

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Mohammad Karim Khan Agha

Mr. Justice Amjad Ali Sahito,,

CRIMINAL APPEAL NO.134 OF 2011

Appellant	Abdul Zaheer s/o Abdul Majeed through Mr. S. Muhammad Ishrat Ghazali, Advocate
Complainant	Razi Jamil through Mr. Kashif Hanif, Advocate
Respondent	The State through Mr. Irfan Ali Memon, Deputy Attorney General.
Date of Hearing	04.11.2020 and 05.11.2020
Date of Announcement	11.11.2020

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Abdul Zaheer son of Abdul Majeed has assailed the impugned judgment dated 26.02.2011 passed by Learned Special Court (Offences in Banks) Sindh at Karachi in Case No.43 of 2008 arising out of Crime No.192 of 2008 u/s.420/468/471/34 PPC r/w section 5(2) PCA-II, 1947 registered at PS CID Sindh Civil Lines, Karachi whereby the appellant was convicted u/s.245(2) Cr.PC and sentenced to undergo Rigorous Imprisonment for seven years (7 years) and to pay a fine of Rs.2,53,69,486/- and in default of payment of fine he was to further undergo Simple Imprisonment for 21 months.

2. The brief facts of the prosecution case as per the FIR lodged on 10.09.2008 by the complainant Mr. Razi Jamil, Branch Manager NIB Bank Korangi Industrial Area Karachi are that complaints were received from numerous account holders regarding shortage of funds in their accounts. Accordingly an inquiry was conducted and it was revealed that the branch Cash Services Supervisor (CSS) namely Abdul Zaheer (the accused) had fraudulently made bogus transactions in various accounts by debiting, crediting the accounts of the customers and cash was withdrawn through the cheques therefore the accused was transferred,

and subsequently it was disclosed that an amount of more than Rs.29 million were found short in the account of complainants/account holders and that the appellant was responsible for the same through his illegal acts.

3. After completion of the investigation, the charge against the accused was framed to which he pleaded not guilty and claimed trial of the case.

4. To prove its case the prosecution examined 08 prosecution witnesses and exhibited numerous documents and thereafter the side of the prosecution was closed. The statement of the accused u/s 342 Cr.P.C. was also recorded in which he denied all the allegations leveled against him and claimed false implication. He did not examine himself on oath or call any defense witnesses in support of his defense case.

5. Learned Judge Special Court (Offences in Banks) Sindh at Karachi after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 26.02.2011, convicted and sentenced the appellant Abdul Zaheer as stated above, hence this appeal has been filed by the appellant against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 26.02.2011 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that he is completely innocent and has been falsely implicated in this case; that no PW has given evidence against him; that all the documents which were exhibited were photocopies which were inadmissible in evidence; that there was no evidence to link him to the offenses so charged and as such he should be acquitted of the charge based on the benefit of the doubt and his appeal allowed.

8. On the other hand learned Deputy Attorney General and learned counsel for the complainant have fully supported the impugned judgment. They have contended that the prosecution has proved its case against the appellant beyond a reasonable doubt as the appellant has been fully implicated in the case by the PW's and documentary evidence and in particular the audit report and as such the appeal should be dismissed.

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law.

10. At this point it is pertinent to note that the appellant is on bail granted by this court pending the outcome of his appeal for the last 8 years after previously spending 3 years and 3 months in jail without the benefit of S.382 (B) Cr.PC which seems to have been wrongly denied to him

11. After our reassessment of the evidence we are of the view that the prosecution has **not** been able to prove beyond a reasonable doubt that the appellant was guilty for the offenses for which he was charged for the following reasons;

(a) The appellant has mainly been convicted because (a) he was allegedly the cash supervisor however this is in some doubt as according to PW 1 Razi Jameel he was client supervisor whose job it was to bring more account holders to the bank and (b) the audit report was against him however the audit report has not explained as to how a loss of several lacs jumped to 3 crores.

