

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

CRIMINAL APPEAL NO.638 OF 2022

Appellant: Khawaja Saeed Ahmed S/o. Khawaja Ghulam Muhammad through Mr. Muhammad Nadeem Khan, Advocate.

Respondent/State: Through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh

CRIMINAL APPEAL NO.620 OF 2022

Appellant: Abdul Hameed S/o Khuda Bux, through Mr. Sarfaraz Ali Metlo, Advocate.

Respondent/State: Through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh

CRIMINAL APPEAL NO.631 OF 2022

Appellant: Muhammad Asif Nawaz S/o Muhammad Aslam through Mr. Javaid Ahmed Rajput, Advocate.

Date of hearing: 19.02.2024

Date of announcement: 26.02.2024

JUDGMENT

Mohammad Karim Khan Agha, J.- Appellants Khawaja Saeed Ahmed, Abdul Hameed and Muhammad Asif Nawaz have preferred these appeals against the impugned judgment dated 28.10.2022 passed by the learned Special Judge, Anti-Corruption (Provincial), Karachi in Special Case No.46/2019 under F.I.R. No.45/2019 u/s. 409/420/34 PPC R/w Section 5(2) of Prevention of Corruption Act-II, 1947 registered at ACE, Karachi; whereby the appellants were convicted under Section 409 r/w Section 34 PPC and sentenced to R.I. for four years and to pay fine of Rs.50,000/- each. In case of default in payment of fine, they shall further serve S.I. for four months more. The appellants were also convicted u/s

5(2) Prevention of Corruption Act, 1947 and sentenced to R.I. for one year and to pay fine of Rs.30,000/- each. In case of default in payment of fine, they shall further serve S.I. for one month more. The sentences shall run concurrently. However, the benefit of Section 382-B Cr.P.C. was extended to the appellants.

2. The brief facts of the prosecution case as per FIR are that on 13.11.2015 Muhammad Asif Nawaz submitted surety documents viz. Defense Saving Certificate No.JB-383878 & JB-387879 amounting to Rs.50,000/- each in Bail Application No. 2820/2015 in respect of FIR No.672/2015 of PS Ferozabad Karachi but Abdul Hameed, Junior Clerk, Court of IVth Additional District & Sessions Judge Karachi East handed over the said Special Saving Certificates to Khawaja Saeed Ahmed (though he was not surety in said bail application) without any reasons. From the investigation, it transpired that Abdul Hameed, Junior Clerk, Court of IVth Additional District & Sessions Judge Karachi East fraudulently and dishonestly gave/handed over above Defense Saving Certificate to Khawaja Saeed Ahmed which then reached Muhammad Asif Nawaz who was the surety who encashed the same despite the accused being on bail and his trial proceeding. Hence, they committed cognizable offence u/s 409/420/34 PPC R/w Section 5(2) Act-II of 1947. Therefore, the case was registered against them on behalf of the State.

3. After completion of usual investigation, a charge was framed against the accused persons to which they pleaded not guilty and claimed to be tried.

4. In order to prove its case, the prosecution examined 05 witnesses who exhibited various documents in support of the prosecution case where after the prosecution closed its side. The statement of the appellants/accused was recorded under Section 342 Cr.P.C. wherein they denied the prosecution allegations and claimed themselves as innocent. However, the appellants neither examined themselves on oath nor produced any witness in their defence.

5. After hearing the learned counsel for the parties and assessment of evidence available on record, learned trial Court vide judgment dated,

