JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.D-26 of 2021

Present:-
Mr. Justice Mahmood A.Khan,
Mr. Justice Zulfiqar Ali Sangi

Appellant:	Bibi Yasmeen Shah through M/s. Mohammad Yousuf Laghari and Mola Bux Ayoub Leghari, Advocates.
Complainant:	Through Mr. Aijaz Ahmed Chandio, Advocate along with Mr. Zaheer Abbas (Law Officer, ECP).
	Mr. Ghulam Abbas Sangi, Assistant Attorney General for Pakistan.
Date of hearing:	19.09.2023.
Date of Decision:	19.09.2023.

J U D G M E N T

***ZULFIQAR ALI SANGI*, J-.** Through the instant Criminal Appeal, the appellant has assailed the conviction judgment dated 17.02.2021, passed by learned Sessions Judge, Badin in a Direct Complaint No.04 of 2018 filed by the Regional Election Commissioner, Hyderabad for the offences punishable under sections 78, 82, 94 and 95 of Representation of People Act, 1976 (Now repealed) read with sections 167, 173, 174, 190 and 193 of Election Act, 2017 and section 199, 200 and 471 PPC, whereby appellant was convicted under section 82 of the People Representation Act, 1976 ("ROPA") and sentenced to suffer R.I. for two years with fine of Rs.5000/- (Rupees five thousand only); and in case of default whereof, she shall suffer S.I. for three months more.

2. Brief facts of the case are that the complainant in his complaint has stated that he has been authorized by the Election Commission of Pakistan ("ECP") to lodge the complaint. It is stated that appellant contested elections for the seat of Provincial Assembly, Sindh and National Assembly in General Elections 1997, 2002, 2008

and 2013 but she did not return successful in the Elections. She also contested election for the seat of Senator in the year 2003 and returned successful wherein she filed nomination papers as well as declaring on oath before concerned Returning Officer that she is graduate and qualified in terms of Article 62 of the Constitution of Islamic Republic of Pakistan ("Constitution") and is not subject to any disqualification provided under Article 63 of the Constitution to become a candidate for the seats of Provincial Assembly, National Assembly and Senate. Appellant was required under the law to be graduate to contest General Elections of 2002 and 2008. She filed her qualificational documents, which were inquired to by the Election Commission of Pakistan under the order dated 09.05.2013 passed in a C.P. No.D-1645 of 2013 filed by contesting candidate Dr. Fahmida Mirza during General Elections 2013 and her Bachelor Degree was found to be fake / forged vide letter dated 10.05.2017 by the Higher Education Commission (HEC). Consequently, complainant filed a direct complaint.

3. The complaint was registered and brought on regular file by the learned trial Court and pursuant to issuance of B.Ws; the appellant appeared before the learned trial Court.

4. After supplying the case papers of the complaint, the charge was framed against the accused, to which she denied the allegations and claimed trial. During trial, the complainant Sain Bux Channer, the Regional Election Commissioner, Hyderabad was examined at Ex.04, who produced complaint at Ex.04/A, authorization letter at Ex.04/B, copies of letter with B.A Degree, verification letter of Degree, order dated 25.10.2017 passed by ECP, and order dated 03.07.2018 passed by Supreme Court of Pakistan at Ex.04/C to Ex.04/F respectively. Thereafter, learned counsel for the complainant closed the side vide statement Ex.05.

5. After examination of the complainant and closure of its side, the appellant was given chance to explain about the allegations by recording her statement under Section 342 Cr.P.C, in which she denied all the allegations. However, neither she examined herself on oath nor led evidence in her defense. In her statement, appellant produced certified true copy of letter dated 17.07.2018, letter of

Provincial Election Commissioner, Sindh issued to Regional Election Commissioner, Hyderabad dated 20.07.2018, special certificate dated 08.11.2022 issued by Assistant Controller of Examinations, University of Karachi, original degree, verified photo copy of degree and verified Marks Certificate issued by University of Karachi dated 08.11.2022 at Ex.06/A to Ex.06/F, respectively.

6. Learned counsel for the appellant contended that the appellant is innocent and she has been falsely implicated in the instant case due political rivalry; that the complainant was not competent person to file complaint; that the charge is groundless; that only complainant was examined and no other witness was examined in support of the evidence of the complainant; that the documents which were produced and relied by the trial court for convicting the appellant are not the original nor the same were produced by the person issued the same; that there is bar under section 95 of the Representation of the People Act, 1976, to take cognizance on such complaint except upon a complaint in writing made by order or under authority from, the commission or the Commissioner; that the material of another case was relied in the present case for awarding the conviction which is against the law; that the prosecution had not produced reliable, trustworthy and confidence inspiring evidence against the appellant; that the entire case doubtful hence he prayed that by extending her the benefit of the doubt she may be acquitted from the charge.

7. On the other hand, learned Assistant Attorney General for Pakistan and Law Officer of ECP fully supported the impugned judgment and contended that prosecution proved the case against the appellant beyond a reasonable doubt; that all the relevant documents were produced by the complainant in his evidence; that the appellant used a forged and fake degree by submitting it at the time of her nomination papers; that the complaint was maintainable and was filed by proper person who was authorized to file complaint; that the degree used by the appellant was also declared to be fake by the Supreme Court; that no defence evidence was produced by the appellant to rebut the allegations made in the complaint, hence the appeal of the appellant may be dismissed.

