

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.390 of 2017

Present: **Mr. Justice Nazar Akbar**

Appellant : Rehmatullah Rehan, through
Mr. Ashfaqe Ahmed Shah, advocate

Versus

Respondent No.1 : Muhammad Zia-ud-Din,
Through Mr. Ishrat Ghazali, advocate.

Respondent No.2 : The State
Through Ms. Rahat Ahsan, Addl. P.G.

Date of Hearing : **14.01.2019**

Date of Decision : **26.03.2019**

J U D G M E N T

NAZAR AKBAR, J.- Appellant Rehmatullah Rehan has preferred this Criminal Appeal against his conviction order dated **25.8.2017** delivered by learned VIIIth Additional Sessions Judge, West Karachi in Direct Complaint No.1886/2015 filed by respondent No.1 under Section 200 Cr.P.C allegedly for an offence under **Sections 500 and 501 PPC**, whereby the appellant was sentenced in the following terms:-

*Based on what have been discussed above, I feel that complainant had proved his case against accused beyond reasonable doubt. Accused had made application which contains words which are found defamatory and thus, accused Rehmatullah Rehan son of Abdul Rehman is found guilty of offence under section 499 P.P.C and resultantly, I convict him under section 265 H(ii) Cr.P.C r/w 500 P.P.C and sentence him to fine only by taking lenient view that he is first offender and **charge against him is one of criminal as well as tort in nature.** He is holding a company and putting him in jail would also cause hardship for his livelihood and his family. Thus, in the light of all circumstances, **he is directed to pay rupees 1 lac (1,00,000) as fine to the complainant within period of 30 (thirty) days.** In default of payment of fine, he shall undergo simple imprisonment for period of 3 months. Accused is*

present on bail. His bail bond is cancelled and surety stands discharged.

2. To be very precise, the facts of the case are that Respondent No.1 on **03.8.2015** before the VII Judicial Magistrate West Karachi filed a complaint under Section 200 Cr.P.C against two persons namely Rahmatullah Rehan (Appellant) and Jaffer Nadeem stating therein that he is running his business of Ship Chandelling by the name and style of M/s Minara International since 1986 and the appellant and Jaffar Nadeem are also running similar business under the name and style of M/S Chatriwala International and M/S Falcon International respectively. He averred that he (the complainant) had filed complaints to Chairman PNSC not only against these two persons but also against M/S Niaz & Co. and after enquiry, their business firms were blacklisted. It was also averred that thereafter the appellant and Jaffar Nadeem started to defame Respondent No.1 and his business by moving false complaints and published pamphlets with defamatory words within the business community. On **27.07.2017** Respondent No.1 received a complaint whereby he came to know that the appellant had sent an Email dated **11.02.2014** to the Chairman PNSC wherein defamatory words against the reputation of Respondent No.1 and his brother were made. The said complaint of the appellant and Jaffar Nadeem was not entertained by PNSC on account of being false. Even on approach by respondent No.1 with request not to distribute the copy of the false complaint among the business community and the society as it would cause loss to his business, they did not stop. The complainant also approached police but police has refused to take any action. (Para, 4, 5, 6 and 7 of the complaint), therefore, on **03.8.2015** Respondent No.1 filed direct complaint under Section 200 Cr.P.C in the Court of learned VII Judicial Magistrate, West Karachi. On

28.8.2015 it was forwarded the direct complaint to the District Judge, West Karachi as the alleged offence was triable by Sessions Court. It was marked to VIII-Additional Sessions Judge, West Karachi by the learned Sessions Judge. On **18.9.2015** after recording statement of Respondent No.1 under **Section 202 Cr.P.C** by himself learned VIII-Additional Sessions Judge referred the case to **Ind Judicial Magistrate**, West Karachi for holding preliminary enquiry to ascertain truth and/or falsehood of the complaint.

3. On **02.2.2016** the Judicial Magistrate submitted preliminary enquiry report to the learned VIII-Additional Sessions Judge, West Karachi and by order dated **27.4.2016** he took cognizance of the offence against the appellant. Then after recording evidence and hearing the learned counsel for the parties, the applicant was convicted and sentenced as stated above. Therefore, the appellant has filed the instant Criminal Appeal.