28.10.2022 convicted and sentenced the appellants as stated above, hence these appeals against conviction have been filed.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellants all claimed that they were innocent. In particular, Abdul Hameed contended that there was no evidence that he had handed over the certificates to any one; that no witness has deposed against him and that the ingredients for the offences for which he was convicted had not been made out; the learned counsel for the appellant Kh. Saeed contended that there was no evidence that the certificates had ever been handed over to him; that no witnesses has implicated him in the offence; that he was not the beneficiary and that he had only been implicated on the basis of the statement of a co-accused Abdul Hameed which was of no evidentiary value; learned counsel for the appellant Asif Nawaz contended that the surety documents had been handed over to him by the accused/Adnan and he had encashed them as was his right; that he had no idea that the surety documents had been obtained by any wrong doing. All the accused contended that based on the above contentions they should be acquitted by being extended the benefit of the doubt. In support of their contentions they placed reliance on the cases of Ayub Masih v The State (PLD 2002 SC 1048), Muhammad Samiullah v The State (2022 SCMR 998), Abdul Rashid Nasir & Ors. v. The State (2009 SCMR 517), Tariq Pervez v The State (1995 SCMR 1345), Muhammad Yousuf v The State (2020 YLR Note 132), Abdul Karim Kumbar v The State (2021 YLR Note 10), Imtiaz Ali v The State (2019 YLR 2807), Eshwar Lal v The State (2022 YLR Note 103), Syed Altaf Hussain Shah v The State (2018 YLR 482), Zakir Ali v The State (2022 YLR Note 147), Bashir Ahmed v The State (2022 P Cr.L.J Note 16), Najaf Ali v The State (2021 YLR Note 86) and Muhammad Zeeshan v The State (2021 MLD 60).

8. Learned Adl. Prosecutor General contended that the appellant Abdul Hameed was entrusted with the surety documents who deliberately, dishonestly and in order to cause misappropriation without

lawful authority committed breach of trust by giving the surety documents to appellant Kh.Saeed who was not the surety in the first place which found there way to appellant Asif Nawaz who was the surety who encashed the same despite these documents being required for the production of Adnan before the trial court as they were surety documents for his bail. He placed reliance on the record.

9. I have heard the arguments of learned counsel for the parties and scanned the entire evidence minutely.

10. After my reassessment of the evidence on record, I find that the prosecution has proved beyond a reasonable doubt the charge against the appellants Abdul Hameed and Kh.Sharif for which they were convicted for the following reasons;

- (a) The potential offence emerged when the court of IV Addl District and Sessions Judge Karachi East passed the following order on 18.01.2016 based on a report by appellant Abdul Hameed Junior Clerk;

"ORDER
18.01.2016

Mr. Abdul Hameed Jr. Clerk of this court has submitted report regarding misplacement of surety documents in bail application No.2820/2015. He has informed that on 13.11.2015 surety documents Viz Saving Certificate No.JB.383878 and JB.387879 amounting Rs.50,000/- were submitted by surety Mohammad Asif Nawaz son of Mohammad Aslam in Bail Application No.2820/2015 for the accused person.

On that day one Khawaja Saeed came with surety before Mr. Abdul Hameed Jr. Clerk and took away Saving Certificates as mentioned above from him for obtaining photo copies of the same which amounted to Rs.1,00,000/- (Rupees One Lac) but thereafter, he did not turn up. He further submitted that he then approached him to return original Defense Saving Certificates but on one or the other pretext he delayed and ultimately, he did not return the same.

In view of above submission, Mr. Abdul Hameed Jr. Clerk is directed to appear before SHO P.S. City Courts and record his statement u/s 154 Cr.P.C. and to proceed in accordance with law. (Bold added)

Announced in open Court.

Given under my hand and seal of this court on 18th day of January 2016.

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(INAM ALI KALHORO)
IVTH ADDITIONAL SESSIONS JUDGE
KARACHI EAST.

Two copy of order dated 18.01.2016 forwarding to the SIO PS City Court Karachi for information and compliance under intimation to this Court.

(b) From this order it is clear that Appellant Abdul Hameed Junior clerk of the court took away the saving certificates which were entrusted to his safe custody and used as surety documents in criminal bail application No.2820/2015 amounting to RS one lac and gave the same to appellant Kh.Saeed for photocopying which were not returned by Kh.Saeed despite the best efforts of appellant Abdul Hameed. This lead to appellant Abdul Hameed recording his S.154 Cr.PC statement on 18.01.2018 which is set out below for ease of reference;

IN THE COURT OF AREA MAGISTRATE, PS.M CITY COURT
KARACHI
FIRST INFORMATION REPORT OF A COGNIZABLE CRIME
REPORTED U/S: 154 CR.P.C. AT THE POLICE STATION.