8. We have heard the arguments advanced by the parties and have perused the relevant material available on record with their able assistance.

9. After hearing the parties we have decided to first address the issue of maintainability of the complaint filed by the Reginal Election Commissioner Hyderabad and as to whether he was legally authorized to file the same or not?.

10. Perusal of the complaint it reveals that it was filed under sections 78 R/W S. 82, 94 and 95 of the "REPRESENTATION OF THE PEOPLE ACT, 1976 (NOW REPEALED)" R/W Ss. 167, 173, 174, 190 and 193 of the "ELECTION ACT, 2017" and Ss. 199, 200 and 471 of the "PAKISTAN PENAL CODE, 1860." Section 78 of the "ROPA, 1976" defines the Corrupt practice and reads as under:-

> ***78. Corrupt practice.—A person is guilty of corrupt practice if he—***
> ***[(1) contravenes the provisions of section 49;]***
> ***(2) is guilty of bribery, personation or undue influence or prevent any woman from contesting election or exercising her right to vote or enters into formal or informal agreement or understanding debarring women from becoming candidates for an election or exercising their right of vote in an election;];***
> ***(3) makes or publishes a false statement [or submits false or incorrect declaration in any particular material]—***
> ***(a) concerning the personal character of a candidate or any of his relation calculated to adversely affect the election of such candidate or for the purpose of promoting or procuring the election of another candidate, unless he proves that he had reasonable grounds for believing, and did believe, the statement to be true;***
> ***(b) relating to the symbol of a candidate whether or not such symbol has been allocated to such candidate;***
> ***(c) regarding the withdrawal of a candidate; [or]***
> ***(d) in respect of his educational qualifications, assets and liabilities, or any liability with regard to payment of loans or adherence to party affiliation specified in sub-section (2) of section 12.].***
> ***(4) calls upon or persuades any person to vote, or to refrain from voting, for any candidate on the ground that he belongs to a particular religion, province, community, race, caste, bradari, sect or tribe;***
> ***(5) knowingly, in order to support or oppose a candidate, lends, employs, hires, borrows or uses any vehicle or vessel for the purposes of conveying to or from the polling station any elector except himself and members of his immediate family; or***
> ***(6) causes or attempts to cause any person present and waiting to vote at the polling station to depart without voting.***

Section 82 of the "ROPA, 1976" defines the penalties for corrupt practice which reads as under:-

> ***82. Penalty for corrupt practice.—Any person guilty of corrupt practice shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees, or with both.***

Section 83 of the "ROPA, 1976" defines the Illegal Practice which reads as under:-

> ***83. Illegal practice.—(1) A person is guilty of illegal practice if he—***
> ***[(a) fails to comply with the provisions of section 50;]***
> ***(b) obtains or procures or attempts to obtain or procure, the assistance of any person in the service of Pakistan to further or hinder the election of a candidate;***
> ***(c) votes or applies for a ballot paper for voting at an election knowing that he is not qualified for, or is disqualified from, voting;***
> ***(d) votes or applies for a ballot paper for voting more than once in the same polling station;***
> ***(e) votes or applies for a ballot paper for voting in more than one polling station for the same election;***
> ***(f) removes a ballot paper from a polling station during the poll; or***
> ***(g) knowingly induces or procures any person to do any of the aforesaid acts.***
> ***(2) Any person guilty of illegal practice shall be punishable with [imprisonment for a term which may extend to six months and fine which may extend to five] thousand rupees.***

Section 94 of the "ROPA, 1976" defines the offences as to be cognizable which reads as under:-

> ***94. Certain offences cognizable.—(1) notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence punishable under [section 80A] or section 82 [or section 82A] or section 85 or sub-section (1) of section 87 shall be cognizable offence.***
> ***[(2) Notwithstanding anything contained in this Act or any other law for the time being in force, the offences of corrupt practice shall be tried by the Sessions Judge and an appeal against his order shall lie before a Division Bench of the High Court.***
> ***(3) Where proceedings against a person for being involved in corrupt practice are initiated on a complaint made by a private individual, and such person is convicted by the court and his conviction is maintained in final appeal, the complainant may be entitled to such reward payable out of the amount of fine as may be imposed by the court.***
> ***Provided that where such complaint proves to be false, malafide or is made for any ulterior motive to provide benefit to another person, the complainant shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.]***

Section 95 of the "ROPA, 1976" defines in respect of the Prosecution of offences by public Officers which reads as under:-

> ***95. Prosecution of offences by public officers.—(1) No Court shall take cognizance of an offence punishable under sub-section (2) of section 87, section 89, section 90, section 91 or section 92 except upon a complaint in writing made by order of or under authority from, the Commission or the Commissioner.***
> ***(2) The Commission or the Commissioner shall, if it or he has reason to believe that any offence specified in sub-section (1) has been committed, cause such enquiries to be made or prosecution to be instituted as it or he may think fit.***
> ***(3) An offence specified in sub-section (1) shall be exclusively triable by the Court of Session within the Jurisdiction of which the offence is committed.***
> ***[(4) In respect of an offence specified in sub-section (1), section 494 of the Code of Criminal Procedure, 1898 (Act V of 1898), shall have effect as if, after the word and comma "may," therein, the words "if so directed by the Chief Election Commissioner and" were inserted.]***