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

5. Learned counsel for the appellant has contended that from the evidence it was very clear that no case of an offence punishable under **Section 500 PPC** was made out as at every stage the complainant (respondent No.1) has failed to prove defamation or any loss sustained by him and his brother beyond reasonable doubt. The malafide and harassment, he further contended, in filing direct criminal complaint may be appreciated from the facts that initially he had made a complaint against two persons for the offence of defamation, however, even before the Magistrate in the preliminary enquiry he has failed to bring any evidence worth taking any cognizance against either of the two accused. He further contended that the complainant has shown three witnesses in support of his

private complaint including his real brother and before the Magistrate only his real brother Muhammad Naemuddin and one witness Muhammad Iqbal have appeared. His third witness has refused to appear before the Magistrate. Not only this, but at the trial stage even these two witnesses refused to support the complainant. Therefore, the learned trial Court has wrongly concluded that the case of the complainant is proved beyond any doubt and legal lacuna. On the other hand learned counsel for the complainant has contended that enough evidence has come on the record that an attempt to defame Respondent No.1 has been made by the appellant.

6. I have perused the record and gone through the conviction order. The cardinal principle of criminal justice is that the complainant party has to prove the charges in accordance with law against the accused party beyond iota of doubt. The record shows that the complainant has produced only two witnesses including his real brother Muhammad Naemuddin and neighbor Muhammad Iqbal as PW-2 and PW-3. His brother categorically stated as follows:-

I had not received the e-mail which is subject of document X-4 further says but I found copy of this e-mail already dropped in my office. PNSC has never called me in respect of this document X-4. It is incorrect that I do not know what PNSC did on the document X-4 further says they concluded that it is frivolous.-----.

The complainant's brother has further stated in his cross-examination that:-

I cannot say whether complainant had suffered any loss on account accused conduct. I cannot say that this complaint is made by complainant due to professional jealousy as accused is also in business of ship chandelling.

Other witness who was examined on **15.10.2016** totally refused to support the complainant when in his cross-examination he stated that:-

“It is correct that I have no concern with either parties. I have no knowledge of the present case”.

And the complainant on **15.10.2016** has closed his side for evidence. The complaint in view of the above evidence should have been dismissed forthwith. The learned VIII-Additional Sessions Judge was conscious of this legal position. He has even observed failure of complaint to prove his case in para 11 of the impugned conviction order and I quote the same as under:-

It is admitted fact that complainant (respondent No.1) had not produced any evidence as to alleged application made by accused to the Chairman PNSC and neither any pamphlet had been produced by the complainant in evidence. In cross, complainant admitted that;

“It is correct that I have not filed the copy of complaint which accused made against me.-----

*-----
I do not have the original copy of the pamphlet issued by the accused further says the complaint was made through email and said complaint was distributed by pamphlet”*

Further, the witness Muhammad Iqbal appeared before court and deposed that he had no concern with either of the parties and have no knowledge of the present case. **Thus suffice to say that complainant had failed to prove that any defamatory email/ application or even any pamphlet was published by the accused against complainant. Even the version of complainant that he came to know about pamphlet through Muhammad Iqbal is also rendered unproved as said witness did not depose any single word about such fact.** Since the very document which is made basis of the allegation is not produced or proved to exist, this court is not inclined to discuss the said instance in the present matter any further and complainant had failed to prove the case to that extent.

7. However, the record shows that the learned Additional, District Judge **Mr. Naveed Ahmed Soomro** made extra ordinary efforts to ensure that some punishment should be inflicted on the appellant.

The extra-ordinary performance of learned Additional Sessions Judge is apparent from the following Court order sheet:-

15-Oct-2016

*Case called, complainant and his advocate are present. Respondent No.1/accused Rehmatullah Rehan is present on bail. DC & ADPP are present. PW-Muhammad Iqbal is present. Evidence examined as exhibit No.6, PW-3, complainant filed statement along with certified copies. Order file advocate for complainant filed statement for closing the side. Order filed. **Complainant side is closed as Exhibit No.7, Case adjourned to 29.10.2016 for statement of accused.***

Sd/-

VIII ADJ, Karachi West

29-Oct-2016

P.O is on leave. Case called, complainant and his advocate are present. Respondent No.1/accused Rehmatullah Rehan is present on bail. Case adjourned to 19.11.2016 for statement of accused.

