IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Criminal Appeal No. S-35 of 2016

Muhammad Qasim Bhutto
Versus
The State

Appellant Muhammad Qasim Bhuto (on bail).	:	Through Mr. Athar Abbas Solangi, Advocate.
The State	:	Through Mr. Ali Anwar Kandhro, Additional Prosecutor General, Sindh.

Date of Hearing : 14.04.2022.
Date of Judgment : 14.04.2022.

J U D G M E N T.

MUHAMMAD SALEEM JESSAR, J.- This criminal appeal is directed against the judgment dated 19.04.2016, passed by Special Judge Anti-Corruption (Prov.), Larkana, in Special Case No. 117 of 2000, being outcome of Crime No.56/2000, registered at PS ACE, Larkana, under sections 409, 381, PPC read with section 5(2) Act–II of 1947, whereby the appellant was convicted for an offence under section 409, PPC read with section 5(2) of Prevention of Corruption Act, 1947 and was sentenced to R.I. for five years and fine of Rs.500,000/-. Benefit of section 382-B, Cr.P.C. was extended to the appellant.

2. This appeal was admitted for hearing vide order dated 20.04.2016 and vide order dated 22.04.2016, the conviction of the appellant was suspended and the appellant was admitted to bail.

3. Detailed facts of the case are succinctly narrated in the impugned Judgment, however, for the purpose of this Judgment it

would suffice to observe that the appellant, while posted as Record Keeper in Sessions Court, District Larkana, had allegedly misappropriated cash of Rs.703,033/- and various articles as mentioned in the impugned Judgment. Thus, FIR No.56/2000 was registered against him under sections 409, 381, PPC read with section 5(2) Act–II of 1947.

4. After usual investigation the appellant was challaned before the trial Court and necessary papers were supplied to him as per Exh.1. Formal charge was framed against the appellant as Exh.2, to which he pleaded ‘not guilty’ and claimed to be tried vide his plea as Exh.3.

5. During trial, the prosecution examined PW Azizullah at Exh.9, PW Imdad Ali Sangi at Exh.11, PW-Muhammad Ismail Chandio at Exh.12, PW Muhaqamuddin Bhutto at Exh.13, PW Ghulam Hyder at Exh.14, and PW Imdad Ali Solangi at Exh.15. However, PW-Roshan Ali Manghrio was given up by the prosecution vide statement at Exh.10 by the ADPP.

6. The statement of the appellant was recorded under section 342, Cr.P.C. at Exh.18, wherein he pleaded his innocence, but declined to examine himself on oath, as provided under section 340(2), Cr.P.C. nor led any evidence in his defence.

7. The trial court, after framing two points for determination, and answering Point No.1 in the affirmative, convicted and sentenced the appellant under Point No.2, as stated above. Hence this criminal appeal.

8. Mr. Athar Abbas Solangi, learned counsel for the appellant, submitted that there is a long delay in registration of the FIR; that the appellant along with co-accused Liaquat Ali Sangi were jointly nominated in the F.I.R No.56/2000; however, co-accused Liaquat Ali Sangi was not tried in this case and he was separately tried in another F.I.R No.57/2000 and was acquitted. He further submitted that P.Ws, who were examined before the trial Court, had deposed on the basis of hearsay evidence and none of them was an eyewitness; that the memo of inspection of place of incident was not prepared; that one P.W, namely, Roshan Ali Mangrio, was given up by the prosecution and non-examination of said witness gives presumption