Bare perusal of section 95 of the **"ROPA, 1976"** it reveals that "No Court shall take cognizance of an offence punishable under sub-section (2) of section 87, section 89, section 90, section 91 or section 92 except upon a complaint in writing made by order of or under authority from, the Commission or the Commissioner and The Commission or the Commissioner shall, if it or he has reason to believe that any offence specified in sub-section (1) has been committed, cause such enquiries to be made or prosecution to be instituted as it or he may think fit. In the case in hands though the Election Commission of Pakistan in the case No. 2(32)/2017-Law re: **CASE OF CORRUPT PRACTICE AGAINST MS. YASMEEN SHAH, BADIN KARACHI**. Filed by Dr. Fehmida Mirza against the appellant decided on 25-10-2017 and directed the office to de-notify the appellant as Senator retrospectively from the date when she, for the first time, entered upon her office. The retrospective de-notification was ordered to bear its own legal consequences i-e the recovery of all the financial benefits that she received as Senator. No order for initiating the criminal proceedings was passed nor after the aforesaid decision was another inquiry conducted by the Election Commission or the Commissioner for the aforesaid purpose.

11. Similar legal position is for the initiating criminal proceedings in respect of the **"Election Act, 2017"**. From perusal of complaint it also reveals that the same was too filed to prosecute

appellant under sections 167, 173, 174, 190 and 193 of the "**Election Act, 2017"**. For ready reference aforesaid sections are re-produced as under:-

> ***167. Corrupt practice.—A person is guilty of the offence of corrupt practice if he—***
> ***(a) is guilty of bribery, personation, exercising undue influence, capturing of polling station or polling booth, tampering with papers, and making or publishing a false statement or declaration;***
> ***(b) calls upon or persuades any person to vote, or to refrain from voting, for any candidate on the ground that he belongs to a particular religion, province, community, race, caste, bradari, sect or tribe;***
> ***(c) causes or attempts to cause any person present and waiting to vote at the polling station to depart without voting; or***
> ***(d) contravenes the provisions of section 132.***
>
> ***173. Making or publishing a false statement or declaration.—A person is guilty of making or publishing a false statement or declaration if he makes or publishes a false statement or submits false or incorrect declaration in any material particular—***
> ***(a) concerning the personal character of a candidate or any of his relations calculated to adversely affect the election of such candidate or for the purpose of promoting or procuring the election of another candidate, unless he proves that he had reasonable grounds for believing and did believe, the statement to be true; or***
> ***(b) relating to the symbol of a candidate whether or not such symbol has been allocated to such candidate; or***
> ***(c) regarding the withdrawal of a candidate; or***
> ***(d) in respect of statement of assets and liabilities or any liability with regard to payment of loans, taxes, government dues and utility expenses.***
>
> ***174. Penalty for corrupt practice.—Any person guilty of the offence of corrupt practice shall be punished with imprisonment for a term which may extend to three years or with fine which may extend to one hundred thousand rupees or with both.***
>
> ***190. Cognizance and trial.—(1) Notwithstanding anything contained in any other law but subject to section 193, an offence under this Chapter shall be tried by the Sessions Judge and any aggrieved person may, within thirty days of the passing of the final order, file an appeal against the order in the High Court which shall be heard by a Division Bench of the High Court.***
> ***(2) The proceedings against a person for being involved in corrupt or illegal practice may be initiated on a complaint made by a person or by the Commission but if a complaint made by the person proves to be false, based on bad faith or is made for any ulterior motive to provide benefit to another person, the complainant shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees or with both.***
> ***(3) The Commission may direct that the summary trial of an offence under this Act may be conducted in accordance with the provisions of Chapter XX of the Code.***

> ***193. Certain offences triable by authorized officers.— Notwithstanding anything contained in the Code, an officer exercising the powers of a civil or criminal court, or an officer of the Armed Forces, or an officer performing a duty in connection with an election, who is authorized by the Commission in this behalf may***
> ***(a) exercise the powers of a Magistrate of the first class under the Code in respect of the offences of personation, or capturing of polling station or polling booth punishable under section 174; and***
> ***(b) take cognizance of any such offence under section 190 of the Code; and shall try it summarily under Chapter XX of the Code.***

Bare perusal of section 190 (2) of the **"Election Act, 2017"** it reveals that the proceedings against a person for being involved in corrupt or illegal practice may be initiated on a complaint made by a person or by the Commission but if a complaint made by the person proves to be false, based on bad faith or is made for any ulterior motive to provide benefit to another person, the complainant shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees or with both, whereas section 193 of the "Election Act,2017" provides that an officer exercising the powers of a civil or criminal court, or an officer of the Armed Forces, or an officer performing a duty in connection with an election, **who is authorized by the Commission in this behalf may** exercise the powers of a Magistrate of the first class under the Code in respect of the offences of personation, or capturing of polling station or polling booth punishable under section 174; and take cognizance of any such offence under section 190 of the Code; and shall try it summarily under Chapter XX of the Code. The case of the appellant does not fall within the said categories for taking cognizance and if so the competency of a person authorized by the commission would be discussed in the coming paras. Now only remains provisions of the **"Pakistan Penal Code, 1860"** for which the complaint was also filed and the said provisions are re-produced as under:-

