

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,  
HYDERABAD**

Criminal Acquittal Appeal No.S-293 of 2021  
Criminal Acquittal Appeal No.S-03 of 2022

Appellants: Through Mr. Ahsan Gul Dahri, Advocate.

Respondent-1: Through Agha Waqar Ahmed, Advocate in Criminal Acquittal Appeal No.S-03 of 2022.

Respondent/State: Through Mr. Shahzad Saleem Nahiyoan, Additional Prosecutor General, Sindh.

Date of hearing: 14.11.2022.

Date of judgment: 05.12.2022

**JUDGMENT**

**ADNAN-UL-KARIM MEMON, J .** Through this single Judgment, I intend to decide the captioned Criminal Acquittal Appeals as both have been filed challenging the orders dated 30.10.2021 & 3.12.2021 passed on applications moved under Section 249-A Cr.P.C. by learned Civil Judge & Judicial Magistrate-II, Kunri in Criminal Case No.144 of 2021, passed whereby private respondents were acquitted under Section 249-A Cr.P.C.

2. The brief story of F.I.R lodged by appellant/complainant Syed Haji Niaz Muhammad Shah is that from 20.04.2021 to 27.06.2021 at different times one Facebook ID named "Malik Ali Malik" shared unethical posts/messages against his cousin Syed Mian Muhammad Hassan Shah and others, such messages also seen by complainant party at Otaq of said Syed Muhammad Hassan Shah wherein he received threats of dire consequences from said Facebook ID alleged to have been used by private respondents Abdul Qadir Shahani, Abdul Hafeez and Gul Bahar, hence they were booked in said F.I.R and reported upon.

3. Mr. Ahsan Gul Dahri, learned counsel representing the appellant submits that the impugned orders, passed by learned Civil Judge & Judicial Magistrate-II Kunri in said criminal case is not sustainable under the law as there was sufficient evidence available on record against the private respondents but the trial Court brushed aside the same, more particularly, the private respondents acquitted of the charge under section 249-A Cr.P.C. without assigning any valid reason; that the prosecution witnesses have not been examined however, the trial Court without doing so has passed the

impugned orders hurriedly, which are not sustainable; apart from this, the appellant has proved his case against the private respondents as from Forensic Report of FIA Cyber Crime Wing, it was established that mobile phone so recovered was in the use of private respondent Abdul Qadir Shahani prima facie showing guilty of the offence even then such material was ignored by learned Trial Court while acquitting private respondents from the charge; that findings arrived at by learned Trial Court are erroneous in nature as Article 13 of the Constitution of Islamic Republic of Pakistan, 1973 in respect of double jeopardy but it was misconstrued by learned Judge that inquiry was being conducted by FIR Cyber Crime Wing is trial and FIA was not going to register criminal case as it was mandated to conduct forensic analysis of recovered mobile phone, as such, impugned orders are not sustainable in law which may be set-aside by remanding the matter to learned Trial Court for recording evidence of prosecution witnesses and then decision on merits.

4. Mr. Shahzad Saleem Nahiyoan learned Additional Prosecutor General, Sindh assisted by Agha Waqar Ahmed, learned counsel representing respondent No.1, in Criminal Acquittal Appeal No.5-03 of 2022 has supported the impugned orders by submitting that there was no probability of private respondents to be convicted hence the orders of learned Trial Court are well reasoned and speaking one need not to be interfered by this Court, therefore, prays for dismissal of instant Criminal Acquittal Appeals.

5. I have considered the arguments advanced by the counsel for the parties and examined the contents of FIR, challan, and charge framed by the learned trial Court as well as the impugned orders dated 30.10.2021 and 03.12.2021, passed by learned Civil Judge & Judicial Magistrate-II Kunri in Criminal Case No.144/2021 on application under Section 249-A Cr.P.C. filed by the respondents / accused. I have noted from the record as under:-

- i. The allegations against the respondent / accused are that they in between 20.4.2021 to 27.6.2021 at different times portrayed themselves to be Malik Ali and created fake facebook ID in the name of "Malik Ali Malik" and posted abusive posts against the cousin of complaint and his elders with intention to defame them. They were also charged with the threats for dire consequences;
- ii. The Investigation Officer submitted report alongwith digital forensic analysis report of FIA against respondent Abdul Qadir in Criminal Acquittal Appeal No.5-03 of 2022;

- iii. The charge was framed against the respondents / accused on 11.8.2021.
- iv. Application under Section 249-A Cr.P.C. was moved on behalf of the respondent / accused on the plea that the alleged incident took place in between 20.4.2021 to 27.6.2021 whereas FIR was lodged on 01.7.2021 i.e. after ten days from the initiation of alleged incident;
- v. No direct threats were issued to the complainant as alleged by him;
- vi. No facebook ID was brought on record to show the involvement of the respondents / accused in the alleged crime;
- vii. Ingredients of offences under Section 419, 500 and 506(ii) PPC were attracted;
- viii. Digital forensic analysis report (page 45 in Cr. Acq. Appeal No.03 of 2022) shows the following findings:

*“... Finding 1: .....*

*During the forensic analysis, the above mentioned evidentiary items USP port is malfunctioning. However, the evidentiary item physically examined and found that two facebook messenger ID namely m.me/ab.qadir.526 (AB Qadir Shahni) and Malik Ali Malik are configured in said evidentiary item and attached as (Annex-D page 09), for further investigation and legal proceedings.”*

- ix. The acquittal of the respondents / accused is based on the following findings: -

*“Apart from the above, as per record available, it transpires that I.O. failed to submit any proof regarding involvement of both accused persons from which their involvement shown in commission of offence. As far as, the report of FIA also reveals that, fake facebook ID named as “Malik Ali Malik” was not used by both the accused persons nor such used from their cell phones.”*

6. To see whether the basic ingredients of aforesaid offenses are attracted in the present case.

7. So far as Section 500 PPC is concerned which provides that whoever defames another shall be punished with simple imprisonment for a term which may extent to two years or with fine or with both and as per Cr.P.C. this offence is non-cognizable and the same could not be investigated without permission of the Magistrate, however, investigating officer booked the respondent / accused under Section 500 Cr.P.C. without order of the Magistrate. So far as Section 419 PPC is concerned which deals with cheating by personation whereas in the present case no direct cheating by way of personation has been made rather alleged fake facebook ID was used as discussed supra for which the report of FIA reveals that fake facebook ID named as “Malik Ali Malik” was not used by the respondent / accused from their cell phones. However, the offences pertaining to cybercrime are required

to be investigated by FIA and special provision under Prevention of Electronic Crimes Act, 2016 (PECA) and Rules 2018 are available, however, the complainant has not invoked these provisions and felt it feasible to bring his case within the provisions of Section 419, 500 and 506(ii) PPC rather than under the PECA and the learned Magistrate finally observed that there is no probability of the accused to be convicted of the aforesaid offences, besides that the inquiry on the aforesaid allegations is pending before FIA against respondents / accused. Additionally, Section 506(ii) PPC provides issuance of threats to cause death or grievous hurt. There is no material available on record to suggest that there are direct threats issued to the complainant and these all are on using of fake facebook ID for which FIA is dealing with the inquiry as disclosed in the impugned orders.

8. Coming to the issue of cybercrime, primarily, internet technology is progressing thick and fast and we all are benefited from it in almost all fields of life but at the same time, it has multiple disadvantages as well. Unless we exhibit maximum maturity and protect ourselves by self-imposed restrictions, we can easily fall victim to this latest technology, and chances of being misled or even defrauded become more obvious when personal spite, selfishness or greed take charge of our social activities, whereas, a strong selfish desire of having more and more of something, especially the money is so damaging that it can destroy everything in man's life and take away even what is his hardened.

9. However, the instant case appears to be a classic example, where, the complainant dragged the respondents / accused in Criminal Case No.144 of 2021 arising out of offences falls under PPC, rather under the Cybercrime, more than the cleverness of the complainant who played more effective role to book them in the accomplishment of his intent.

10. A question arises whether offenses under any other laws if being committed concerning or through the use of an information system would be investigated and tried under PECA or their legal recognition shall not be affected for investigation and trial under other laws i.e. PPC? Such proposition requires thorough examination of provisions of PECA, 2016.

11. The main object of PECA, 2016 as reflected in the preamble is to prevent unauthorized acts for the information system; in the light of definition

clauses, the recitation and examination of relevant provisions of PECA, which makes it clear that offenses under PPC or any other laws will be recognized and enforced under said laws even if they are committed to or through the use of an information system. The nature of offenses under this Act is different from offenses under other laws; most of the offenses under the Act, 2016 have the status of predicate offenses that are committed to facilitating the commission of main offense.

12. Primarily, PECA, 2016 deals with white-collar crimes through the use of information system; white-collar crime is “a crime committed by a person of respectability and high social status in the course of their occupation”. Typical white-collar crimes could include wage theft, fraud, bribery, Ponzi schemes, insider trading, labor racketeering, embezzlement, cybercrime, copyright, infringement, money laundering, identity theft, and forgery. Offenses under this Act are not alike the offenses under different laws like Telegraph Act, 1885, the Anti-terrorism Act, 1997, the Pakistan Telecommunication (Reorganization) Act, 1996, the Electronic Transaction Ordinance, 2002 and Pakistan Penal Code, 1860, etc. The language used for offenses under PECA is different from somewhat like offenses under other laws. It has a clear-cut distinction, even though most of the offenses under PECA are non-cognizable except certain offenses. They are Cyber Terrorism, Offences against modesty of a natural person or minor, and Child Pornography.

13. From the above expression, it is clear that if an offense under other laws is committed by uploading data or information generally on facebook or sending messages through any mobile application, it would not be an offense under PECA, 2016 until it is transmitted through unauthorized access for the purpose of a required action as depicted in the relevant sections of PECA or target a particular person in case of offenses of cyber stalking, spamming or spoofing.