that if he had been examined, he would have not supported the prosecution's case. Therefore, provisions of Article 129-(g) of Qanun-e-Shahadat Order, 1984 are attracted and benefit of same is to be given to the accused. He next submitted that second Investigating Officer, namely, Imamuddin Channa was vital witness of the prosecution, however, he was not examined. He submitted that former record keeper, namely, Nisar Ahmed Qureshi, to whom the appellant had given charge, was also not examined. He further goes on to say that the appellant from very beginning had been beseeching that the alleged embezzlement as well as misappropriation was committed by the co-accused Liaquat Ali Sangi, who had been acquitted from the charge of FIR No.57/2000 by way of order dated 15.02.2006 passed under section 249-A, Cr.P.C and said acquittal had not been assailed by the prosecution before any forum. In support of his contention, he placed on record a copy of acquittal order dated 15.02.2006, passed by the trial Court in respect of co-accused Liaquat Ali Sangi. He, therefore, submitted that the prosecution has miserably failed to establish charge against the appellant; hence, by granting appeal, the appellant may be acquitted. Learned counsel for the appellant placed reliance upon the cases of *Javaid v. The State* **(PLD 1994 Supreme Court 679)**, *Muhammad Akram v. The State* **(2009 SCMR 230)**, *Akbar All v. The State* **(2007 SCMR 486)**, *Tariq Pervez v. The State* **(199 SCMR 1345)** and *Rashid Ahmad v. State* **(PLJ 2001 SC 1430)**.

9. Mr. Ali Anwar Kandhro, learned Addl. P.G., appearing for the State, opposed the appeal, on the ground that the appellant is nominated in the F.I.R; besides, he has embezzled a huge amount, which was entrusted to him being its custodian. He further submitted that he has deposited Rs.250,000/- out of embezzled amount, which tends to show that the appellant had admitted the guilt; hence, he is not entitled for acquittal. He; however, could not controvert the fact that P.W Nisar Ahmed Qureshi, to whom the appellant had given the charge was not examined and enquiry report was also not exhibited. Although, he admitted that enquiry report was vital document which should have been exhibited, but was not brought on record. He, however, prayed for dismissal of instant criminal appeal.

10. In rebuttal, learned counsel for the appellant stated that as far as contention raised by learned Addl. P.G. that the appellant had deposited Rs.250,000/- is concerned, being subordinate to the District Judiciary, he had deposited the same under pressure of his superiors.

11. First Information Report, which is referred to as FIR in the legal parlance, is regarded as the cornerstone of the prosecution case and, in fact, gets the ball rolling in a criminal case. The first thing to be seen with regard to an FIR is the promptitude with which the same was lodged, as passage of time creates doubts in the prosecution case. The trustworthiness of the complainant of the FIR also plays a pivotal role in the fate of the case.

12. In the present case, the offence was allegedly committed between 1996 and 1999, but the F.I.R was lodged in the year 2000. In the FIR, the time of occurrence has been shown as "Year 1996 to 1999", while the date and time of report has been shown as "30.06.2000, at 1000 hours". However, very surprisingly, in the fifth column of the FIR, which is meant for recording any delay, it is mentioned that there is "No delay". It can be seen that there is inordinate delay in lodging of the FIR, as the offence is alleged to have been committed during years 1996 to 1999 and the FIR was lodged on 30th June, 2000. There is no explanation for such delay. However, the trial Court completely ignored this crucial lapse in the prosecution's case as well as the law laid down on the point of delay in filing of FIR by the superior Courts. In the case of **Mehmood Ahmed & others v. The State (1995 SCMR 127)**, the Hon'ble Supreme Court, while dealing with delay of two hours in lodging of the FIR, observed as under:

> "Although in some circumstances a delay of two hours may not be of much importance yet in the facts and circumstances of this particular case as they have happened, the delay has great significance. It can be attributed to consultation, taking instructions and calculatedly preparing report keeping the names of accused open for roping in such persons whom ultimately prosecution may wish to implicate."

13. As held by the Hon'ble Apex Court in the above-cited case, a delay in lodging of the FIR can be attributed to consultation, taking

instructions and calculatedly preparing report. This tarnishes the worth of the FIR and renders the case of the prosecution weak. It is well-settled that if there is any doubt in the prosecution case, its benefit will go to the accused.