> ***199. False statement made in declaration which is by law receivable as evidence: Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.***

> ***<u>200. Using as true such declaration knowing it to be false</u>: Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.***
>
> ***<u>471. Using as genuine a forged document:</u> Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.***

12. The above provisions of Pakistan Penal Code cannot be invoked directly without fulfilling the requirement as provided in section 195 of the **"Criminal Procedure Code, 1898"**. Section 195 Cr.P.C. provides that "(1) No Court shall take cognizance **"(a)** of any offence punishable under sections 172 to 188 of the Penal Code, **except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate;** Prosecution for certain offences against public justice" and in clause , **"(b)** of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, **199, 200**, 205, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate; or Prosecution for certain offences relating to documents given in evidence and in clause **"(c)** it provides that of any offence described in section 463 or punishable under section **471**, section 475 or section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate. The term court is also defined in clause (2) of the section 195 Cr.P.C which reveals that in clauses (b) and (c) of sub-section (1), the term "Court" includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the 238[Registration Act, 1908].

13. After going through the relevant laws as discussed above under which the complaint was filed it is clear that the complaint was to be filed by the Election Commission, the Commissioner, Public servant and or the court where such false

information/statement or declaration was furnished or by whom they are subordinate. In the case in hand the degree was not submitted before the court and the same was submitted before the Election Commission, therefore only the election commission or the Commissioner was authorized to file the complaint which in the present case not has been done. The perusal of the charge framed against the appellant available at page. 21 reveals that the same was framed for offences punishable under sections 78, 82 and 94 of the Representation of the people Act, 1976 and the appellant was convicted for offence under section 82 of the Representation of the People Act, 1976. Under section 95 of the Representation of the People Act, 1976, it is provided that no Court shall take cognizance of an offence except upon a complaint in writing made by order of or under authority from, the Commission or the Commissioner. The commission and the Commissioner are defined under Article 218 of the **"Constitution of Islamic Republic of Pakistan 1973"** which reads as under:-

> ***218. [(1) For the purpose of election to both Houses of Majlis-e Shoora (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law, a permanent Election Commission shall be constituted in accordance with this Article.]***
>
> ***[(2) The Election Commission shall consist of—***
> ***(a) the Commissioner who shall be Chairman of the Commission; and***
>
> ***(b) four members, each of whom has been a Judge of a High Court from each Province, appointed by the President in the manner provided for appointment of the Commissioner in clauses (2A) and (2B) of Article 213.]***
>
> ***(3) It shall be the duty of the Election Commission [Omitted] to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.***

In the case in hand the commissioner or any of the member of the Commission while assigning reasons or conducting an inquiry had not issued such directions/ authorization to file complaint against the appellant. ***Though the Election Commission of Pakistan in the case No. 2(32)/2017-Law filed by Dr. Fehmida Mirza against the appellant decided on 25-10-2017 issued certain directions but not directed that the complaint be filed for the prosecution of the appellant.*** The decision of the Election Commission was challenged before this court and was reversed but

on appeal before the Supreme Court filed by the Election Commission it was set-aside and the decision delivered by the Commission was restored. ***This Court or the Supreme Court of Pakistan though heard the matter at length but also not issued any directions to the Election Commission or the Commissioner for prosecution of appellant under the relevant laws.*** The Election Commission after hearing the matter passed the observations against the appellant which for the ready reference are reproduced as under:-

> ***"18. In view of the foregoing discussion on factual and legal plane and on weighing the rival arguments for the parties we are of the considered view that the respondent is hit by the provisions of the Article 62 (1) (f) of the constitution of the Islamic Republic of Pakistan. We have no disposition to accept the arguments that the respondent was under a bona fide perception believing that she is a graduate. She remained a part of the legislature for a long time and such person cannot be expected to be swayed by any wrong misperception with regard to her disqualification in terms of Article 62 and 63 of the Constitution of the Islamic Republic of Pakistan. Thus deriving wisdom and seeking guidance from the aforementioned judgments of the Apex Court we hold that the respondent managed to occupy seats in the Senate right from 2003 by making false statement with regard to her educational qualification. Consequently we direct the office to de-notify the respondent as Senator retrospectively from the date when she, for the first time, entered upon her office. We may also mention here that the retrospective de-notification shall bear its own legal consequences i.e. the recovery of all the financial benefits that she received as Senator. In this respect office shall issue recovery order to the concerned quarters in terms of the judgment of Hon'ble Supreme Court PLD 2010 S.C. 1089) quoted above. The petition is accepted under Article 218 (3) and 219 of the Constitution. Follow up action regarding recoveries, be taken."***

