

JUDGMENT SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Crl. Revision Application No. 159 of 2020

Present

**Mr. Justice Mohammad Kareem Khan Agha,
Justice Mrs. Kausar Sultana Hussain**

1. For orders on office objection at "A".
2. For hearing of main case.
3. For hearing of M.A No.9304 of 2020.

For Applicants. : Mr. M.A. Kazi, Advocate.

For Respondent : Mr. Gul Faraz Khan Khattak, A.A.G. Pakistan.

Date of hearing : 10.11.2020

Date of announcement : 20.11.2020.

KAUSAR SULTANA HUSSAIN, J:----- This Criminal Revision Application No. 159 of 2020 under section 435, read with Section 439 & 561-A Cr.P.C is directed against the order dated 26.09.2020, passed by the learned Presiding Officer, Special Court (Offences in Banks) Sindh, at Karachi in Special Case No. 40 of 2014 , in FIR No. 30 of 2014, FIA CBC Karachi, under Sections 409, 420, 468, 471, 477-A, 109/34 PPC Read With Section 5(2) PCA, 1947, R/W Section ¾ of AMI Act, 2010, whereby an application under Section 222(2), 233, 234, 235 & 239 Cr.P.C. R/W Article 10-A of the Constitution for framing of separate charge for each item/offence charged against the accused persons to enable the accused persons to prepare their defence as envisaged under Article 10-A of the Constitution filed by the learned counsel for the applicants on 19.3.2020 was dismissed. Hence this application.

2. The facts necessary for the disposal of the instant Criminal Revision Application are that the complainant Samiuddin Siddiqui, Metropolitan Commissioner, Karachi, Metropolitan Corporation had lodged a complaint against the accused/applicants at Police Station FIA, CBC, Karachi, which was later on converted into FIR, stating therein that defunct KMC (Karachi Metropolitan Corporation now CDGK (city District Government, Karachi) maintaining saving accounts with NBP, HBL, UBL and ABL Banks (major chunk of saving were also

invested with ABL Civic Centre branch and Hassan Square branch) from funds pertaining to employee's pension, provident fund, welfare funds as well as from the public funds. It is further alleged, they learnt some fraud has been committed in ABL Hassan Square branch and in this respect the officials of the KMC started writing letters to the officials of said branches and thereafter managers of Hassan Square and Civic Centre Branches asked them to furnish the bank statements of relevant accounts including details of all investments, and according to information furnished by the Hassan Square Branch it revealed that the entries of TDR's (Term Deposit Receipts) total amounting to Rs.1,562.869 million were missing in the said statements. The details of above TDR's are mentioned in the FIR. Similarly the statement furnished by the ABL, Civic Centre branch revealed that the entry of TDR amounting to Rs.740.03 million was also conspicuous by its absence from the statement of ABL, Civic Center Branch. While reconciling the misleading information furnished by both the branches through the bank statements on KMC record it emerged that a total amount of Rs.1,557,200,291/- was missing/embezzled. The summary of funds is mentioned in the FIR and it also reflects that the debit/credit of 03 TDR's unauthorized made by the bank itself. The Manager, Civic Centre branch also informed regarding various transactions for premature encashment of TDR's as well as transfer of funds from the account of KMC made on the instructions of authorized officers of KMC as it is fact that transactions were not made at the behest of KMC, but were carried out by the bank authorities at their own to defraud/embezzle the amount of Rs.1,557,200,291/-by way of forged authority letters and signatures of the authorized officers purportedly following that documents were sent from the authorized officers of KMC for encashment of TDR's but said request for the matter, authority letters and signatures thereon were forged prepared by the bank officials themselves to defraud and embezzle the whole amount invested by KMC. It is also alleged that while examining the currently provided bank statements of accounts maintained with both branches, it revealed that a number of debit/credit entries are un-authorized/illegal as reflected in the statements provided by the bank authorities, which in-fact did not pertain to KMC nor ever directed by KMC. The bank staff was criminally breaching the trust of KMC,

illegally encashed KMC's TDR's/other instruments and illegally transferred the funds into the accounts of their accomplices, thus caused huge financial loss to the government exchequer and corresponding illegal gain to them and their accomplices, therefore the FIR was registered against the accused persons.

3. In this case charge against the accused persons was framed by the learned trial Court on 02.05.2016, thereafter amended charge was framed on 23.4.2019, then the learned counsel for the applicants filed an application on 19.3.2020 under Section 222(2), 233, 234, 235 and 239 Cr.P.C R/W Article 10-A of the Constitution of Pakistan with the prayer to frame separate charges for each offence. The learned trial Court dismissed the said application of the applicant's vide impugned order dated 26.9.2020.

