

IN THE HIGH COURT OF SINDH KARACHI

Criminal Appeal No.473 of 2021 Cr. Revision Application No. 227 of 2021

Sana Rizwan & another, appellants in : through Mr. Amir Mansoob
Cr. Appeal No. 473/2021 & Qureshi Advocate
Respondent in Cr. Rev. Application
No. 227/2021

Muhammad Farooq, complainant : through Mirza Sarfaraz Ahmed
In Cr. Appeal No. 473/2021 & Advocate.
Applicant in Cr. Rev. Application
No. 227/2021

State : through Syed Meeral Shah,
A.P.G. Sindh.

Dates of hearing : 21.02.2023

Date of Judgment : 16.03.2023

Date of Announcement : 22.03.2023

JUDGMENT

MUHAMMAD SALEEM JESSAR. J- By this single judgment I propose to dispose of captioned Cr. Appeal and Criminal Revision Application as both arise out of the same judgment.

2. By means of Cr. Appeal No 473 of 2021 appellants namely, Mrs. Sana Rizwan and Iqbal Mirza Nazar have assailed Judgment dated 21.08.2021 passed by learned Additional Sessions Judge-IX Karachi South in Sessions Case No. 1393 of 2015, being outcome of FIR No.311/2015, registered at P.S. Darakhshan, Karachi whereby each of accused/appellants has been convicted for offences punishable under Sections 420 PPC and awarded sentence to suffer RI for 10 months and to pay fine of Rs.1,00,000/- (one Lac) and in default of payment thereof, to suffer SI for 03 month more. The accused/appellants were also convicted for the offences punishable Under Sections 467/468 & 471 PPC and were awarded same sentence of RI and fine as above under each count. The sentence in default of payment of fine was also same.

The sentences awarded to both accused were ordered to run concurrently. However, they have been extended benefit under Section 382-B Cr.PC.

3. Through above said Cr. Revision Application, complainant Muhammad Farooq has called in question the quantum of sentence awarded to accused / appellants above named and has prayed for enhancement of the sentences.

4. Brief facts of the prosecution case, as disclosed in above FIR lodged by complainant, Muhammad Farooq are that DR. Amina Faheem was owner of Bungalow No.E-4, Darakhshan Villas, Phase 6 DHA Karachi for which power of attorney was executed in favour of the complainant. Complainant further stated that on 30-06-2003 a deal with regard to the sale of said house was done between complainant and Mst. Sana Rizwan and the agreement was later on cancelled as said Mst. Sana Rizwan failed to make payments in time. He further stated that father of Mst. Sana Rizwan namely Iqbal Mirza filed a civil suit before the competent court in this regard. Meanwhile Iqbal Mirza Nazar and Sana Rizwan managed to file fake and fabricated agreement with him in respect of Plot No. 117 Popular Avenue Phase VI, Karachi and plot No. C-6, Khayaban-e-Bukari Phase 6, DHA Karachi with his forge signatures. He further stated that he was neither owner of said properties nor any power of attorney was executed in his favour for the same. He further stated that The Hon'ble Court in view of the evidence available on record dismissed the civil suits and passed judgment in his favor. According to him, the fake documents of said two properties have been prepared on 18-07-2003, hence the above FIR was lodged.

5. After registration of FIR, usual investigation was carried out and on conclusion of investigation final charge sheet was submitted against accused Sana Rizwan and Iqbal Mirza Nazar.

6. A formal charge against accused was framed and read over to them at Ex.2, to which, they pleaded not guilty and claimed to be tried vide their pleas recorded at Ex.2/A & 2/B.

7. In order to prove its case, prosecution led evidence and examined 5 PWs, PW-1 Muhammad Farooq at Ex.3, PW-2 Tariq Hussain at Ex.4, PW-03 Faisal Amjad at Ex.6, PW-4 SIP Muhammad Ejaz Awan at Ex.8, PW-5 SI Ghulam Yaseen at Ex.9, thereafter learned ADPP closed the side of prosecution's evidence at Ex-10.