14. The criminal proceedings against the appellant were initiated on the complaint filed by the Regional Election Commissioner Hyderabad, who himself was not competent to file the same as discussed above in detail. The complainant exhibited authorization letter dated: 17th July, 2018 issued by the **Malik Mujtaba Ahmed, Additional Director General (law)** which simply states that Election Commission of Pakistan has been pleased to authorize the Regional Election Commissioner, Hyderabad to file a criminal complaint of corrupt practice before the court of District & Session Judge, Badin against Ms. Yasmeen Shah, District Badin, under section 78 read with section 82, 94 and 95 of the Representation of the People Act, 1976 (Now Repealed) read with sections 167, 173, 174, 190 & 193 of Election Act, 2017 and section 199, 200 and 471 of the Pakistan Penal Code, 1860. ***The aforesaid letter does not disclose the reasons or any order of the Election***

Commission of Pakistan for initiating the criminal proceedings and we do not find any such observations/reasons available in the order dated: 25-10-2017, available at page 38 of the paper book. There is no record which reflects that after the said order dated: 25-10-2017 any other order was passed by the Election Commission of Pakistan or the Commissioner and there is no base for issuance of so called authorization letter date: 17th July, 2018 issued by the Additional Director General (law) nor the complainant produced any authorization letter which authorize the Additional Director General (law) to act on behalf of the Election Commission of Pakistan or the Commissioner. Further from perusal of statement under section 342 Cr.P.C. of the appellant it reflects that she also filed a letter dated: 20-07-2018 issued by "Abdullah Hanjrah, Law officer" to the Regional Election Commissioner, Hyderabad while forwarding the copy of letter No. F.1(1)/2017-Legal dated 17th July 2018 along with draft complaint and other letters, directing him to inform/confirm about the filling of the complaint to him and progress report of the proceedings before the court also were directed to communicate for onward transmission to ECP Islamabad. No any letter/order/reasons as required by law discussed above were communicated to the Regional Election Commissioner, Hyderabad for issuance of the authorization of Election Commission of the Commissioner. As has been discussed above we are of the view that the complaint filed by the Regional Election Commissioner, Hyderabad against the appellant Bibi Yasmeen Shah was not maintainable.

15. Turning the merits of the case, we observe that the prosecution is bound to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is cast upon the accused to prove his/her innocence. It has also been held by the Superior Courts that conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the case of ***Wazir Mohammad v. The State (1992 SCMR 1134),*** it was held by the Supreme Court that *"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." The Supreme Court in another case of ***Shamoon alias Shamma v. The State (1995 SCMR 1377)*** held that *"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. The prosecution cannot fall back on the plea of an accused to prove its case.....Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise."* It is settled law that the Court(s) must never be influenced with severity of the offence while appreciating evidence for finding guilt or innocence because severity of an offence could only reflect upon quantum of punishment. Therefore, even such like tragic cases, the Courts are always required to follow the legally established position that it is intrinsic worth and probative value of evidence which plays a decisive role in determining the guilt or innocence and not heinousness or severity of offence. Reliance can be placed on the case of ***Azeem Khan and another v. Mujahid Khan and others (2016 SCMR 274).*** The rule of benefit of the doubt is essentially a rule of prudence which cannot be ignored while dispensing justice following the law. The conviction must be based on unimpeachable evidence and certainty of guilt and doubt arising in the prosecution case must be resolved in favour of the accused. The said rule is based on the maxim. ***"It is better that ten guilty persons be acquitted rather than one innocent be convicted"*** which occupied a pivotal place in the Islamic Law and is enforced strictly because of the saying of the Holy Prophet (PBUH) that the ***"mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".*** Reliance is also placed on case of ***Naveed Asghar and 2 others v. The State (PLD 2021 SC 600).*** The rule of allowing benefit of doubt is not a rule to be followed only in the ordinary cases but the same is also applicable to the cases related to the elections and the allegations which are founded on corrupt and illegal practices are quite strict and stringent and the allegations in this regard must be absolutely proved through positive evidence without accepting any inferences and if there is any doubt, the benefit must go to the person against whom corrupt or illegal practices are being alleged. A Division Bench of Islamabad High Court in the case of ***Syed Zafar Ali Shah vs. Federation of***

Pakistan and others (PLD 2015 Islamabad 156), has held as under:-

> . ***It is further noted that it is settled law that the burden of proof in election matters for establishing corrupt or illegal practices, inter alia, rigging, under the two Statutes has been placed at par with the burden of proof in a criminal case. Not every person but only one of the candidates to the concerned seat may challenge the election of a returned candidate and the elections will be set aside or declared void if he is able to prove the allegations beyond a shadow of doubt and the returned notified candidate is entitled to the benefit of doubt. Affirming the law laid down in PLD 1957 SC 91, the Supreme Court held in Saeed Hassan v. Pyar Ali and 7 others PLD 1976 SC 6] as follows.--***
>
> ***"While agreeing with the proposition that the analogy of a criminal trial would hold good in the matter of a corrupt or illegal practice which must be affirmatively proved to the exclusion of a reasonable hypothesis consistent with the non-commission of a corrupt practice and the benefit of doubt must go to the person against whom a corrupt or illegal practice is alleged--"***
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> ***Reliance in this regard is also placed on the cases of Ram Singh and others v. Col. Ram Sing [AIR 1986 SC 3], Syed Qutub Ahmed v. Syed Faisal Ali Subzwari and others [2007 CLC 1682], Dr. Abdul Sattar Rajpar v. Syed Noor Muhammad Shah and 8 others [2005 YLR 937], Capt. Syed Muhammad Ali v. Salim Zia [1999 CLC 1026].***