4. Through filing present Criminal Revision Application, the applicants/accused challenging the said order dated 26.9.2020 passed by the learned trial Court, raising pleas thereof that the said impugned order is against the principles of natural justice and without applying the correct law regarding the joinder of charges and mis-joinder of charges as well as parameters laid down by the Hon'ble Superior Courts in this regard; that the joint charge was framed against the applicants under Sections 409, 467, 468, 471, 109/34 PPC R/W 5(2) PCA, 1947 R/W 3, 4 AML Act, 2010 and learned trial Court while framing the charge under Section 222(2) Cr.P.C has ignored the provisions of Sections 233, 234, 235 and 239 Cr.P.C and Article 10-A of Constitution. The applicants prayed that the present Revision Application may be allowed in the larger interest of justice and set aside the said impugned order and to direct the learned trial Court to frame separate charges for each item/offence against the applicants/accused to enable them to prepare their defence as envisaged under Article 10-A of the Constitution.

5. The learned counsel for the applicants has vehemently contended that section 233 Cr.P.C envisages that for every distinct offence, there shall be a separate charge, and all the accused shall be tried separately except in cases mentioned in sections 234, 235, 236 and 239 Cr.P.C. The learned counsel for the applicants has further submitted that per prosecution separate offences allegedly committed at

ABL Civic Centre Branch Karachi and at ABL Hassan Square Branch, Karachi at two different times under section 467, 468, 471, 109 PPC by the applicants in addition to Section 409 PPC, is illegal to try them jointly under section 222(2) Cr.PC. It was also illegal to lump 87 items together of six years of ABL Civic Center Branch, Karachi and 42 items of four years of ABL Hassan Square branch, Karachi. The learned counsel states that the general rule stated in section 233 is that for every distinct offence there shall be a separate charge. The learned counsel for the applicants has argued that the section 234 Cr.PC permit one trial of not more than three offences of same kind, if committed within the period of one year.

6. On the other hand, the learned Assistant Attorney General, Pakistan for the State has supported the impugned order passed by the learned trial court.

7. We have carefully considered the arguments advanced by both the sides and have also perused the impugned order and entire material available on record and considered the relevant law. While perusing the record, it reveals that the learned counsel for the applicants has raised a legal point related to the provisions provided for framing of charge against the accused person(s) for commencing the trial. Per learned counsel for the applicants, the learned trial Court has framed joint charge against the applicants under sections 222(2) Cr.P.C for the separate offences allegedly committed by different accused at two different branches i.e. ABL Civic Centre, Karachi and ABL Hassan Square, Karachi at two different times while ignoring the provision of section 233, 234, 235 and 239 Cr.P.C and Article 10-A of the Constitution.

8. Section 222 Cr.P.C is, for convenience of reference, reproduced below :-

“222. Particulars as to time, place and person: (1) The charge, shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without

specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 234:

Provided that the time included between the first and last of such dates shall not exceed one year.

9. In cases of criminal breach of trust, subsection (2) of section 222 of Cr.P.C made an enabling provision that instead of giving all the details of each item of misappropriation it would be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and this would be deemed to be a charge of one offence within the meaning of section 234 Cr.PC.

10. Section 234 Cr.PC can be applied in cases where if a person is accused of more offences than one of the same kind committed within a period of one year, he can be charged with and tried at one trial for any number of them not exceeding three.

11. Under section 234 Cr.PC, there is a limitation of maximum three offences/item which can be combined, while there is no such limitation with regard to offence of Criminal Breach of Trust provided for in sub-section (2) of section 222. Therefore, subject to the other conditions, if a person is charged with, having committed several offences of Criminal Breach of Trust, within a period of one year, they can all be combined into one charge, but the provision being only an enabling one, it will not be necessary to do so in all the cases, because the general rule in this behalf is, as provided in section 233 Cr.PC, that for every distinct offence there shall be a separate charge and the same shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239 Cr.PC.

12. Section 235 Cr.PC is another exception to the rule in section 233 Cr.PC that there should be a separate trial for every offence charged. Section 235 Cr.PC is, for convenience of reference, reproduced below:-

235. Trial for more than one offence: (1) *If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence-*

(2) *Offence falling within two definitions: If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for*

the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for each of such offences.

