

IN THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Appeal No.01 of 2019
Special Criminal Appeal No.02 of 2019
Special Criminal Appeal No.04 of 2019
Special Criminal Appeal No.06 of 2019
Special Criminal Appeal No.07 of 2019

Present: **Mr. Justice Nazar Akbar**

Appellant : Asim Khan in Spl.Crl.Appeal No.01/2019
Appellant : Muhammad Asif Hussain, in Spl.Crl.Appeal
No.04/2019
Appellant : Muhammad Qasim Qazi, in Spl.Crl.Appeal
No.06/2019.
through Mr. Umar Farooq, Advocate.
Appellant : Asmatullah in Spl.Crl.Appeal No.02/2019
through Mr. Shoukat Ali Shahroze, Advocate
Appellant : Muhammad Nadeem Suleman Khel, in
Spl.Crl.Appeal No.07/2019
through Mr. Muhammad Jamil, Advocate

Versus

Respondent : The State, through
Mr. Ashiq Ali Anwar Rana, Special
Prosecutor Customs.
Date of Hearing : **07.12.2020**
Date of Decision : **06.05.2021**

J U D G M E N T

NAZAR AKBAR, J.- Through this common judgment I intend to dispose of all the above Spl. Crl. Appeals which have been preferred by the appellants against their conviction through a common judgment dated **23.08.2019** delivered by learned Special Judge (Customs & Taxation), Karachi in case No.193/2018 arising out of FIR No.SI/Misc/307/2018 Export/EW under Section 156(I)(14)(14-A) of the Customs Act, 1969 registered by Model Customs Collectorate of Exports, Customs House, Karachi, whereby the appellant/accused Asmatullah was convicted and sentenced to R.I for a period of five years and fine of Rs.5,00,000/- and in case of default in payment of fine he is to suffer one year S.I. Benefit of section 382-B Cr.P.C was

also extended to him, whereas, all the other accused being abettors, facilitated and connived in the subject offence were convicted and sentenced to pay fine of Rs.4,00,000/- each and in case of non-payment of fine they shall suffer S.I. for one year.

2. To be very precise, the facts as narrated in the FIR are that M/s. First Way Link Traders, Karachi filed an Export GD No.KEXP-SB-9388 dated 24.4.2018 for export of Rice weighing 680 Tons against **E-Form No.MCB-1200269 dated 24.4.2019** through Clearing Agent M/s. Kazi Corporation and after examination of the consignment the shipment was allowed. Thereafter above mentioned Form-E was referred to M/s.Muslim Commercial Bank, Eden Centre Branch, Lahore (issuing bank) for verification/genuineness of the same. According to reply of the Bank the said Form-E was not issued by their branch and bank stamps and signatures thereon do not match with specimen signature/stamps available with the bank. According to Bank's reply the exporter M/s.First Way Linker Traders is not even account holder of the said branch. During further scrutiny it revealed that said exporting Firm also shipped 11 more consignments and all the E-Forms in those GDs were also issued from the said branch of the Bank who was not authorized to issue E-Forms. During further investigation it revealed that exporter in connivance with clearing agents M/s.Kazi Corporation, M/s. International Cargo Leaders (Pvt.) Limited and M/s. Faster Line Business have submitted fake and fabricated E-Forms due to which an amount of US \$ 33,45,380/- (Rs.37,67,75,114/-) was not remitted in the country despite the goods have been exported and resultantly evaded payment of withholding tax and EDS. During investigation it was also revealed that accused Asmatullah is the actual owner of 9 consignments whereas Haji Juma Gul is the owner of 2 consignments

and Shah Wali is the owner of one consignment, whereas Shaikh Adnan Ghani and Nadeem Salmani are the main culprits who provided fake E-Forms to the clearing agent for processing the GDs. On 26.9.2018 Nadeem-ur-Rehman lodged the FIR against the accused persons.