16. It transpired from the contents of the complaint that it was filed in respect of alleged fake/forged degree allegedly used by the appellant while submitting her nomination papers which on verification was declared by the University as fake/forged. When after taking cognizance of offence and completing formalities the charge against the appellant was framed the word "Invalid" degree was used not a fake/forged for a reference the charge is reproduced as under:-

> ***CHARGE***
>
> ***"That in the year 1997, 2002, 2008 and 2013 you had contested elections for the seat of Provincial Assembly Sindh and National Assembly in General Elections and also contested election for the seat of Senator in 2003 and returned successful and at the time of filing the Nomination Papers, you had appended invalid Bachelor degree so as to secure qualification eligibility for contesting elections and also occupied the Seat of Senator, knowing that you were not qualified to contest elections for a seat in Provincial Assembly and you were turned up as to "Senator". But on verification from the Higher Education Commission the same was declared as "invalid". Thus you are involved in corrupt practice and thereby you committed an offence punishable under sections 78, 82 and 94 of the Representation of the People Act, 1978 and within the cognizance of this Court.***
>
> ***And I hereby direct that you be tried by this Court for the aforesaid charge."***

Now there appears a controversy concerning to 'invalid' and 'forged'. Restraining ourselves to dilate in detail only say that if a university is recognized by a government or accrediting body as a

legitimate institution of higher education, then the degree from that university would be considered valid. However, if the university is later found to be operating fraudulently or without proper accreditation, it is possible that such degree may not be considered valid. Interestingly the word 'invalid degree' is used in the charge but 'forged degree' is not used. The university has not denied that it was not issued by the university nor there appear any evidence that the university was subsequently declared to be operating fraudulently or without proper accreditation. By using the word invalid degree in the charge the appellant was misled in taking proper defence. Even otherwise we believe that she was not misled even then the responsibility of proven the case against her is on the shoulders of the prosecution.

17. The prosecution evidence is required to be re-apprise only to ascertain as to whether in this case there is evidence to the effect that illegal practices in terms of the law as provided have been committed and so proved. The case in hand is based upon the document allegedly produced by the appellant along with her nomination papers and only one witness was examined by the prosecution who was not a person before whom said document was produced nor he was a person who got it verified. Even this witness is not a person who issued verification report nor did he examine the alleged document. The role of this witness was only to file a complaint and no other witness was examined by the prosecution in support of the allegation made in the complaint. Admittedly the original degree, photocopy of which was allegedly annexed by the appellant with her nomination papers was neither brought on record during the course of investigation nor was exhibited during the course of trial proceedings. While going through the record available on file we have observed that said document was brought on record in the shape of a photocopy, however, the same being secondary evidence is inadmissible and that was not proved in accordance with law. It is settled law that a person relying on a document is under obligation to prove the same, hence, the same could not be read in evidence to record conviction against the appellant keeping in view the pronouncements of the superior courts of the country. The august Supreme Court of Pakistan in the case of ***State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal (2011 SCMR 1013),*** laid down the following principle:-

> ***"---O.XIII, Rr. 3 & 4---Document not produced and proved in evidence but only marked could not be considered by courts as a legal evidence of a fact."***

Further in the cases of ***Zia Ul Hasan v. The State (PLD 1984 SC 192), Abdul Qayyum v. Muhammad Rafique (2003 SCMR 104), Fazal Muhammad v. Mst. Chohara and others (1992 SCMR 2182) and Muhammad Arshad Naseem v. The State (2004 P.Cr.L.J 371),*** similar view was followed. We observe that the production of documents and proof of documents are two different subjects. The document could be produced in evidence that was always subject to proof as required under Art. 78 of Qanoon-e-Shahadat, order, 1984, for ready reference Art. 78 is reproduced as under:-

> ***"78. Proof of signature and handwriting of person alleged to have signed or written document produced: If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting".***

18. We have carefully examined the evidence of PW-1 (Complainant) who produced the documents before the trial court had not deposed a single word that he himself got verified the alleged fake document. The document was not presented before him nor did he receive the verification report. The Authority who issued the Degree Certificate of the appellant was not examined before the trial court. Person who got verified the said degree was also not examined nor the person who issued verification letter by declaring the degree as fake was examined before the trial court as a witness to prove that the degree was fake. In short none from the University where from the degree was obtained and got verified and from the HEC was examined to prove the allegation leveled against the appellant in the complaint. In such a circumstances the evidence of complainant in respect of fake degree is of no evidentiary value in view of Art, 79 of Qanoon-e-Shahadat Order, 1984 which read as under:-

> ***"79. Proof of execution of document required by law to be attested: If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of given Evidence. Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will,***