8. The statements of both accused u/s 342 Cr.P.C. were recorded at Ex.11 and Ex.12 respectively, wherein they denied prosecution allegations and professed their innocence. However, both accused neither opted to examine themselves on Oath as envisaged u/s 340(2) Cr.P.C. nor led any evidence in their defence.

9. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing advocates for the parties, trial Court vide impugned judgment convicted and sentenced to the appellants, as stated above. Appellants/convict have challenged their conviction by filing said criminal appeal while complainant has filed above noted Cr. Revision Application for enhancement of sentence awarded to accused /appellants.

10. I have heard arguments advanced by learned counsel for the parties and have perused the material available on the record.

11. Learned counsel for appellants in Cr. Appeal No. 473 of 2021 submitted that though charge has been framed against appellants in terms of Section 420/468/ & 467 PPC yet it was not proved, even then they have been convicted wrongly. He further submitted that original documents were not sent to hand writing expert for examination and referred to statement of the I.O (available at Page-211 of the paper book) and submitted that it was admitted by him that he did not send the same to handwriting expert. He further submitted that forensic of the forged signature allegedly made by the appellants, was not made, therefore, allegation leveled by the prosecution, has not been established; hence submitted that impugned judgment does suffer from many illegalities and infirmities and as such, is liable to be set-aside. As far as Criminal Revision Application filed by the complainant is concerned, he submitted that same is misconceived and question of enhancement of sentence particularly in view of evidence adduced by the prosecution, is not much of the consequence. He, therefore, prayed for grant of appeal as well as dismissal of Revision Application. He placed reliance upon the cases (i) Waseem Khan Versus The State and 2 others (2022 P.Cr.L.J Note 70), (ii) Pervaiz Khan and another Versus The State (2022 SCMR 393), (iii) Najaf Ali Shah Versus The State (2021 SCMR 736), (iv) Tariq Perves Versus The State (1995 SCMR 1345).

12. Learned Addl. P.G. Sindh opposed the appeal and supported impugned judgment as well as Revision Application and submitted that documentary evidence adduced by the prosecution, has not been shattered; besides, the sentence/punishment awarded by the trial court is inadequate.

13. Learned counsel for the complainant also opposed the Appeal and submitted that prosecution has adduced sufficient evidence and subsequently proved the case against accused; hence appeal merits no consideration and he prayed for dismissal of the appeal. He further submitted that though sufficient evidence has been brought on record by the prosecution and prosecution has successfully established the charge against respondents/ appellants/convicts; however, trial court has taken lenient view

which in view of the ratio of the evidence adduced by the prosecution, is unwarranted; hence, prayed for enhancement of the sentences awarded to the respondents/convicts by the trial court.

14. From perusal of the contents of F.I.R. it seems that main stress laid by the complainant for lodging F.I.R. is on the fact that while dismissing Civil Suits Nos. 1291/2003 and 10/2004 filed by accused, Mrs. Sana Rizwan against the complainant, the learned Single Judge (O.S.) of this Court declared that the accused had prepared documents by forging complainant's signatures. In his evidence, the complainant deposed, ***"In the year 2015 Hon'ble High Court dismissed both suits by declaring power of attorney were forged."*** Even the trial Court while convicting the accused / appellants at page 9 (Page 33 of the Court file) observed, ***"It is crystal clear from legal proceeding in this case and in civil suits filed by accused Sana Rizwan before Hon'ble High Court of Sindh that accused Sana Rizwan committed cheating forgery by preparing forged documents i.e. Power of attorney and sale agreement with forged signature of complainant"***. However, from perusal of the judgment delivered in aforesaid suits, it appears that there is no mention of such declaration as claimed by the complainant. Even no issue in this regard was framed in the aforesaid suits by the learned Single Judge sitting on the Original Side. In the circumstances, the plinth of which complainant's case was built is found missing. In fact, following three Issues were framed in said suits:

- "i. Whether the plaintiff failed to fulfill the terms and conditions of the sale agreement dated 30th June 2003, deliberately and intentionally within the stipulated period?"***
- ii. Whether the defendants have cancelled the agreement dated 30th June 2003?"***
- iii. Whether the plaintiff is entitled to specific performance of the agreements dated 30th June 2003, and 18th July 2003?"***

15. From perusal of above coated issues it is crystal clear that in entire judgment, which was made basis for lodging the FIR against the appellants, there was at all no declaration of even observation of the learned Single Judge (O.S) that the appellants by forging signatures of the complainant had prepared two documents i.e. sale agreement and power of attorney.

16. It is also of worth importance that in such cases where allegation of fraudulently manipulating certain documents by making forgery and forged signature, it is necessary to get the disputed documents and signatures verified from the Handwriting Expert in order to come at conclusion regarding truthfulness or otherwise of such allegation of committing fraud and forgery. It seems that the investigating Officer had sent the specimen signatures of the complainant to the handwriting

expert/Forensic Laboratory however, the Handwriting Expert vide his letter / Preliminary Report dated 29.06.2015 at Ex.8/L, available at page 245 of the Paper Book had informed the I.O. as under:-

“The following documents are required for examination.

- *Original of disputed agreement for sale bearing questioned signature.*
- *Authentic admitted signatures of persons in verification of his routine of work as CNIC, Passport, official/private or other correspondence in original.”*

17. However, the Investigating Officer thereafter did not succeed in procuring the original sale agreement and power of attorney in question, nor even he took any step to procure aforesaid authentic documents as required by the Handwriting Expert.

18. It may be observed that even the trial Court had ample powers to compare the signature of the complainant by virtue of the provisions of Article 84(2) of the Qanoon-e-Shahadat Order, 1984. It would be advantageous to reproduce hereunder the contents of Article 84(2) of the Order, 1984:

“84(2) The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

19. In this connection reference may also be made to a decision given by a Division Bench of this Court in the case of **SHER ASFANDYAR KHAN and others** Vs. **NEELOFAR SHAH and others**, reported in **2020 C L D 1260** [Sindh], wherein while dealing this point, it was held as under:

41. So far as the objection of the learned counsel for the appellants that the learned Single Judge was not justified in comparing the signatures of Alamgir Khan is concerned, here again we tend to disagree with the submissions made by the learned counsel for the appellants, as Article 84 of the Order-1984, as reproduced above, duly authorizes the Court itself for reaching to a fair and just conclusion.

20. In view of this legal position, if the Investigating Officer could not succeed in procuring the final report from the handwriting expert, in such an eventuality the trial Court could have exercised its powers bestowed upon it under the above said provision of law, particularly in view of the fact that the bone of contention in the case was; as to whether the signatures on the sale agreement and power of attorney were, in fact, that of the complainant or not? For this purpose, the trial Court, as provided in Article 84(2) of the Qanoon-e-Shahadat Order, 1984, could have directed the complainant to produce his Passport, CNIC and / or other authentic and admitted documents and then the Court could have easily compared signatures on the sale agreement and power of attorney, which the accused / appellant claimed to be that of complainant, with the signatures of the complainant on said authentic and admitted documents.

