ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Criminal Acquittal Appeal No.10 of 2013

Date	Order with signature of Judge

Present: Mr. Justice Nazar Akbar

Appellant : Muhammad Hanif Khan
Mr. Khalid Ahmed Khan, Advocate.

Versus

Respondent No.1 : The State.
Ms. Rahat Ahsan, Additional P.G.

Respondent No.2 : Niaz Ahmed Khan
Respondent No.3 : Shahzad Ahmed
Respondent No.4 : Haji Muhammad Akbar Khan, all through
Mr. Muhammad Akbar Khan, Advocate.

Date of hearing : **07.03.2019**

Date of decision : **12.04.2019**

JUDGMENT

NAZAR AKBAR, J:- This Crl. Acq. Appeal is directed against the Judgment dated **10.12.2012** passed by the learned VII-Judicial Magistrate, Central Karachi in Criminal Case No.253/2008 arising out of FIR No.418/2007 under Sections 420/471/468/34 PPC registered at P.S North Nazimabad, Karachi, whereby learned trial Court had acquitted the accused/Respondents No.2 to 4.

2. Brief facts of the case are that the appellant/complainant Muhammad Hanif Khan registered FIR against respondents No.2 to 4 stating therein that he and his family members wanted to go to perform Hajj and in this regard he after seeing the advertisement of Karvan-e-Abdullah, Al-Jamil Square, Block-G, North Nazimabad, Karachi went in their office and met with accused/respondent No.2

and asked him about the expenses of Hajj. Respondent No.2/accused told him the expenses at Rs.170,000/- per head and in this respect the appellant/complainant filled the proforma and deposited the payment of his six family members and one neighbor namely Mohammad Hanif for performing Hajj but after sometime when appellant did not receive information from the office of Karwan-e-Abdullah, he went to their office for enquiry but said office was found closed and he met some other persons who were also came there for same purpose. On enquiry it was transpired that respondents/ accused had not deposited any amount in the concerned Hajj office and respondents/accused committed fraud and in this regard many people were effected and the accused/respondents used forged documents as genuine and committed breach of trust, therefore, FIR was lodged against respondents No.2 to 4/accused.

3. On completion of investigation, charge sheet was filed in the trial Court and formal charge was framed against accused persons to which they pleaded not guilty and claimed to be tried. The prosecution examined eight PWs and thereafter the prosecution closed their side for evidence. When statements of respondents No.2 to 4/accused were recorded under **Section 342** of the **Cr.P.C**, they again denied the allegation as leveled against them. Only Respondent No.2 Niaz Ahmed Khan examined himself on oath under **Section 340(2)** of the **Cr.P.C**. Respondents No.3 and 4 neither recorded their statement on oath nor led any evidence in their defence. Then after hearing learned counsel for the parties, learned trial Court acquitted accused/ Respondents No.2 to 4. Therefore, complainant/ appellant has filed the instant Criminal Acquittal Appeal against the said acquittal order.

4. I have heard learned counsel for the parties and perused the record.

5. The main thrust of the arguments of learned counsel for the appellant is about violation of **Section 367** of the **Cr.P.C** by the learned trial Court. He has vehemently contended that the trial Court has failed to examine the evidence of the parties in the judgment. He has contended that not only the evidence of the prosecution was not discussed and examined by the trial Court but also the evidence of Respondent No.2 has been totally ignored. Respondent No.2 has on oath made a statement under **Section 340(2)** of the **Cr.P.C**. He has contended that Respondent No.2 has admitted running business of Hajj and Umrah and collected money from different customers but even his statement under Section 340(2) of the Cr.P.C has not been referred in the impugned order. The learned counsel has also drawn my attention to the statements of accused under **Section 342** of the Cr.P.C. He pointed out that not a single document produced in evidence against the Respondents was confronted to them and, therefore, even statement under **Section 342** of the Cr.P.C was defective and such failure of the trial Court also renders the judgment liable to be set aside.

6. Learned counsel for the Respondent/accused has not commented on the non-discussion of evidence of prosecution and statement of Respondent No.2 on oath which has not been discussed by the trial Court in the impugned order. There is no cavil to the general preposition of law referred to by Respondents in their arguments that the burden of proof is always on the prosecution and that how the Court has to discuss the evidence led by the parties for coming to a particular point for determination in the judgment. Both

the parties have filed their written arguments and the written arguments filed by the Respondents in fact confirm the stance taken by the learned counsel for the appellant in their arguments that the Court has not even examined the evidence as required under **Section 367** of the Cr.P.C. Respondents' written arguments have not touched the contentions of learned counsel for the appellant that the trial Court has violated the provisions of **Section 342** and **367** of the Cr.P.C Learned Additional P.G. representing the State has supported the impugned order, however, she also has not commented on the grievance of the appellant against impugned order that it is against the provision of **Section 367** of the **Cr.P.C** and also that the trial Court has not recorded statements of accused under **Section 342** of the Cr.P.C with reference to incriminating evidence against the accused.

7. I have also gone through the judgment and critically analyzed the same. The reasoning part of the judgment starting from page-5 shows that the learned trial Court has reproduced only cross-examination of the prosecution witnesses and there is no mention of examination-in-chief of any of the witnesses. Only cross examination of witnesses has been reproduced in the impugned judgment and after reproduction of the cross-examination, learned Judge without applying his mind acquitted the Respondents in the following passage:-

> *On assessment of evidence available on record, I found following:-*
>
> *a) No Verification of Signature of accused Niaz on `receipt as Exh.4/A.*
>
> *1. It is admitted by PW-8 SIO Mehmood Khan admitted in his cross that he did not verify the signature of accused Niaz on receipt At Exh.4/A, he deposed as "It is correct to suggest that the signature of accused Niaz*

does not match with the signature obtained by him in the investigation report. I cannot give any opinion whether the signature Exh.4/A bears the signature of Niaz or Not. I have not sent Ex.4/A as well as original signature to the hand writing expert to verify the signature on (of) accused/." This fact is confirmed from comparing signature of accused Niaz on statements of accused US 342 Cr.P.C and 340(2) Cr.P.C at Exh.17 and Exh.18 with Exh.4/A.

b) Production of Photo copy of application US 154 Cr.P.C as well as FIR.