> ***which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.***

19. It is observed that non-examination of a person who issued the Degree or the person who received the same at the time of submission of the nomination papers and the person who got verified it and even the person who issued verification letter to prove that the same Degree and the subsequent letters were issued with their signatures is fatal to the case of prosecution. Under these circumstances it can safely be held that the prosecution has failed to prove that the Degree was fake. Under the similar facts and the circumstances in the case of ***Rasheed Akbar Khan vs. The State and another (2018 P.Cr.L.J 1495),*** the Division Bench of the Lahore High Court (authored by his lordship ***JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI, J),*** had observed as under:-

> ***"13. While going through the record available on file we have observed that mainstay of the prosecution version in this case is that during the course of investigation, Investigating Officer had transmitted copy of the B.A. degree to the University of the Punjab for its verification, however, the concerned officials of University of the Punjab vide its report (Exh.PF) reported that the same was bogus. In order to establish this fact the prosecution produced Rana Fazal Ahmad, a retired Assistant Controller of Examination, who appeared during the course of trial as PW-5. There is no cavil to this proposition that at the time of making his statement during the course of trial, PW-5 was no more at the strength of University of the Punjab as such in no way he was not custodian of record. Although said PW had stated that he had submitted his report (Exh.PF) qua authenticity of the B.A. degree, however, during the course of cross-examination, he frankly conceded that Exh.PF did not bear seal of the Assistant Controller concerned. Relevant extract out of his statement is reproduced as under: -***
>
> ***"It is correct that Ex.P.F does not bear seal of the .Assistant Controller concerned."***
>
> ***Needless to mention that without official seal the said report is devoid of legal importance and no sanctity whatsoever can be attached to it qua its genuineness. Fact also remains that said PW neither produced original record qua the B.A. degree nor provided any attested/certified copy of the said degree.***
>
> ***15. Admittedly the original degree, photocopy of which was allegedly annexed by the appellant with his nomination papers was neither brought on record during the course of investigation nor was exhibited during the course of trial proceedings. While going through the record available on file we have observed that said document was brought on record as Mark-A in the shape of a photocopy, however, the same being secondary evidence is inadmissible and that was not proved in accordance with law. It is settled law that a person relying on a document is under obligation to prove the same, hence, the same could not be read in evidence to record conviction against the appellant***

keeping in view the pronouncements of the superior courts of the country. The august Supreme Court of Pakistan in the case of State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal (2011 SCMR 1013), laid down the following principle:-

> ***"---O.XIII, Rr. 3 & 4---Document not produced and proved in evidence but only marked could not be considered by courts as a legal evidence of a fact."***

Similar view was held in the cases of Zia Ul Hasan v. The State (PLD 1984 SC 192), Abdul Qayyum v. Muhammad Rafique (2003 SCMR 104), Fazal Muhammad v. Mst. Chohara and others (1992 SCMR 2182), Muhammad Arshad Naseem v. The State (2004 PCr.LJ 371) and Asif Ali Hashmi through 4 Legal Heirs v. Muhammad Arif Mian and 4 others (PLD 2015 Islamabad 191).”

20. The officials who appeared before the Supreme Court and furnished certain documents in respect of the Degree of the appellant and on that basis the order passed by the Election Commission of Pakistan was maintained, the said officials were not appeared before the trial court for recording their evidence they were not cross the test of cross-examination before the Supreme Court. It is settled law that the evidence recorded in one case cannot be used in another case for awarding the conviction. The Supreme Court of India in the case of A***.T. MYDEEN AND ANOTHER vs. THE ASSISTANT COMMISSIONER, CUSTOMS DEPARTMENT, along with other Appeals (CRIMINAL APPEAL NO. 1306 OF 2021 @ SPECIAL LEAVE PETITION (CRL.) No. 374 of 2020 along with others Appeals)*** has observed as under:-

> ***37. Now, merely because the seven witnesses produced by the prosecution were the same in both the cases would not mean that the evidence was identical and similar because in the oral testimony, not only the examination-in-chief but also the cross-examination is equally important and relevant, if not more. Even if the examination-in-chief of all the seven witnesses in both the cases, although examined in different sequence, was the same, there could have been an element of some benefit accruing to the accused in each case depending upon the cross-examination which could have been conducted maybe by the same counsel or a different counsel. The role of each accused cannot be said to be the same. The same witnesses could have deposed differently in different trials against different accused differently depending upon the complicity or/and culpability of such accused. All these aspects were to be examined and scrutinised by the Appellate Court while dealing with both the appeals separately and the evidence recorded in the respective trials giving rise to the appeals.***
>
> ***38. We cannot proceed on presumption and assume that everything was identical word to word. We are therefore, not inclined to accept the submission of Mr. Banerjee and in fact both the judgments relied upon by***

> ***Mr. Banerjee having similar facts as the present case lay down the same proposition of law that evidence of one trial can be read only for the purposes of the accused tried in that trial and cannot be used for any accused tried in a separate trial. The view taken by the Calcutta High Court in 1928, expressed by Rankin, C.J., has been appropriately followed and accepted and is the correct view.***
>
> ***39. The provisions of law and the essence of case-laws, as discussed above, give a clear impression that in the matter of a criminal trial against any accused, the distinctiveness of evidence is paramount in light of accused's right to fair trial, which encompasses two important facets along with others i.e., firstly, the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses. These facts are, of course, subject to exceptions provided under law. In other words, the culpability of any accused cannot be decided on the basis of any evidence, which was not recorded in his presence or his pleader's presence and for which he did not get an opportunity of cross-examination, unless the case falls under exceptions of law, as noted above.***
>
> ***40. The essence of the above synthesis is that evidence recorded in a criminal trial against any accused is confined to the culpability of that accused only and it does not have any bearing upon a co-accused, who has been tried on the basis of evidence recorded in a separate trial, though for the commission of the same offence.***