3. After usual investigation challan against the accused namely (1) Asmatullah s/o Janan, (2) Muhammad Asif Hussain s/o Muhammad Akram, (3) Muhammad Qasim Qazi s/o Naseeruddin Qazi, (4) Asim Khan s/o Abdul Rauf, (5) Muhammad Nadeem Suleman Khel s/o Qalandar Khan, (6) Muhammad Akhtar s/o. Muhammad Ibrahim and (7) Sheikh Adnan Ghani s/o. Shaikh Usman Ghani was submitted before the trial Court. The case of the absconder accused was bifurcated bearing No.193-A/2018.

4. Trial court framed charge on **07.05.2019** against the accused at Ex.2 to which they pleaded not guilty and claimed for trial vide their pleas at Ex-2/A to Ex-2/G.

5. At trial, prosecution examined PW-1 Principal Appraiser Customs, Nadeem-ur-Rehman as complainant at Ex.3, PW-2 Altaf Rehman another Appraising Officer as mushir of arrest at Ex.4, PW-3 Khair Muhammad, Inspector as the Investigating Officer at Ex.5. Thereafter, prosecution side was closed at Ex.6.

6. Statements of accused persons were recorded under Section 342 Cr.P.C at Ex.7 to Ex-13. Accused denied all the incriminating pieces of prosecution evidence brought against them on record. They claimed false implication in the present cases. They have not examined themselves on oath nor produced any evidence in their defence. The trial court inadvertently has not put up and confronted to the accused with one piece of evidence while recording their

statement under section 342 Cr.P.C therefore, trial Court on **22.8.2019** recorded additional statement of the three accused vide Exh.14-16.

7. Trial Court after hearing the learned counsel for the parties and assessment of evidence, by judgment dated **23.08.2019**, convicted and sentenced the appellants as stated above, hence these appeals.

8. Mr. Umer Farooq, counsel for the appellant namely (i) Muhammad Asif Hussain, (ii) Asim Khan, and (iii) Muhammad Qasim Qazi contended that appellants have never processed any document regarding the subject consignment personally. It is further averred that documents were prepared and processed by one appellant/clearing agent (Qasim Qazi) who had no knowledge of fakeness of the document/Form-E. The clearing agent/appellant had fulfilled the statutory requirement as envisages in **Rule 101 of Customs Rules 2001 vide SRO 450/(1)/2001 dated 18.6.2001** and there is SOP in custom department for verification of Form-E prior to processing the documents for export by the department.

9. Learned counsel on behalf of appellant/ Qasim Qazi, contended that appellant cannot verify the disputed **Form-E** before processing it with customs department as its information and verification are secret among the Customs department, State Bank and exporter of the consignment. It is further averred that there is no evidence against the appellant that he prepared the fake Form-E or he had knowledge of fakeness of it.

10. Mr. Muhammad Jamil, counsel for the appellant/Muhammad Nadeem Suleman Khel contended that the prosecution produced only three PWs (all Customs Officials) including two interested witnesses,

namely, the complainant and I.O of the case. Although both are themselves the main culprits who mastermind the scheme to save themselves under the garb of being the complainant and I.O of the present case. The third PW is the only mushir of the seizures and arrest whose statement was recorded on **14.2.2019** after five months of arrest and 10 months of FIR. It is further averred that statement of the appellant was recorded U/s.342 Cr.P.C wherein the appellant denied the charges and trial Court has not framed any question during the statement pertaining to preparation of forged Form-E or about evasion of any livable and furthermore not a single exhibit was put to the accused if the same came on record through any witness.

11. Mr. Shoukat Ali Shahroze, counsel appellant/Asmatullah contended that in order to prove the authenticity of above mentioned verification letters prosecution has failed to record the statement of any banker, who issued the said letters and verification letters to the I.O of the case or to the customs authority. It is further averred that no verification was sought by the prosecution from the State Bank of Pakistan with regard to the genuineness or fakeness of subject E-Forms and such fact is also admitted by the PW-3, the Investigating Officer during his cross-examination.