Prosecution failed to produce original application US 154 Cr.P.C as well as FIR before court without showing any plausible reason for production of photo copy instead of original.

c) Lacking of Ingredients of offence Criminal breach of trust and misappropriation.

It is pertinent to mention here that there is no evidence available on record led by the prosecution to prove the entrustment to accused and prosecution failed to prove the charge of Criminal breach of trust and misappropriation.

d) No Evidence in respect of forted documents.

Prosecution failed to produce any evidence in respect of forged document. Moreover, PWs gave contradictory statements which create dent in prosecution case.

In present case the evidence relied upon by the prosecution does not inspire confidence.

Upon scrutiny of prosecution evidence as discussed herein above, it is difficult to perceive that the guilt of accused person has been established according to scheme of section 420/468/471/34 PPC, as prosecution failed to connect the accused with ingredients of offence nor proved the fake/forged documents.

I have never come across such kind of appreciation of evidence for coming to the conclusion on the point for determination in criminal cases. It looks that there is no assessment of evidence on the composite story developed by the prosecution. There is no mention of the statement of Respondent No.2 under **Section 340(2)** of the Cr.P.C in which there has been incriminating evidence of receiving money from the intending Hajis which he claimed to have passed on

to the others. The Court is not supposed to look for one or two lacuna in the story on the basis of documents recklessly produced by the prosecution to determine guilt of culprits in criminal cases. The entire evidence has to be examined and the Respondents under **Section 342** of the Cr.P.C were required to be confronted with the evidence brought against them. The Court has to focus on the allegations and the other evidence produced by the prosecution which includes examination-in-chief of witnesses. Mere cross-examination would not be considered as evaluation of the evidence or a proper assessment of the evidence led by the parties. In several case-laws it has been held by the superior Courts that evidence is not merely cross examination. The evidence is both the examination-in-chief and the cross examination and even re-examination, if any. In the case in hand there has been an examination-in-chief of even Respondent No.2 in shape of his statement on oath under **Section 340(2)** of the Cr.P.C and that too should have been reflected in the very judgment even for the purpose of acquittal. The perusal of statement of accused available at page-181 to 193 also adversely reflects on the equality of proceeding in the trial Court. The impugned order appears to be devoid of reasoning of learned Judge for accepting or rejecting the evidence of prosecution. In the case of Shahid and 2 others vs. The State reported in **1996 SCMR 1368** the Hon'ble Supreme Court has observed as follows:-

> ***Section 367, Cr. P.C****. requires that the judgment of the Court should contain the point or points for determination, the decision of the Court on such points, and reasons for the decision. Therefore, failure of the State Counsel to offer satisfactory reply to the criticism of the defence counsel to the prosecution evidence could not result in the acceptance of the contention of the defence counsel, thereby absolving the Court from its duty to examine and evaluate the evidence in the case and recording the reasons for acceptance or rejection of*

> *the evidence as required by law.* ***We are sorry to say that the Trial Court while dealing with the prosecution evidence in the case did not record his own reasons for rejecting the prosecution evidence. Mere reproduction of the criticism of the defence counsel to the prosecution evidence in the case was not sufficient to absolve the Court from its duty to record its own reasons for acceptance or rejection of the prosecution evidence.*** *In these circumstances, the learned Judge in Chambers was fully justified in interfering with the judgment of acquittal which was passed by the learned Trial Court without evaluating prosecution evidence in the case.*

In another case of Muhammad Shah vs. The State reported in **2010 SCMR 1009** in para-11 the Hon'ble Supreme Court has observed as follows:-

> *11. It is not out of place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him.* ***It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C. in which the words used are "For the purpose of enabling the accused to explain any circumstances appearing in evidence against him" which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984.***

8. In view of the above, the contentions of the learned counsel for the appellant that the incriminating material and major part of prosecution evidence has not been properly examined by the trial Court appears to be justified. However, as an appellate Court unless

the trial Court thoroughly examine the evidence in the judgment in terms of **Section 367** of the Cr.P.C it would not be appropriated on the part of this Court to re-write the judgment on the basis of evidence which has not been discussed by the trial Court. In any case lacuna in recording statement of Respondents under **Section 342** of the Cr.P.C cannot be removed by the appellate Court.

9. In view of the above, as the impugned judgment was not in accordance with **Section 367** of the Cr.P.C, therefore, the same is set aside and the case is remanded to the trial Court with direction that the trial Court shall record statement of all the accused afresh strictly in accordance with the requirement of **Section 342** of the Cr.P.C and decide the case after hearing all the parties on merit in accordance with law. The respondents are present in Court, they are directed to appear before the VII-Judicial Magistrate, Central Karachi for recording their statement afresh under **Section 342** of the Cr.P.C and if so advised, their statements on oath in terms of **Section 340(2)** of the Cr.P.C may also be recorded on oath. They should appear before the trial Court on **20.04.2019**. They were on bail, therefore, they should submit fresh surety of the same amount for which they had earlier granted bail pending the trial before the trial Court. In case they fail to appear, the trial Court may issue only once a Bailable warrants and if they again fail, Non-bailable warrants may be issued forthwith. The trial should be concluded within six months from **20.04.2019**.

JUDGE

Karachi
Dated:12.04.2019

Ayaz Gul