Further the Supreme Court of Pakistan in the case of ***Khalid Mehmood alias Khaloo vs. The State (2022 SCMR 1148),*** has held as under:-

> ***.....This Court in the case of Nur Elahi v. Ikram ul Haq and State (PLD 1966 SC 708) has categorically held that "witnesses should be examined only once and their statements read out as evidence in the other case is not supportable in law". It was further held that "every criminal proceeding is to be decided on the material on record of that proceeding and neither the record of another case nor any finding recorded therein should affect the decision and if the court takes into consideration evidence recorded in another case or a finding recorded therein the judgment is vitiated." The judgment in Nur Elahi supra case was further reiterated by this Court in Muhammad Sarwar v. Khushi Muhammad (2008 SCMR 350) wherein it has been held that "the evidence recorded in one case may not hold good for the other case." .....***

21. The observations of the Supreme Court while deciding the appeal against the judgment of this court where the judgment of Election Commission of Pakistan was set-aside, are also not to be used for awarding the conviction and the trial court is duty bound to decide the criminal case on the basis of the evidence by following the procedure prescribed under the Qannon-e-Shahat, Order 1984, ***"(Law of Evidence)"*** in respect of appreciating the evidence recorded

in the said case. The Supreme Court of Pakistan ***"(05 Members Bench)"*** in the case of ***Mian Muhammad Nawaz Sharif and others vs. Imran Ahmed Khan Niazi and others (PLD 2018 SC 1)*** has held as under:

> *14. The argument that this direction implies unambiguous approval of the material collected by the JIT whose probative worth is yet to be established is also misconceived as none of our observations projects any such impression.* ***The trial court in any case would be at liberty to appraise evidence including the material collected by the JIT according to the principles of the law of evidence without being influenced by any of our observations. Even otherwise, all the observations made in the judgment, being tentative, would not bind nor would restrain the trial court from drawing its own conclusions from the evidence recorded before it in accordance with the principles and provisions of the law of evidence.***

22. Article 189 of "***The Constitution of Islamic Republic of Pakistan, 1973"*** provides that "***Any decision of the Supreme Court shall, to the extent that it decides question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan."*** The pronouncement of the Supreme Court on a point of law is the law declared, and unless it is altered or over ruled by the Supreme Court itself, the other courts have no option but to follow it. The subordinate judiciary should always give its utmost respect, regard and consideration to the judgments, decrees, directions and orders of the Supreme Court, for, it is necessary apart from the binding nature of the same for maintaining discipline in all ranks of the judiciary. When the Supreme Court itself gives due consideration to the earlier decisions rendered by it, it is not understood as to why the subordinate judiciary in Pakistan should turn a deaf ear to the judgments, awards, findings or observations of the Supreme Court. The courts and authorities subordinate to the Supreme Court are under legal obligation to follow the law laid down by it, and if they consider that the case-law cited before them is not relevant or applicable to the facts and circumstances of the case they are dealing with, then they should distinguish it with reasons showing application of mind by them. This exercise would enable the party citing the case-law to understand as to why the precedents relied upon by it were not followed. Reliance is place on the cases of ***Farhat Azeem v. Waheed Rasul and others (PLD 2000 SC 18), Syed Sajjad Hussain v. Secretary, Establishment Division, Cabinet Secretary, Islamabad and 2***

others (1996 SCMR 284), Ataur Rehman v. The State (PLD 1967 SC 23), Province of the Punjab through Secretary, Health Department v. Dr. S. Muhammad Zafar Bukhari (PLD 1997 SC 351), Ashiq Hussain alias Muhammad Ashraf v. The State (PLD 1994 SC 879) and Sakhi Muhammad and another v. Capital Development Authority, Islamabad (PLD 1991 SC 777). It is settled law that ***each criminal case has to be decided on its own peculiar facts and the circumstances.*** The precedents in criminal cases have hardly any bearing on the other criminal cases. ***Muneer Ahmed v. Chaudhary Iltaf Hussain and another (PLD 2003 kar 332).*** Normally, any judgment or order by the superior courts in a criminal case are not to be taken as a precedent, particularly when finding was based on consideration of the facts in that particular case. Only such judgments/orders in criminal cases had the force of precedent in which some principle of law had been enunciated or any law had been interpreted. Seldom facts of two criminal cases were similar, therefore a great caution was required in following the judgments in criminal cases.

23. For the reasons discussed above we are of the view that the prosecution failed to establish a criminal charge against the appellant by producing reliable, trustworthy and confidence inspiring evidence. These are the reasons of our short order dated: 19-09-2023, whereby we allowed the instant appeal and acquitted the appellant.

JUDGE

JUDGE