Further, he admitted during cross-examination that at the time of the alleged fraud he was not posted at the said Bank. He further stated that ***“It is fact that at that time two cashiers used to sit on the cash counter one for receiving the cash and the other to pay the cash. I do not know that the accused present in court was used to sit on the counter of payment of cash as at that time I was not posted in the said branch.”*** This witness also admitted that ***“The case was registered prior to my posting in the said branch as such I have no knowledge about this case.”*** Evidence of PW-3, Muhammad Nasir Umar is only in respect of the issuance of cheque books.

12. The **investigation officer PW-1 Deedar Ali Shaikh** was examined and as per his evidence he received the case papers along with a written complaint of Manager MCB, from PS Sharifabad and his letter through DD FIA, CBC, Karachi on 7-8-1999 on such basis he registered the FIR No.31/1999. He arrested accused Kamran Mirza on 7.8.1999 and recorded the statements of PW Abdul Razzaq, Amin Khatri and others u/s 161 Cr.P.C. then submitted interim challan against the accused. He also recorded the statements of PWs U/S 161 Cr. P.C. of Muhammad Rafiq Ahmed and Muhammad and he has not deposed a single word as to whether he sent a receipt for the opinion of the handwriting expert or not nor he had exhibited any report of the handwriting expert. The opinion of a Police Officer who had investigated the case as to the guilt or innocence of an accused person is not a relevant fact, and is therefore not admissible, under the Qanun-e-Shahadat Order, 1984; as he is not an "expert" within the meaning of that term as used in Article 59 of the Qanun-e-Shahadat Order, 1984. Even the Criminal Procedure Code (Cr. P.C) does not authorize him to form such an opinion. Determining the guilt or innocence of an accused person alleged to be involved in the commission of an offence is a judicial function that can only be performed by a court of law. This judicial function cannot be delegated to the Police Officer investigating the case. The Police Officers are empowered under the provisions of Chapter XIV of the Cr. P.C., only to investigate the non-cognizable offence with the order of a Magistrate and the cognizable offence without such order. This power of investigation, in no way, includes the power to determine the guilt or innocence of the accused persons. An investigation, as defined in section 4(1)(l) of the Cr.P.C., includes all proceedings under the Cr.P.C. for the collection of evidence conducted by a Police Officer or by any other person authorized by a Magistrate. This definition makes it clear that the assignment of a Police Officer conducting an investigation is limited to the collection of evidence, and the evidence when collected has to be placed by him before the competent court of law. Only the court has the power and duty to form an opinion about the guilt or innocence of an accused person and to adjudicate accordingly based on evidence produced before it. An opinion formed by the investigating officer as to the non-existence or existence of sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused person to

a Magistrate under sections 169 and 170 of the Cr. P.C. does not amount to an opinion as to the guilt or innocence of the accused person. Despite such opinion of the investigating officer the final determination even as to the existence or non-existence of sufficient ground for further proceeding against the accused person is to be made by the Magistrate under sections 173(3) and 204(1) of the Cr.P.C. on examining the material available on record and not based on the opinion of the investigating officer. Since the evidence of the witnesses of the case is not believed by this court as discussed above then the evidence of the investigation officer only is not sufficient to maintain conviction. Reliance is placed on the case of ***Muhammad Idrees and another v. The State and others (2021 SCMR 621)***.

13. As per the prosecution case appellant and co-accused S.M. Haider were jointly involved in the misappropriation of funds/amount and the deposit slips produced by the P.Ws were alleged to be issued or signed by them. Both were sent up for trial however the trial court disbelieved the same evidence against co-accused S.M. Haider and acquitted him and believed such evidence only against the appellant and awarded a conviction. It is well settled that if a set of witnesses is disbelieved to the extent of some accused the same cannot be believed in respect of the remaining accused facing the same trial without any independent and strong corroboration. Upon scrutiny of the material available on record, we find no corroboration to maintain the conviction and sentence of the appellant.

14. The case of the prosecution is based on oral as well as documentary evidence and we have already disbelieved the oral evidence against the appellant therefore there becomes only documentary evidence in the shape of counterfoils and the receipts showing the amount was deposited and the bills were paid in the bank. The prosecution has not produced convincing evidence to prove that at the relevant time the appellant was posted as a cashier however it has come in evidence that at that time three persons were posted as cashiers. We observed that the production of documents and proof of documents are two different subjects. The document could be

produced in evidence that was always subject to proof as required under Art. 78 of Qanoon-e-Shahadat, order, 1984, which provides that “If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting”. The other aspect regarding the proving of the document is provided under Art, 79 of Qanoon-e-Shahadat Order, 1984 which provides that “If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence. **Provided** that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.” The documents relied upon by the prosecution against the appellant were never sent for seeking expert opinion in respect to confirming the signature of the appellant on it nor the prosecution produced any document to prove that the appellant was posted as a cashier at the bank at the relevant time. Thus the documentary evidence so produced by the prosecution is also not sufficient to maintain the conviction of the appellant.

15. It is a settled principle of law that no one should be convicted of a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible. Similarly, the mere heinous or gruesome nature of crime shall not detract the court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused.

16. Based on the above discussion and our reassessment of the evidence on record we are of the view that the prosecution has failed to prove its case against the appellant beyond any reasonable doubt and therefore, we allow the instant appeal and set aside the conviction and sentences awarded by the trial court vide judgment dated: 24-10-2021

and acquit the appellant from the charges by extending him the benefit of the doubt. The appellant shall be released forthwith unless wanted in any other custody case.

17. The above appeal is disposed of in the above terms.

JUDGE

JUDGE