19-Nov-2016

*Case called, complainant is present in person. Respondent No.1,/ accused Rehmatullah Rehan is present on bail. Advocate for the accused is also present. **Statement of accused under section 342 & 340 (2) Cr.P.C be recorded as exhibit No.8, Case adjourned to 07.12.2016 for final arguments.***

Sd/-

VIII ADJ, Karachi West

07-Dec-2016

*Case called, complainant is present in person. Accused and his advocate are present. Argued heard. **Complainant also submit written arguments. Case adjourned to 31.12.2016 for order.***

Sd/-

VIII ADJ, Karachi West

31-Dec-2016

*Case called, complainant is present in person. Respondent/accused is present on bail. Advocate for the accused is also present. **Order not passed for rush of work. Case adjourned to 13.01.2017 for orders.***

Sd/-

VIII ADJ, Karachi West

8. After closing of side by prosecution on **15.10.2016**, followed by statement of accused under Section 342(2) Cr.P.C, on **19.11.2016** and even written arguments filed by the complainant on **7.10.2016**, learned Additional Sessions Judge, **Mr. Naveed Ahmed Soomro**,

without assigning any reason, on **13.01.2017** instead announcing order on merit restarted the trial and issued process **for evidence** to the Additional Collector (Preventive) Pakistan Customs as **COURT WITNESS** and again after recording evidence of the said COURT WITNESS on **21.2.2017** he second time recorded statement of appellant/accused under **Section 342 and 340(2) Cr.P.C.** Relevant order sheet is reproduced below:-

13-Jan-2017

Case called, complainant is present in person. Respondent/accused is present on bail. **Let the process be issued additional collector (Preventive) Pakistan Customs, Custom House Karachi. 01.** Issue Letter to the additional Collector (Preventive) Pakistan Customs. Case adjourned to 19.01.2017 **for Evidence.**

Sd/-

VIII ADJ, Karachi West

06-Feb-2017

Case called, complainant is present in person. Respondent/accused is present on bail. Mr. Murtaza Hussain preventive officer Pakistan Customs filed application for adjournment. Order passed on it, Let the matter be fixed on 07.02.2017, at 8:30 A.M. along with proof of appearance before Honourable High Court. Case adjourned to 07.02.2017 for Evidence and submit proof.

Sd/-

VIII ADJ, Karachi West

07-Feb-2017

Case called, complainant is present in person. Respondent/accused Rehmatullah Rehan is present. advocate for the accused is also present. **PW-Syed Muhammad Raza Assistant Collector is present. Evidence examined as exhibit No.9, PW-1, witness produced annexure as exhibit No.10,** case adjourned to 21.02.2017 for statement of accused and final arguments.

Sd/-

VIII ADJ, Karachi West

21-Feb-2017

Case called, complainant is present in person. Respondent/accused namely Rehmatullah Rehan is present. Advocate for the respondent/accused is also present statement of accused **under section 342 & 340 (2) Cr.P.C be recorded as exhibit No.11,** Case adjourn to 18.03.201, **for accused examined on oath.**

Sd/-

VIII ADJ, Karachi West

The accused after second statement under **Section 342 Cr.P.C** had examined himself on oath and he has produced documents **Ex-13 to Ex-20** showing character of the complainant. In his statement on oath, the applicant/accused has stated as follows:-

*I produce its supporting annexures as Ex-13 to Ex-16, show cause notice issued to complainant by Custom Authorities at Ex.17. No action was taken by custom on my application. I also file a counter affidavit filed by PNSC in CP No.18. I also produce the counter affidavit of PNSC in C.P No.2644/2013 **in which clear allegations are made against complainant in para-4 as well as para-6, 7, 8 and 9 at Ex.19. My firm had never been black listed and for that I produce the letter at Ex.20.***

He was cross-examined by the complainant/respondent No.1 but none of the documents exhibited by appellant were challenged as forged or fabricated by the complainant's counsel.

9. From the conviction order I have noticed that when the learned Additional Sessions Judge found that complainant has failed in his duty to prove the charge, (already reproduced in para-7 above), the learned Additional Sessions Judge himself assumed the role of the prosecutor/ complainant, therefore, on **13.01.2017** instead of passing final order on the complaint he decided to examine an official from the Custom Department as COURT WITNESS whose only evidence was to produce/bring on record Exhibit 4-A, a document which the complainant has failed to produce in his evidence. The learned Additional Sessions Judge in the orders dated **13.01.2017** when decided to record evidence of Additional Collector (Preventive) Customs as Court witness failed to even mention the law under which he exercised such powers on a day when the case was fixed for final orders by him. He also did not mention a reason that under

what circumstances and on whose request additional evidence of a Court witness was required after the conclusion of trial.

10. The learned Additional Sessions Judge not only misused his position or unlawfully exercised his authority by reopening the case after statement of accused and even written arguments filed by the complainant but he also failed to appreciate statement of accused recorded on oath under Section 340(2) Cr.P.C in correct perspective.