14. Another very important aspect of the case is that a perusal of the letter No.5451 of 2000, dated 21.06.2000 (Exh.12-B, at page-91 of paper book) addressed by District & Sessions Judge, Larkana to the Deputy Director, Anti-Corruption Establishment, Larkana, reveals that at the time of sending this letter for lodging of the FIR against the appellant as well as co-accused Liaqat Ali Sangi, no details of the case properties were provided, as the same were to be provided by Accountant of that Court. It also transpires from the said letter (Exh. 12-B) that the Accountant of the District & Sessions Court was to act as complainant. However, a look at the FIR itself (Exh.12-C, at page-93 of the paper book) reveals that instead of the Accountant of the District & Sessions Court, Larkana, Muhammad Ismail Chandio, Circle Officer, ACE, Larkana had acted as complainant, who himself recorded the FIR. The complainant to a question in his cross-examination stated that the letter of District & Sessions Judge, Larkana (Exh.B-12) does not disclose the nature of property and cash so embezzled, but voluntarily stated that such information was provided to him and soon thereafter he proceeded to arrest the appellant / accused. As per contents of the FIR, details of the missing case properties were provided to the complainant by Nisar Ahmed Qureshi, Record Keeper, Sessions Court, Larkana; however, this person did not step into the witness-box. Therefore, his statement carries no evidentiary value and cannot be relied upon for the purpose of convicting the appellant for the above offence. This is also not clarified as to why and how Muhammad Ismail Chandio, Circle Officer, ACE, Larkana, acted as complainant in the instant case. He was neither an eye-witness nor an employee of the District & Sessions Court, Larkana.

15. This was not a case, which was unearthed by the Anti-Corruption Establishment and in which an officer / official of the ACE should have acted as complainant on behalf of the State; rather, it was a case which was reported by the District & Sessions Judge,

Larkana and the newly transferred Record-Keeper, who took charge from the appellant, should have been proper person to act as complainant; however, it was not done and the Circle Officer, ACE, Larkana, for no valid reason, played such role, who not being an eye-witness of the offence had nothing to do with that.

16. I have also examined the depositions of the witnesses in this case. PW-1 Azizullah is the COC of the Court of II-Senior Civil Judge, Larkana. He stated in his cross-examination that his name does not appear in the list of witnesses in this case. His following statement is very important:

> "In year 2000 I took over the charge of the record from Nisar Ahmed Qureshi, the then Record Keeper of the District Court, Larkana, during course of handing over charge to me Nisar Ahmed Qureshi handed over to me one Revolver and seven Guns late. The properties involved in FIR Crime No.25/2006 of P.S. Anti-Corruption, Larkana were not handed over to me by him; same according to him were not handed over to him by accused Muhammad Qasim Bhutto at the time of handing over charge of the record to him."

17. The above statement should have been seen in juxtaposition with the stance taken by the appellant that his predecessor had not handed over to him certain case properties, for which he was also nominated in the FIR; however, he was tried separately and was acquitted of the charge. It is also worth mentioning that Nisar Ahmed Qureshi was not examined by the prosecution as a witness in this case.

18. PW-4, Muhaqamuddin, was posted as English Clerk in the District & Sessions Court, Larkana at the relevant time. This witness also stated that Mr. Nisar Ahmed Qureshi had taken over charge of the record keeper from the present accused. Thus, he has no direct part to play in this case, as at the relevant time he was working as English Clerk in the District & Sessions Court, Larkana. As per his own statement during cross-examination that his office is at a distance of 15 [there seems to be some typing mistake] furlongs from the record-room. However, it is an admitted position that office of this witness is at quite a distance from the record-room; thus, he is also not an eye-witness of the case. This witness also stated that District &

Sessions Judge, Larkana held an inquiry against the appellant; however, neither the inquiry officer was examined at the trial nor the inquiry report was brought on record during evidence. It was on the basis of this inquiry and its report that the present FIR was registered against the present appellant.

19. So far as PW-Ghulam Hyder (Exh.14) is concerned, he at the very outset of his examination-in-chief stated "*I have heard that some case properties were missing. Present accused was record keeper and disclosed that his predecessors had handed over some short amount to him and obtained his signature in good faith and faisla was held and parties were present in the 'Faisla' namely Mohammad Qasim, Liaqat Ali Sangi, Nisar Ahmed Qureshi & Imdad Ali Sangi & others."* During his cross-examination, he stated that he had not seen the record of missing properties, as it was not shown to him. Thus, this witness was talking about what he had heard about the missing case properties and was not an eye-witness. Therefore, his deposition also falls within the ambit of hearsay evidence.