F.I.R. No. 05/2016	POLICE STATION: CITY COURT	DISTRICT: CITY South, Karachi
Date and hour of occurrence:	13-11-2015 court time	
1).DATE AND HOUR OF REPORT:	18-01-2016 1500 Hrs.	
2). NAME AND RESIDENCE OF INFORMATION AND COMPLAINANT	Mr. Abdul Hameed S/o Khuda Bux, posted as Junior Clerk in the Court of IVth. ADJ East Karachi. Phone No.0341-2762756-7 CNIC No.42201-3365675-7	
3). BRIEF DESCRIPTION OF OFFENCE (WITH SECTION AND OF PROPERTY CARRIED OF, IF ANY).	Offence U/s. 406 PPC	
4). PLACE OF OCCURRENCE AND DISTRICT AND DIRECTION FROM THE POLICE STATION	Inside office of the IV ADJ East City Court, Karachi, at a distance of about 200 paces, towards west from PS	
5). STEPS TAKEN REGARDING INVESTIGATION AND EXPLANATION OF DELAY IN RECORDING INFORMATION IF ANY.	Case is being registered by the written order of the IVth. ADJ East Karachi. The SIO of above P.S., shall investigate the case.	

6). DATE AND HOUR OF
DISPATCH FROM THE POLICE
STATION.

By post

SIGNATURE: Sd/- (in
English)

ASL

At this time, it is written that one written order issued by the Court of
IVth. ADJ East Karachi through Abdul Hameed S/o Khuda Bux, Junior Clerk of
above Court was received from recording statement U/s 154 Cr.P.C.

STATEMENT UNDER SECTION 154 CR.P.C.

Statement deposed by Mr. Abdul Hameed S/o Khuda Bux, posted as
Junior Clerk in the Court of IVth. East Karachi, having phone No.0341-2762756,
NIC No.42201-3365675-7, on enquiry stated that; I am posted as Junior Clerk in
above Court. On 13-10-2015, Muhammad Asif Nawaz son of Muhammad Aslam
submitted surety documents viz. Defence Saving Certificate No.JB-383878 & JB-
387879 amounting Rs.50,000/- each in Bail Application No.2820/2015 for the
accused persons involved in Case No.672/2015 of PS Ferozabad Karachi and on
the same day the person namely Khawaja Saeed came at my office and
said me that certificates which have been got submitted by Muhammad
Asif Nawaz as surety, copies whereof has to get made, upon which I
handed over the said Special Saving Certificates to Khawaja Saeed but
neither Khawaja Saeed returned me original saving certificates nor has
come back to me till today. I informed such facts to my Judge in above
Court. Now I have come at police station to register FIR against Khawaja Saeed
by the order of Hon'ble Court. My complaint is against Khawaja Saeed to
take away saving certificates from me by committing fraud. This much is
my statement. (bold added)

Sd/- (In English)
Mr. Abdul Hameed
dated 18-01-2016

- (c) In this FIR which was signed by appellant Abdul Hameed
roughly the same facts are set out as per court order
reproduced above whereby he admits handing over the
surety documents to appellant Kh.Saeed for photocopying,
but the same were not returned to him.
- (d) Admittedly, the FIR was lodged after a delay of five days
however I do not see this as being fatal to the prosecution
case. This is because the FIR is in effect roughly the same as
the court order which was passed 5 days ago so there was no
time for the appellant Abdul Hameed to cook up a false case
against anyone. In fact it is his complainant which lead to both
the court order and FIR whereby he admits his liability of
handing over the surety documents to Kh.Saeed. In any event

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the explanation has been provided for the delay namely that the office where the FIR was to be lodged was closed due to COVID. As such any delay in lodging the FIR has been fully explained and as such the delay in lodging the FIR is not fatal to the prosecution case. In this respect reliance is placed on the case of Muhammad Nadeem alias Deemi v. The State (2011 SCMR 872).