14. Some more provisions of PECA, 2016 throw light to differentiate trials of offenses under PECA or other laws. Section-36 (3) (b) & (c) of PECA, 2016 talks about another ongoing investigation or criminal proceedings; which fortifies that the offence defined in other laws shall be investigated and tried separately by the respective courts. Section-30 of PECA, 2016 mandates about Joint Investigation Team, to investigate an offence under PECA or any other law for the time being in force which gives a distinct mark and clear

indications to deal with the trials separately, if different offences have been committed. Section-44 of PECA, 2016 deals with cognizance and trial of offences and permits the application of Cr. P.C and Qanun-e-Shahadat Ordinance, 1984 subject to inconsistency with PECA, if any.

15. Section 235 Cr. P.C is the only section that explains the charging of different offenses committed in the same transaction. Section 235 (2) of Cr.P.C reads as under:

“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.”

16. It deals with offenses falling within two or more separate definitions of any law; the word “any law” does not mean different laws but by the same law. Thus, the Court constituted under PECA, 2016 prima facie cannot try offenses falls under PPC.

17. As per Section 26 of General Clauses Act, 1897, an offense falling under two definitions of different laws shall be tried separately. Unlike Section 17 read with Section 21-M of the Anti-terrorism Act, 1997, there is no specific provision for holding the joint trial in PECA. As per Section 50 of PECA, Provisions of this Act shall have the effect, not in derogation of Pakistan Penal Code or any other laws; which means, if a similar offense under PPC and PECA is committed then the offender shall be charged under PECA only. The offender is usually charged with the offense only under special law that has an effect on any other law for the time being in force; like CNS Act, the offender is charged under Section 9 of CNS Act and not under Article 3 or 4 of Prohibition (Enforcement of Hadd) Order, 1979. Some personal offenses like Cyber Stalking, Spamming, or Spoofing would only be tried independently under PECA even if they are offenses under any other law because provisions of PECA shall have an effect on other laws and no charge under other laws shall be part of the trial in the Court constituted under PECA.

18. From the above it is inferred that offenses under PPC, if committed through the use of an information system shall be tried by the ordinary Court and not by the Court constituted under PECA; if such acts are committed through unauthorized access to the information system, then the main offense shall be tried by the ordinary Court and offense of unauthorized access shall

be tried by the Court under PECA. Besides Section 28 of PECA mandates applicability of PPC; according to the statute the said section runs as under:

“Section-28; Pakistan Penal Code, 1860 to apply. The provisions of the Pakistan Penal Code, 1860 (Act XLV of 1860), to the extent not inconsistent with anything provided in this Act. shall apply to the offences provided in this Act.”

19. From the perusal of above provision, it is clear that it does not support the omnibus application of all provisions of PPC rather application is limited to those provisions which relate to vicarious liability like common intention or common object, abetment, or criminal conspiracy and provisions relating to General Exceptions in PPC, if they are not inconsistent with provisions of PECA.

20. Learned counsel for appellant / complainant contends that the offenses of PPC cannot be investigated by FIA along with offenses under PECA, 2016 nor they can be tried by a Court constituted under the said Act; therefore, only an ordinary Court can try the offenses under Sections 419, 506(ii) PPC in present FIR. He further contends that forensic report prima facie suggests the involvement of the respondents / accused; that mere pendency of inquiry report with the FIA does not absolve them from the trial under PPC thus, their acquittal without recording evidence is not called for; that the respondents / accused have committed the offence of extending threats, defamation and impersonation and such offences could only be proved by the prosecution in full-fledged trial. He further submitted that acquittal of the respondent No.2 at the initial stage is perverse and is based on erroneous approach; that prosecution has sufficient material to prove the case against the respondent / accused that they have committed the offences discussed supra. He lastly prayed for setting the acquittal orders passed by the learned trial Court and remanding the matter for allowing the parties to lead evidence.

21. Perusal of impugned order reveals that facebook ID named “Malik Ali Malik” was not used by the accused persons from their cell phones which was the main evidence of the prosecution to prove the guilt of accused persons hence learned Magistrate rightly reached to the conclusion by exercising powers of Section 249-A Cr.P.C.

22. Basically, the scope of interference in an appeal against acquittal is narrow and limited for the reason that in acquittal, the presumption of

innocence is significantly added to the cardinal rule of criminal jurisprudence that an accused shall be presumed to be innocent until proved guilty in other words presumption of innocence is doubled. As per dicta laid down by the Honorable Supreme Court, it has been categorically held that such judgment should not be interfered unless the findings are pervasive, arbitrary, foolish, artificial, speculative, and ridiculous, which is not the case in hand.

23. In the light of findings of the learned trial Court, I am of the considered view that if the charge is groundless and there is no probability of the accused to be convicted of the offences in such circumstances the trial of the accused under Sections 419 and 506(ii) PPC will be a futile exercise and these are the reasons the provisions of Section 249-A has been enacted to deal with such a situation to nip the futile trial in the bud, therefore, the learned Magistrate has rightly exercised the powers under Section 249-A Cr.P.C.

24. In the instant case, I do not find any illegality or irregularity committed by the learned trial Court, while passing the impugned orders, which does not call for any interference by this Court.

25. In view of the facts and reasons discussed above, I find no merit in the present acquittal appeals. Resultantly, the instant acquittal appeals merits no consideration and are dismissed.

**JUDGE**