20. A careful examination of the depositions of the prosecution witnesses reveals that none of them was present when the alleged embezzlement was committed or the amounts / case properties were allegedly misappropriated by the appellant. As such, the evidence which they gave in the Court was neither heard by them nor seen nor perceived by them, therefore, their evidence with regard to the said facts does not fall within the ambit of oral evidence as defined in Article 71 of Qanun-e-Shahadat Order, 1984, which reads as under:--

> "71 Oral evidence must be direct.--- Oral evidence must, in all cases whatever be direct, that is to say:--
>
> If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
>
> if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
>
> if it refers to a fact which could be perceived by any other senses or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
>
> if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence the person who holds that opinion on those grounds:

> Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treaties if the author is dead, or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:
>
> Provided further that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection:
>
> Provided further that, if a witness is dead, or cannot be found or has become incapable of giving evidence, or his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case the Court regards as unreasonable, a party shall have the right to produce *Shahada ala al-Shahada* by which a witness can appoint two witnesses to depose on his behalf, except in the case of Hudood."

21. Thus, I am of the considered view that the evidence of P.Ws. examined by the prosecution in this case is inadmissible in evidence, as their depositions do not meet the standards set by the above-quoted Article 71 of Qanun-e-Shahadat Order, 1984.

22. Apart from above, the prosecution case also suffers on account of the fact that some important witnesses were not examined at the trial. Firstly, the main person i.e. Nisar Ahmed Qureshi, who took charge of the Record-Room from the present appellant and allegedly reported the matter regarding missing of case properties as well as shortage in cash, was not produced as a witness by the prosecution before the trial Court. As per the FIR, he is the person who provided the details regarding the missing case properties; however, he was not examined by the prosecution without any valid reason. Non-examination of this witness leaves a gaping hole in the prosecution case.

23. The other person, who was not examined before the trial court, is I.O. of the case, namely, Imamduddin Channa. In this regard, PW-6 Zulfiqar Ali, ASI ACE, Larkana during his deposition stated that Imamuddin Channa is paralyzed and cannot appear before the Court. He stated that he is well-conversant with the signature and hand-writing of Imamuddin Channa. He stated that Imamuddin Channa recorded the statements of the witnesses in his own hand-writing,

which he identified. However, when Imamuddin Channa was available, then efforts should have been made to produce him before the Court. This witness also stated that he was present in Court when challan was produced against the appellant in Court, but this statement cannot be relied upon, as he becomes a chance witness.

24. The matter does not end here, as the prosecution also gave up another witness, namely, Roshan Ali Mangrio, vide statement of the ADPP at Exh.10. This further weakens the case of the prosecution, as presumption would arise that if he had been examined by the prosecution, he would have not supported the prosecution case. Therefore, provisions of Article 129-(g) of Qanun-e-Shahadat Order, 1984 are very much attracted and benefit of same is to be given to the accused and not to the prosecution. Article 129 of the Qanun-e-Shahadat Order, 1984, reads as under:

> "129. Court may presume existence of certain facts: The Court may presume the existence of any fact which it thinks lik ely to have happened, regard being had to the common course of natural events, human c onduct and public and private business, in their relation to the facts of the particular case.
>
> Illustrations
>
> The Court may presume—
>
> (a) – (f) ---------- not relevant ----------
>
> (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;"

25. Therefore, non-examination of the above witness before the trial court also creates doubt in the prosecution case, the benefit whereof has to be given to the appellant.