12. Learned counsel for the appellants jointly objected on the jurisdiction of the trial Court, they contended that offence, if any, relates to Foreign Exchange Regulatory Authority for loss of remittance and not under the Custom Act, 1969 thus is beyond the jurisdiction of the trial Court and further argued that issue of none remitting the currency into the country exclusively falls under the Foreign Exchange Regulatory Authority Act and the State Bank of Pakistan is authorized to take necessary action in case the remittance against the export is not received into the country. The

State Bank of Pakistan is also authorized to initiate criminal proceedings against the accused persons on the basis of fake E-Forms and there is no loss of revenue to the national exchequer as remittance is the exporter's own money and not any duty or tax, therefore, **section 32 and 32(a)** of the Customs Act, 1969 are not applicable to the present proceedings. It is further stated that verification of E-Form from State Bank of Pakistan is not available which is also after six months of export. Learned counsel referred to SRO 3/2001, 12/2001, 3871/2002, FE Circular No.10 of 2015 showing responsibilities of the Regulatory Authority and the State Bank in relations to Form-E. It is further averred that there is no independent witness of the case and FIR does not show any loss of revenue and Form-E does not come within the ambit of Customs Act, 1969 and lastly they requested that the accused persons may be acquitted from the charge.

13. On the other hand, learned Special Prosecutor Customs, Mr. Ashiq Ali Anwar Rana argued that State Bank of Pakistan can only initiate proceeding against the exporter when the genuine E-Form is issued by the bank and remittance is not received. He further argued that in the instant case situation is completely different as fake E-Forms were prepared and submitted before the Customs and as such provisions of Section 32 and 32-A of the Customs Act are invoked in the instant case and customs authorities are competent to initiate criminal proceedings against the accused persons involved in the forgery. He further argued that sufficient evidence is brought on record to connect the accused persons, exporter, clearing agents and other accused who are involved in the instant case, therefore, accused persons may be punished in accordance with law.

14. I have heard the learned counsel for the parties, perused the record available in the file as well as written arguments filed by the learned counsel for the appellants and Special Prosecutor Customs.

15. The perusal of charge framed by the trial Court against all the appellants is based on the allegations that a fake E-Form was filed by the exporters of rice which resulted in loss of foreign exchange and therefore, the main burden was on the prosecution to establish that a fake 'E' form has been used for export of rice by M/s Asim Khan (appellant in Spl. CrI. Appeal No.01/2019) as proprietor of clearing agent M/s., International Cargo Leaders (Pvt) Ltd., in respect of the goods owned by Asmatullah and Muhammad Asif Hussain, proprietor of M/s. Qazi Corporation and their export manager Muhammad Qasim Qazi (appellants in Spl. CrI. Appeals No.2, 4 & 6 respectively) and Muhammad Nadeem Suleman Khel (appellant in Spl. CrI. Appeal No.07/2019) who allegedly provided fake 'E' form to accused Asim Khan. Each one of the appellants has been charged with for using E-Form in one or the other way and, therefore, the burden was on the prosecution to establish that 'E' form was fake. All the counsel for the appellants have taken common plea that the FIR has been lodged with an inordinate delay and no evidence has been brought on the record to prove that 'E' forms were forged and fabricated. Appellants counsel have drawn my attention to the FIR registered on **26.09.2018** at **12** noon in respect of export goods declaration form (GDs) dated **24.4.2018** for export of rice, which was cleared on the same date from the Port Authorities on clearances by the complainant PW-1, namely, Nadeem-ur-Rehman as Principal Appraiser. There is a clear cut delay of more than 05 months in lodging of the FIR. It is further contended by the counsel for the appellant that the prosecution has examined only the Investigating

Officer and one mushir of arrest of the appellants. None of the PWs have produced any documentary proof showing that 'E' Form submitted to them was fake. The I.O to connect the appellant with the offence has not been able to prove any action of the appellant Asmatullah when in cross-examination he admitted *"It is correct to suggest that accused Asmatullah did not file the GD. It is correct to suggest that the accused Asmatullah did not file any documents in the matter of customs in relation to subject GDs. It is corrected to suggest that as per customs records accused Asmatullah is not the exporter in relation to the subject GDs. I do not know whether any notification in terms of the provision of the Foreign Exchange Regulation Act, 1947 as to functioning of customs officers is in field. I am not in a position to inform the Court as to exact amount of evaded duty and taxes"*.