(3) Acts constituting one offence, but constituting when combined a different offence: If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(4) Nothing contained in this section shall affect the Pakistan Penal Code, Section 71.

13. The expression "by the same person" occurring in section 235 of Cr.PC indicates that where there is more than one accused section 235 of Cr.PC has no application. In instant case there are several accused persons, therefore, in the present case section 235 Cr.PC will not be applicable.

14. Section 239 of Cr.PC is the only section under which the joint trial of several accused persons is permissible. Section 239 of Cr.PC is an exception to the general rule of separate charge and a separate trial for every offence and those cases would attract the provisions of this section which fall strictly within its language. For ready reference we would like to reproduce the relevant provision of section 239 of Cr.PC here as follows:-

239. What persons may be charged jointly: *The following persons may be charged and tried together, namely;*

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of Section 234 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving, or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under Sections 411 and 414 of the Pakistan Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and

(g) persons accused of any offence under Chapter XII of the Pakistan Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence, and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges.

15. The different clauses of section 239 of Cr.PC are not exclusive of each other. If the offences are committed in the course of the same transaction but the persons committing them are covered by more than one sub-section of section 239 of Cr.PC then they can be tried together and their trial will not be bad in law. There is no indication in section 239 of Cr.PC itself to show that the different sub-clauses are mutually exclusive. Section 235 and 239 (d) Cr.PC expressly permits the trial of a person and persons respectively, if the offences have been committed in the course of the "same transaction".

16. Before entering into the realm of facts, it would be desirable to find out what is the meaning of word "same transaction".

17. In *Raj Bahadur v. Emperor* (1935 Cr.LJ 1496) it was held that "it is not possible to enunciate any comprehensive formula of universal applicability' for the purpose of determining whether two or more acts constitute the same transaction, but circumstances which bear on the determination of the question in any individual case can be indicated by saying that proximity of time, unity or proximity of place, continuity of action and community of purpose or design arc; the principal criteria for deciding whether certain acts form parts of the same transaction or not.

"The real and substantial test for determination whether several offences were so connected together as to form one transaction, depends upon whether they are related together in point of purpose, or as cause and effect or as principal and subsidiary acts so as to constitute one continuous action."

Their Lordships of the Supreme Court of Pakistan in the case of *Muhammad Mosaddar Haque and Muhammad Abdul Rouf v. The State* P L D 1958 SC (Pak.) 131 observed that "community of purpose or design and continuity of action are sine

qua non, if the separate acts are to be linked together, so as to constitute one transaction". It was also held in *Noor Khan v. The State* P L D 1958 (W.P.) Lahore 1052:--

"It is however, now well-settled that the real and substantial test for determining whether several offences are so connected together as to form one transaction is whether the offences are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, to constitute one continuous action. Therefore, the question whether distinct offences form part of the same transaction is one, the answer to which must depend on the facts of each particular case."

18. Applying the aforementioned principle of law to the facts of the present case we find, a bare reading of the F.I.R. would demonstrate that different persons committed apparently same offences at different places and time by separate items with different intention though they belong to same business of banking. On the basis of criterion measures as laid down in the above mentioned authorities the question as to whether the alleged offences were committed in same transaction has been examined. It transpired from scrutiny of the record that in instant case alleged offences have been committed by different set of accused persons in two different branches, who had no nexus, connection with the business affairs/dealing of the Bank and the times of commission of alleged offences pertaining to year, 2008 and onwards at ABL Civic Center branch, and 2010 onwards at ABL Hassan Square branch, therefore, apparently this is not a case of same transaction. The general rule as provided in section 233 Cr.PC is that for every distinct offence there shall be a separate charge and separate trial except of course, when the code itself permits otherwise. The principle behind this wisdom is that when each charge is tried separately, there is much less of an apprehension of prejudice to the accused compared to a trial wherein several offences are combined together. We therefore, are of the view that contentions raised by the learned counsel for the applicants for setting aside the impugned order are band on the particular facts and circumstances of this case and are in line with the relevant law, hence the instant Criminal Revision Application is hereby allowed and the impugned order dated 26.9.2020 passed by the learned trial Court is set aside with direction that the learned trial Court frame

separate charges against the two set of accused persons belonging to two different branches of ABL, as mentioned above and hold separate trials in respect of each charge. A copy of the judgment shall be sent to the concerned trial Court for compliance.

19. The Criminal Revision Application stands disposed of in the above terms.

J U D G E

Dated: 20th November, 2020.

J U D G E

Faheem/PA