21. There is also inordinate delay in lodging the F.I.R. From perusal of the contents of the F.I.R. it seems that against the column, “**Date and Hour of Occurrence**” it is mentioned “**18.07.2003 @ unknown hours**” whereas the date of lodging F.I.R. is mentioned as “**03.06.2015 @1945 hours**”. According to the admission of the complainant himself made in his examination in chief to the effect, “*Sana Rizwan filed suit bearing No.1291/2003 before Hon’ble High Court of Sindh for Specific Performance and she filed another suit bearing No.10/2004 before Hon’ble High Court of Sindh for Specific Performance thereafter where I came to know that accused persons prepared forged agreement regarding property C-6 & 117 Popular Avenue*”. It means that at least the complainant came to know about such alleged fraud and forgery in the year 2004 when the said suits were filed, but despite that he remained mum and did not lodge FIR and got the same registered after about 11 years. Even if the period is counted from the date of the judgment passed in the above said suits i.e. 20.03.2015, even then there is delay of 2 months and 11 days for which no satisfactory explanation has been furnished by the prosecution. Needless to emphasize that unexplained delay in lodging the FIR creates doubts about the involvement of actual culprits as the probability of deliberation and consultation in such circumstances cannot be ruled out.

22. On the point of delay in lodging FIR, the Hon'ble Supreme Court in the case of *Ayub Masih v. The State (PLD 2002 SC 1048)* held as under:-

*“The unexplained delay in lodging the F.I.R. coupled with the presence of the elders of the area at the time of recording of F.I.R. leads to the inescapable conclusion that the F.I.R. was recorded after consultation and deliberation. The possibility of fabrication of a story and false implication thus cannot be excluded altogether. **Unexplained inordinate delay in lodging the F.I.R. is an intriguing circumstance which tarnishes the authenticity of the F.I.R., casts a cloud of doubt on the entire prosecution case and is to be taken into consideration while evaluating the prosecution evidence.** It is true that unexplained delay in lodging the F.I.R. is not fatal by itself and is immaterial when the prosecution evidence is strong enough to sustain conviction but it becomes significant where the prosecution evidence and other circumstances of the case tend to tilt the balance in favour of the accused.”*

In the case of *Sabir Hussain V. The State (2022 YLR 173)*, it was held as under:

*“9. The complainant has knowledge about missing of the deceased on 13.07.2019, but despite that, the complainant did not lodge the report, and he lodged the report on 16.07.2019 at 10:30 a.m. Nothing came on record about lodgment of the report of missing of the deceased by the complainant in Levies Thana. It has also come on record that the dead body of the deceased was recovered from the water bank of the Madrasa on 16.07.2019 at 6:30 a.m., and the FIR was lodged on the same date at 10:30 a.m., with a delay of four hours from the recovery of dead body of the deceased. The lodgment of the FIR with delay by the complainant creates a reasonable doubt in the prosecution case. Reliance in this behalf is placed in the case of *Mehmood Ahmed and 3 others v. The State and another (1995 SCMR 127)*.”*

23. It is also significant to observe that the trial Court has laid much stress on the fact that as the accused / appellant had produced photo copies of the sale agreement

and power of attorney which the complainant claims to be forged documents having been prepared after making his forged signatures, during the proceedings of the civil suits filed by accused / appellants, therefore, the original of the said documents must have been with them but they did not produce the same. While making such observations, learned trial Court ignored the well settled principle of law that conviction of an accused must be based and founded on **unimpeachable evidence and certainty of guilt**. Neither the conviction could be based on assumptions and presumptions, nor on surmises and conjectures. In instant case the trial Court has convicted the accused on the basis of *assumption* and *presumption* that as the accused had produced photo copies of the documents in question, therefore, the originals thereof would have been with them. Needless to emphasize that it was the bounden duty of the prosecution to prove the case against the accused beyond shadow of reasonable doubt. It was for the prosecution to produce the originals of sale agreement and power of attorney which are the *bone of contention* in instant case and having failed to do so, at least the signature of the complainant allegedly available on the photo copies of said documents should have been got verified to be of the complainant or not either on the basis of report of the handwriting expert/forensic laboratory or if the same could not be obtained, then it was incumbent upon the trial Court to have exercised its powers bestowed upon it by virtue of Article 84 of the Qanoon-e-Shahadat Order, 1984 which was not done.

