

## IN THE HIGH COURT OF SINDH AT KARACHI

### Criminal Appeal No. 49 of 2012

Appellant : Syed Ishtiaq Ali Zaidi  
through Mr. S. Jawad Rizvi, Advocate

Respondent : The State  
through Mr. Mubashir Ali Mirza, Dy. Attorney General

Date of hearing : 29<sup>th</sup> August, 2022

### JUDGMENT

**Omar Sial, J.**: The background to this appeal is that a man by the name of Abdul Ghafoor alleged that on 08.07.1998 he went to the National Savings Certificate to purchase savings certificate for an amount of Rs. 1 million. He was issued the requisite certificates, which he discovered after their issuance, did not give a monthly profit instead they were term deposit certificates. According to Abdul Ghafoor when he informed Ishtiaque Ahmed Zaidi, the In Charge of the Centre about the mistake he was told by Zaidi that for the certificates to be cancelled, Ghafoor and his wife Farida (in whose joint names the certificates were issued) will have to write an application to seek permission of the Head Office and if he did not want to do that, the certificates could be cancelled after paying a penalty of Rs. 10,000. Ghafoor alleged that Zaidi gave him a receipt of receiving Rs. 1 million and that subsequently, although the replacement certificates had not been issued, Zaidi continued to give Ghafoor a monthly profit of Rs. 13,500 on the investment he had made. Ghafoor continued to receive the monthly profit till September 1999. No profit was given to Ghafoor for October 1999 therefore Ghafoor complained to the F.I.A. After a preliminary inquiry by the F.I.A., F.I.R. No. 13 of 2000 was registered under section 409 P.P.C. and section 5(2) of the Prevention of Corruption Act, 1947 against Zaidi.

2. Zaidi pleaded not guilty to the charge against him and claimed trial. At trial the prosecution examined **Abdul Ghafoor as PW-1** (he was the complainant). **Abdul Majid Khan as PW-2** (he was the In Charge of the National Savings Centre when the F.I.A. conducted its enquiry). **Mohammad Akram Khan as PW-3** (he was a Reader in the office of the Deputy Director, F.I.A. when the inquiry was

conducted). **Jameel Ahmed as PW-4** (he was the cashier at the Centre when the incident is said to have occurred). **Inspector Shafi Mohammad as PW-5** (he was brought in as a witness to primarily confirm the signatures of Imam Bux Baloch, the F.I.A. official who had registered the F.I.R.). Zaidi in his statement under section 342 Cr.P.C. denied the allegation against him, denied he had ever issued the receipt and further stated that the money was returned to Zaidi the very same day when the certificates were cancelled. Learned Special Judge (Central) Hyderabad convicted Zaidi for an offence under sections 409 and 420 P.P.C. together with section 5(2) of the Prevention of Corruption Act, 1947 to 10 years in prison and a fine of Rs. 1 million (or another 2 years in prison upon default). It is this judgment which has been challenged through this appeal.

3. I have heard the learned counsel for the appellant as well as the learned Deputy Attorney General. In spite of several notices, the complainant did not effect an appearance. The individual arguments of the counsels are not being reproduced but are reflected in my observations and findings below.

4. The whole case hinges on a receipt that Abdul Ghafoor alleges was given to him by Zaidi. Zaidi denies that he ever gave this receipt to him. This receipt was produced at trial by the complainant himself. The surprising thing is that the original of the receipt was not ever produced. At trial, the learned counsel for the appellant objected to the production of the photocopy and though the learned judge noted that the objection will be addressed at the time of final arguments and judgment, it appears that he forgot all about the objection when the judgment was rendered. It was not only this objection but every other objection, which the learned judge had said he would address in his judgment, that perhaps due to an oversight, he failed to do.

5. I notice from the record that an explanation as to what happened to the original receipt was given by prosecution witness Muhammad Akram Khan who appeared as PW-3. He was a Reader in the office of F.I.A.'s Deputy Director in Hyderabad. This man testified that when he was working in his office on 31.01.2000, Abdul Ghafoor came and gave him the original of the receipt and told him to give it to Inspector Noor Mohammad Kaka. At some undisclosed date, Akram gave the receipt to Kaka and obtained his signatures on a photocopy. Akram acknowledged at trial that he was not a subordinate of Kaka, that the receipt was given to him without even an envelope. Further, the record reflects