- (e) The ~~in~~ the FIR, which is admittedly not a substantive piece of evidence, contains a full admission that the appellant Abdul Hameed handed over the surety documents without any lawful authority of which he was custodial to appellant Kh.Saeed who he had no enmity with and no reason to implicate in a false case.
- (f) That the appellant Abdul Hameed was the custodian of the surety documents which by his own admission he gave to appellant Kh.Saeed to photocopy. Appellant Kh. Saeed was not the surety and appellant Abdul Hameed had no lawful authority to hand over the surety documents to him for photocopying or otherwise. If legally a photo copy of the surety documents could have been given to appellant Kh.Saeed then appellant Abdul Hameed should have made such copies at the cost of appellant Kh. Saeed whilst retaining the originals with him at all time. **Admittedly**, no order for return of surety has been placed on record by appellant Abdul Hameed which could permit him to return the documents only to the surety (which appellant ~~Kh~~.Saeed was not) subject to proper verification and identification and in accordance with the rules. Not only did the appellant breach his trust by handing over the surety documents in collusion with a person he knew but in the end the surety was misappropriated from the court as it was encashed by appellant Asif Nawaz as per evidence of PW 2 Naveed Hayat and the documents which he exhibited. Notably in his S.342 Cr.PC statement the appellant Abdul Hameed denied giving the surety documents to appellant Kh.Saeed and Kh.Saeed denies receiving the surety documents. I find this to be a complete after thought by appellant Abdul Hameed especially in the face of the earlier reproduced court order which was based on his report and his own FIR.
- (g) The link between appellant Abdul Hameed who gave the surety documents to appellant Kh.Saeed of which he was custodial of without lawful authority is established by the fact that after appellant Abdul Hameed's arrest he took the police to PECHS Block II, tailor shop where on his pointation appellant Kh.Saeed was arrested which clearly shows that the appellant Abdul Hameed knew appellant Kh.Saeed from before and was a part of the misappropriation of the surety documents and breach of trust committed by appellant Abdul Hameed.

- (h) Further involvement of appellant Abdul Hameed and appellant Kh.Saeed in this offence is shown through appellant Abdul Hameed's cross examination of PW 5 Jalaluddin who was the IO of the case which is reproduced as under for ease of reference;

"It is incorrect to suggest that other accused cheated the clerk Abdul Hameed and he is not involved. It is correct to suggest that there was no any NOC from the court for encashment of saving certificates. During my investigation I came to know that accused Kh. Saeed arranged rented house for co-accused Abdul Hameed and by that reference, they had relations."

- (i) Appellant Kh.Saeed had no lawful authority to obtain the surety documents from appellant Abdul Hameed yet based on the Court order and FIR he did so and proceeded to misappropriate the surety amount through appellant Asif Nawaz and assist in appellant Abdul Hameed's breach of trust.
- (j) As such I find that from the evidence on record the ingredients of the offence for which the appellants Abdul Hameed and Kh.Saeed have been fully made out and as such their convictions are maintained.

With regard to sentencing:

- (k) the sentence under Section 409 R/w Section 34 PPC since the appellants Abdul Hameed and Kh.Saeed are first time offenders and the amount involved is relatively minor being only RS one lac is reduced from RI for 4 years to RI for 2 years each and each of their fines is reduced to RS25,000 each and in default they shall undergo S.I for 2 months more.
- (l) The sentence in respect of Section 5(2) Prevention of Corruption Act 1947 in the impugned judgment in respect of appellants Abdul Hameed and Khwaja Saeed shall remain unchanged.

11. With regard to Asif Nawaz admittedly he was the surety but the only evidence against him is that he appears to have received his surety back from Adnan (for whom he stood as surety) and there is no evidence to link him to appellant Abdul Hameed and Kh.Saeed in respect of these offences. Being surety his natural human conduct when receiving the surety would have been to encash the same. The IO did not examine Adnan so there is no way of knowing for sure who gave back appellant Asif Nawaz his surety or proving that he had any mens rea in colluding with his co-accused and as such appellant Asif Nawaz is acquitted of the charge by being extended the benefit of the doubt.

12. In conclusion.

- (a) Appellant Asif Nawaz is acquitted of the charge, his appeal is allowed and his bail bonds stand discharged and he is free to go;
- (b) Appellants Abdul Hameed and Khwaja Saeed's bail is recalled and they stand convicted and sentenced as set out earlier in this order. They shall be taken into custody by SHO PS City Court South who shall return them to Central Prison Karachi to serve out the remainder of their sentence which shall run currently with each being given the benefit of S.382 (B) Cr.PC.
- (c) A copy of this Judgment shall be sent to SSP South for compliance.
- (d) The appeals are disposed of in the above terms.

MAKPS