16. Likewise in the cross-examination to the counsel for the appellant Asim Khan (Spl. CrI. Appeal No.1, 4 & 6 of 2019) the I.O admitted that *"the shipment of the subject good was allowed by the complainant Nadeem-ur-Rehman whereas the 'E' forms were detached by three persons including myself. They were three examiners, namely, Badar Baloch, Iftikhar Appraising Officer and myself. It is correct to suggest that the statement of the two officers neither recorded nor made as witness in this case. I do not remember the name of the customs officials to detach (dispatched) the said 'E' Forms to the SBP. Mr. Nadeem-ur-Rehman Principal Appraiser the complainant allowed the shipment"*. So far the verification is concerned he confirmed and verified from the concerned bank. *"I cannot say the exact date of verification of the 'E' Forms. I cannot say the 'E' Forms were sent for verification after 5 months of the shipment of the goods. I have never detached the 'E' form in my entire service. I*

do not know the procedure of detaching the same”.
.....”it is correct to suggest that Ex-3/C/3 and form ‘E’ No.1200273, 1200263 Ex-3/C/4, does not contain the date and customs department portion is totally blank whereas the rest of the ‘E’ form are unfilled by the customs department. I do not enquire from any of the customs official about the unfilled portion of the ‘E’ form.....
.....It is correct to suggest that I have not exhibited any documents of SBP which shows that these ‘E’ form are fake or genuine. I have not recovered typewriter from the office of Qasim Kazi. (appellant in Spl. Cr.Appeal No.06/2019).

17. The complainant Nadeem-ur-Rehman (Principal Appraiser) as PW-1 in his cross-examination categorically admitted with reference to appellant Asmatullah (Appellant in Spl. Crl. Appeal No.02/2019) that *“it is correct to suggest that I have not produced any document which could show that Asmatullah was owner of the goods of 9 GDs. It is correct to suggest that Asmatullah had not submitted 9 E-forms personally.....*He further admitted in cross-examination that *“I do not know about circular 10 dated 26.10.2015 of State Bank of Pakistan. It is not in my knowledge that under this circular the ‘E’ forms are to be sent for verification within 24 hours. The ‘E’ forms were sent for verification after 4/5 months.*

18. The complaint though claimed in his examination-in-chief that *‘E’ form was sent to the issuing banking Eden Centre Branch, Lahore for verification of genuineness”* and claimed that he received reply from the bank that *‘E’ forms were not issued by the branch* but he has not produced any witness from the bank to verify that the alleged letters he produced as Ex.3/B/1 to Ex-3/B/6 were correspondence between bank and the complainant and on top of it in cross-

examination he categorically stated that *“I have not verified the ‘E’ form”*.

19. In view of the above evidence, the contention of the counsel for the appellant that the prosecution has failed to prove the case against accused is established from the record. There is hardly any cogent and convincing evidence connecting the accused with the alleged offence. It is well settled law in criminal jurisprudence that delay in lodging of FIR, is always fatal and in this particular case the complainant who himself has been responsible for clearance of the export of the goods have failed to explain that under what circumstances he failed to report any loss whatsoever on record of fake E-Form within reasonable time. There is no explanation of delay and irrespective of the delay there is no supporting evidence to confirm that ‘E’ form produced by the appellants were fake. Merely a statement of complainant which has not been cross checked by the I.O. cannot establish that the guilt of the accused is proved beyond reasonable doubt. The I.O in his cross-examination has admitted that *“It is correct to suggest that “I have not exhibited any documents of SBP which shows that these ‘E’ form are fake and genuine”*.

20. In view of the above, it was a case of no evidence and therefore, all the appeals are allowed and the appellants are acquitted of the charges. Their bail bonds are discharged.

Office to place a copy of this judgment in all connected files.

JUDGE

Karachi
Dated: 06.05.2021

Ayaz Gul