that the original receipt was not secured under a memo. Kaka, the investigating officer was not examined at trial let alone him producing the receipt. The photocopy of the receipt produced by Akram at trial does contain a signature purported to be that of Kaka but no official of the F.I.A. appeared at trial to even confirm this aspect. Yet another strange aspect of the case is that Zaidi was never called to give his sample signatures in order to verify from the expert whether the signature on the receipt was indeed his. No explanation was provided as to why Zaidi, when he was admittedly available at all times, was not called by the investigating officer to take samples of his signatures, and instead photocopies of leave granting applications, that were countersigned by Zaidi, were sent to the hand writing expert for analysis. The hand writing expert did issue a report that said that the signatures on the various photocopies did match with the signature on the photocopy of the receipt, however, the hand writing expert was also not examined at trial. A hand writing expert is not one of the persons exempted to appear under section 510 Cr.P.C. The fact that Zaidi's samples signatures were not taken, the original receipt was not brought on record, the hand writing expert as well as the investigation officer was not examined, makes me conclude that manipulation on the photocopy of the receipt cannot be conclusively overruled. Yet another aspect of this whole issue of photocopies is that Article 72 of the Qanun-e-Shahadat Order, 1984 requires the content of documents to be proved through primary or secondary evidence. Article 73 of the Order explains that primary evidence means the document itself produced for the inspection of the Court. In the present case this was not done. Article 74 describes what secondary evidence is and includes copies of the original – which for argument sake, the receipt in the present case was. Article 75 provides that a document must be proved by primary evidence except in cases mentioned in Article 76. Article 76 lists the situations in which secondary evidence may be given of the existence, condition or contents of a document. The reason for non-production of the original receipt in the present case, does not fall within any of the eventualities listed from serial (a) to (i). The photocopy was thus inadmissible in evidence and also not proved. A conviction cannot be based on this document.

6. Prosecution's own witness i.e. Syed Jameel Ahmed, who was the cashier at the time the incident is said to have taken place testified at trial that the amount was returned by him to Abdul Ghafoor on the instructions of Zaidi. He further

testified that the certificates that had been issued to Abdul Ghafoor were cancelled and issued to another client. This witness was not declared as hostile by the prosecution thus what he had testified was accepted by the prosecution itself.

7. I find it absolutely implausible that Abdul Ghafoor, being an advocate by profession, was so naïve that he never took the original certificates from the Centre and kept receiving profit of Rs. 13,500 (which is denied by Zaidi) for nearly an year without any documentary evidence. Ghafoor's version seems that he would walk into the Centre every month and he was given Rs. 13,500 – no questions asked and without the attached token of the certificates nor a cheque being given or issued by him. The original cancelled certificates were admittedly dealt with in accordance with the rules in vogue at that time.

8. Muhammad Saleem Shaikh, Assistant Director (Inspection) National Savings Centre was appointed as an inquiry officer to look into the complaint made by Ghafoor. Though Saleem Shaikh was not called in as a witness, the report he had filed was produced as evidence through Abdul Majid Khan, who was the In Charge of the National Savings Certificate at that time. The investigation had concluded that the original certificates in the aggregate amount of Rs. 1 million were found accounted for at the time of issuance however they had been subsequently cancelled but as the staff at the time of cancellation was no longer available, Shaikh could not determine the reason for cancellation. He concluded his report however by saying *“Apparently, the mischief has not resulted to any fraud.”* Keeping Shaikh's testimony in mind, Abdul Ghafoor's allegation that *“In the October 1999 I came to know that the accused after cancelling my Khas Deposit Certificates encashed the said and deprived me from my amount.”* finds no support.

9. On 18.05.2001, Abdul Ghafoor filed Summary Suit No. 6 of 2001 before the learned 4<sup>th</sup> Additional District Judge, Hyderabad seeking recovery of his money. The plaint in the suit was returned on the ground of jurisdiction. The Suit was then filed before the learned 5<sup>th</sup> Senior Civil Judge, Hyderabad (F.C. Suit No. 178 of 2001) on 03.05.2003. The Suit was dismissed on 25.05.2009. An appeal was preferred by Abdul Ghafoor before the learned District Judge, Hyderabad (Civil Appeal No. 116 of 2009). This appeal was dismissed to the extent of all other respondents but Zaidi on 16.08.2010. Ghafoor challenged the decision of

16.08.2010 before this Court (being 2<sup>nd</sup> Appeal No. 45 of 2010). This appeal is still pending adjudication with very little or no interest shown in it by Abdul Ghafoor. The fact that Ghafoor suffered a loss, even after 12 years, is yet to be established. If he succeeds in his action against the accused under the civil law he may be able to recover his loss, however, from the evidence available before me, a criminal liability of the accused has not been established.

10. The investigating officer of the case Kaka was not examined at trial. No reason was given for his absence. In such an eventuality it will be presumed pursuant to Article 129 illustration "g" that had Kaka testified at trial, he would have not supported the prosecution case.

11. In view of the above observations, I am of the view that the prosecution was unable to prove its case against the appellant beyond reasonable doubt. The appeal is therefore allowed. The appellant is on bail, his bail bond stands cancelled and surety discharged.

JUDGE