26. Perusal of the FIR reveals that the letter No.5451 of 2000, dated 21.6.2000, addressed by the District & Sessions Judge, Larkana to Deputy Director, ACE, Larkana, states that "M/s. Liaqat Ali Sangi, BPS-10 and Mohammad Qasim Bhutto, BPS-8, have misappropriated case properties of different kinds and requested for registration of separate cases against them. It is not clear as to why such request was made when the matter belongs to the same incident and there is a chain of incidents, as the appellant claimed that he was not provided full inventory by Liaquat Ali Sangi and

Nisar Ahmed Qureshi stated that he was not provided full record by the appellant. In this connection, reference may be made to the evidence of PW-Ghulam Hyder (Exh.14), who stated that: "*I have heard that some case properties were missing. Present accused was record keeper and disclosed that his predecessors had handed over some short amount to him and obtained his signature in good faith and faisla was held and parties were present in the Faisla namely Mohammad Qasim, Liaqat Ali Sangi, Nisar Ahmed Qureshi & Imdad Ali Sangi & others"*

27. Thus, the appellant along with co-accused Liaquat Ali Sangi were jointly nominated in the F.I.R No.56/2000; however, co-accused Liaquat Ali Sangi was not tried in this case and he was separately tried in F.I.R No.57/2000. Then, on the same set of facts, Liaqat Ali Sangi was acquitted, while the appellant Mohammed Qasim Bhutto was convicted and sentenced. Where co-accused was acquitted on the same facts, evidence and question of law, appellant could not be deprived from the benefit of doubt on the principle of equity. Reliance may be placed on the case of *Abdul Rahim v. The State* **(2016 SBLR 148)**.

28. It is a trite law that there must be unimpeachable evidence on record and the crime of the accused has to be proved through cogent evidence beyond reasonable doubts. The prosecution had to stand on its own legs to prove its case beyond reasonable doubt and in this regard reference cannot be made to the non-examination on oath of the accused under section 340(2), Cr.P.C. In case the appellant declined to examine himself on oath under section 340(2), Cr.P.C, it does not mean that he is guilty. It is the duty of the prosecution to prove the case against the appellant beyond any reasonable doubt. Reliance can be placed on the case of *Javaid v. The State* **(PLD 1994 SC 679)**.

29. Last, but not the least, though there were allegations against the appellant of embezzlement of a huge number of case properties, however, surprising, during investigation nothing incriminating was recovered from his possession nor the fate of such missing case properties ever came to light. It was the duty of the I.O. to have

unearthed the missing properties or at least some of them and brought before the Court to connect the appellant with such misappropriation.

30. It seems that there is no check and balance in the District Judiciary as there is nothing on record to show that at any time between this long period i.e. from 1996 to 1999, any record was ever checked. It is imperative that a system is put in place so that the case properties as well as the cash available with record keepers is periodically checked. It is also important that each taking over and handing over by the record keepers on transfers are carried out strictly in accordance with the procedure prescribed for the same and such taking over and handing over is supervised by some responsible person.

31. In view of the above discussion, there are number of loopholes in the prosecution case. It is not necessary that there should be series of circumstances creating doubts in the prosecution case to entitle the accused to benefit of doubt. If a slightest doubt is found in the prosecution case, the benefit of such doubt must go to the accused. In behalf reliance may be placed on the case of *Tariq Pervez v. The State* **(1995 SCMR 1345)**, in which the Hon'ble Supreme Court held as under:

> "The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

32. A similar observation was also made in the case of *Akber Ali v. The State* **(2007 SCMR 486)**, to the effect that benefit of doubt would always be given to the accused.

33. This criminal appeal was heard on 14.04.2022 and the following short order was passed on the same day.

> *"Heard arguments. Perused the evidence available on record. For the reasons recorded to be later on, instant appeal is hereby allowed. Consequently impugned judgment dated. 19.04.2016 penned down by Special Judge, Anti-Corruption (Provincial) Larkana/ trial Court vide*

Special Case No.l17/2000 re: State v. Muhammad Qasim arising out of Crime No.56/2000 Police Station ACE Larkana under sections 409, 381, PPC R/w Section 5(2) Act-II of 1947 is hereby set aside. Resultantly, the appellant who is present on bail is hereby acquitted of the charges. The surety furnished by the appellant is hereby discharged."

34. Above are the detailed reasons for my short order dated 14.04.2022, whereby the above criminal appeal was allowed in the above terms.

Larkana, the 14th April, 2022. JUDGE