The record shows that:-

- i. The learned Additional Sessions Judge failed to appreciate that even complainant's own brother has not supported him though in the complaint it was alleged that the appellant and Jaffar Nadeem, both have "*leveled serious allegation and also mentioned defamatory words against the reputation of the complainant and his brother namely **Naeemuddin Siddiqui** (PW-2)*".
- ii. The learned Additional Sessions Judge in a detailed discussion after reproducing the provisions of **Section 499 and Section 500 PPC** again misinterpreted the evidence with reference to the burden of proof in criminal cases when he discussed evidence of appellant in the judgment as follows:-

No doubt that in the counter affidavits filed by the accused, the official of PNSC had leveled allegations of the black mailing and harassment against the complainant and his company but same cannot be deemed to be proof of the said allegation to be true.

- iii. In criminal cases burden is never shifted on accused unless the prosecution evidence is found to have proved the commission of offence beyond a reasonable doubt.

The appellant was not required to prove that complainant is a blackmailer or not. The charge was against the accused by the complainant that he has been defamed and burden was on him to prove it and he has failed to prove it as observed by the learned trial Court in para 7 of the impugned judgment.

- iv. The character of the complainant has been exposed by the appellant in **Ex:13 to Ex:20**. The learned trial Court in his endeavor to ensure that the complainant should go victorious from his Court has not even discussed these admitted documents in accordance with Qanun-e-Shahadat Order 1984. If all these documents (Ex.13 to Ex.20) were not proof of harassment and blackmailing by the complainant then what was the effect of these documents?
- v. The record does not show that the complainant has by way of rejoinder affidavit denied the contents of counter affidavit of officials of PNSC containing the allegation of blackmailing and harassment by the complainant and, therefore, it ought to have been accepted as admitted document about a truth.
- vi. Learned trial Court has failed to appreciate that the complainant was not aggrieved by derogatory remarks on oath against him. If such remarks did not cause any defamation to the complainant, then how a letter written to any Government functionary, which has not been conveyed to the complainant, would have caused any injury to the complainant.

11. The learned Additional Sessions Judge clearly favoured the complainant when he convicted the appellant and sentenced him to pay fine of Rs.100,000/- as punishment under Section 265(ii) Cr.P.C and further ordered that ***“fine be paid to the complainant within 30 days”***. The learned Additional Sessions Judge had no authority to handover the amount of **“fine”** to the complainant. The amount of “Fine” imposed as punishment has to be deposited by Court through its ministerial office in the Government Treasury. It was required to be realized from the accused/appellant in terms of Sindh Criminal Courts Circular published by the Government of Sindh for the guidance of the criminal courts and officials of subordinate to the Chief Court of Sindh. **Chapter-5, Part-A** of Sindh Court General Rules applicable to Sessions Courts including **Rule 30** should have been read by the learned Additional Sessions Judge. The learned Additional Sessions Judge when directed to pay **“fine”** to the complainant then in case of default custody of appellant/accused should also have been ordered to be handed over to the complainant for three months. When the “fine” imposed by the Court should **not** go to the Government Treasury, then why a defaulter in payment of fine be kept in Government jail to undergo imprisonment for a period of three months. Another way of looking at the sentence awarded by the learned Additional Sessions Judge through the impugned judgment is that the lucky complainant got a civil decree of damages by a Court of criminal jurisdiction and for its execution he got the judgment debtor arrested without even filing an execution application.

12. All the above facts indicates that respondent No.1 is capable of influencing the judicial officer and the contents of the counter affidavit of the Secretary, Pakistan National Shipping Corporation on oath in C.P. No.2644 of 2013 which were exhibited in evidence before

the learned Additional Sessions Judge was true and correct since it has gone unrebutted as no rejoinder to the said counter affidavit was filed by the complainant in the said constitution petition.

13. The way Additional Sessions Judge **Mr. Naveed Ahmed Soomro** has conducted himself in the light of above discussion leads us to believe that he is either incompetent or susceptible of influence and devoid of any judicial approach in handling the criminal cases. At least reading of the impugned judgment leaves no room to think of any other impression about its author. Such grave irregularities cannot be allowed to go unnoticed. Therefore, I am constrained to order that copy of this judgment may be placed in the personal file of Mr. Naveed Ahmed Soomro, Additional Session Judge and it should also be brought to the notice of Hon'ble Chief Justice. A proforma circulated by the Hon'ble Chief Justice in November, 2015 to monitor performance of lower appellate Court is also separately filled and sent to the Registrar High Court with comments.

14. In view of the above, the impugned order is set aside and the instant Criminal Appeal is allowed. The appellant is acquitted of the charge and the sentence of fine Rs.100,000/- imposed upon him by the trial Court is set aside, the amount of fine deposited by him may be returned to him forthwith.

JUDGE

Karachi
Dated:26.03.2019

Ayaz Gul