24. The trial Court has also tried to shift the burden of the prosecution to prove its case beyond shadow of reasonable doubt upon the accused. It would be advantageous to reproduce hereunder relevant observations from the impugned judgment:

“The investigation was conducted by police but police failed to recover original power of attorney and original sale agreement produced by accused Sana Rizwan before Hon'ble High Court of Sindh in the suits bearing No. 1291/2003 & 10/2004. It is admitted fact that accused Sana Rizwan filed suit bearing No. 10/2004 and attached sale agreement executed with Amna Faheem through her attorney in respect of property bearing No. Plot No. C-6, Khayaban-e-Bukhari, Phase 6, DHA Karachi but she has failed to produce original power of attorney and sale agreement attached by her in her plaint/suits bearing No. 10/2004.....

The defence plea of both accused is that I.O. has failed to recover both original documents i.e. power of attorney and sale agreement. According to complainant those are forged documents and original are in possession of accused persons as they have annexed photocopy of both documents with suit bearing No. 10/2004 then how complainant can produce the same and those documents should be produced by the co-accused to the I.O as they had produced photocopies before Hon'ble High Court of Sindh.

25. The Superior Courts have not appreciated such conduct and have held time and again that in the first instance it is the duty of the prosecution to prove its case against the accused beyond reasonable doubt. Once the prosecution has succeeded in proving

its case, then it is for the accused to shatter the prosecution case, however, before fulfilling its duty the prosecution cannot take benefit of any weakness in the defence side. In the case reported as *Wazir Mohammad Vs. The State* (1992 SCMR 1134) it was held by Honourable Supreme Court as under:

“In the criminal trial whereas it is the duty of the prosecution to prove its case against the accused to the hilt, but no such duty is cast upon the accused, he has only to create doubt in the case of the prosecution.”

26. In another case reported as *Shamoon alias Shamma Vs. The State* (1995 SCMR 1377) it was held by Honourable Supreme Court as under:

“The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against the accused, entitles the accused to an acquittal.”

27. It is also now well settled that the accused is entitled to be extended benefit of doubt as a matter of right and not as a grace or concession. In present case, there are various admissions in evidence of the prosecution witnesses, so also certain discrepancies and lacunas in the prosecution case which create doubts and put dents in the prosecution case. Even an accused cannot be deprived of benefit of doubt merely because there is only one circumstance which creates doubt in the prosecution story. In this connection, reference may be made to the case of *Muhammad Masha Vs. The State* reported in **2018 SCMR 722**, wherein the Honourable Supreme Court held as under:

*“Needless to mention here that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt, if there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of accused, then accused would be entitled to the benefit of such doubt, not as a matter of grace and concession but as a matter of right. It is based on the maxim, “it is better that ten guilt persons be acquitted rather than one innocent person be convicted”. Reliance in this behalf can be made upon the cases of *Tariq Pervaiz Vs. The state* (1995 SCMR 1345), *Ghulam Qadir and 2 others Vs. The state* (2008 SCMR 1221), *Muhammad Akram Vs. The state* (2009 SCMR 230) and *Muhammad Zaman Vs. The state* (2014 SCMR 749)”.*

28. In view of above, it can safely be held that prosecution has not succeeded in proving its case against the accused beyond shadow of reasonable doubt.

29. For the forgoing reasons, instant Criminal Appeal bearing No. 473 of 2021 is hereby allowed and the impugned judgment dated 21.08.2021 passed by learned Additional Sessions Judge-IX Karachi South in Sessions Case No. 1393 of 2015, being outcome of FIR No.311/2015, registered at P.S. Darakhshan, Karachi, is hereby set aside. Consequently, appellants Sana Rizwan W/o Rizwan Ahmed and Iqbal Mirza Nazar are hereby acquitted from all the charges by extending them benefit of doubt.

30. As regards Criminal Revision Application filed by the complainant for enhancement of sentence awarded to the accused, consequent upon the setting aside impugned judgment of conviction, the same is hereby dismissed as having become infructuous.

Karachi
Dated: 22nd March, 2023

JUDGE