(b) No prosecution witness has given any direct evidence of any fraudulent activities of the appellant except PW 1 Razee Jameel who states in his evidence that the appellant committed the fraud but produced no evidence in support of his contention. Surprisingly his co-accused Riffat in whose account some of the fraudulently acquired funds were transferred to and withdrawn, who there appears to be more evidence against,

was acquitted and neither the bank nor the complainant filed any appeal against his acquittal. PW 2 Jameel Ahmed and PW 3 Muhammed Ilyas simply state in their evidence that the appellant assisted them in opening their accounts which was his job. In fact PW 4 Saeed Mehboob who was the operations manger at the time at the concerned branch states in his cross examination as under at P.151 and 153 of the paper book which tends to indicate that the person who was meant to monitor fraud at the branch had no knowledge of any such fraud let alone being committed by the appellant;

"I do not know about the details of the case what ever I was told by fraud management dept I have stated above. I was assigned the duties to any customer related enquiry, any problem in operation work, if there is any thing which I am unable to solve it I should inform the branch manager. It is correct that it was also my duty to ensure that all process is zero error and timely reported and monitory of suspicious transactions as well as management of operation laws, and control and detection of fraud and forgery. It is correct that so far my responsibilities are concerned nothing any adverse was reported to me during my posting in the branch in respect of any discrepancies. No enquiry was conducted till my posting by fraud risk management against any employee. The branch Manager was all over incharge and he directly was involved with head office. I also did not receive any complaint against accused Abdul Zaheer during my posting. It is correct that no record was presented by me or was demanded by fraud risk management." (bold added)

(c) PW6 Muhammed Samiullah Khan who carried out the audit which revealed the fraud in his cross examination at P.163 of the Paper Book shows improvements in his S.161 statement, that he had no proof that the appellant was cash supervisor as apparently he did not need evidence of the same despite not even calling for his personnel file, he did not produce the statements of bank staff or complainants which were recorded by him and has only relied on photocopy documents which greatly detracts from the veracity of his audit report and states as under;

"It is correct that my statements u/s 161 Cr.P.C. was recorded twice one on 13.9.2008 and second on 9.10.2008. It is correct that I have not pointed out the incident of fraud in my statement recorded u/s 161 Cr.P.C. on 13.9.2008. It is correct that in my statement recorded on 9.10.2008 I have disclosed in detail about the fraud. It is correct that I have also not mentioned the period of enquiry as to when it started and completed in my statement recorded u/s 161 Cr.P.C. I have not produced the personal file of accused Abdul Zaheer showing the appointment of accused as cash supervisor. It is correct that I have not produced the statement of bank staff including claimants whose statements were recorded by me during the course of enquiry. Accused was cash supervisor further says his designation was cash supervisor no further proof is required. It is correct that according to opinion given by me I have pointed out the negligence of accused Abdul Zaheer. It is incorrect to say that I have not disclosed in my report as to how fraud was committed with the bank. It is correct that documents produced in court are not certified copies from the bank record"(bold added).

(d) Even the audit report only finds the appellant guilty of negligence as opposed to criminality which report he concealed from the IO. Interestingly, he found PW 1 Razee Jamil guilty of **gross negligence** and yet he is a PW in this case which suggests that PW 1 Razee Jamil's rather limited evidence against the appellant was in order to save his own skin. Likewise is the case of PW 4 Saeed Mehboob which tends to suggest that the more junior appellant might have been made a scape goat in order to spare more senior bank officials

(e) The credibility and reliability of PW 7 Muhammed Nazim's Quershi's evidence in our view was shattered during cross examination as he was unable to produce a single document to link the accused to the evidence which he gave against the accused and as such we place no reliance on his evidence which even otherwise hardly implicates the appellant in any fraud.

(f) With regard to the evidence of the IO PW 8 Suhail Ahmed it appears that he has treated this as an asset beyond known sources of income case but even otherwise has not been able to link the

accused to any houses or plots which he allegedly owned and were allegedly purchased out of the proceeds of crime acquired through the commission of the offenses for which he has been charged. The documents which he produced were also all photocopies and inadmissible in evidence. The investigation of the IO also appears to be lacking as his evidence reveals that he did not seize the concerned computer from the bank which was assigned to the appellant and from where the fraudulent transactions were mostly made let alone forensically examine the same, he did not visit the IT or audit departments of NIB Bank to check the allegedly fraudulent entries, he failed to collect the deposit slips of the complainants and bank statements none of which were exhibited and as such it is difficult to see how he reached the conclusion concerning the fraudulent transactions and that the appellant was responsible for them especially as by his own admission he did not read the internal audit report which the prosecution placed so much reliance on.

(g) That no complainant from whose account money was taken has implicated the appellant.

(h) That no money was recovered from the appellant and no withdrawal cheques with his signature on have been recovered.

(i) That there is no evidence that the assets which were allegedly owned by the appellant and purchased out of the proceeds of crime arose out of the offenses for which he has been charged are linked to him.

(j) That all the documents exhibited against the appellant are photocopies and are inadmissible in evidence.

(k) As discussed above there is very little evidence against the appellant and there are considerable doubts in the prosecution

case. It is settled by now that the accused is entitled to the benefit of the doubt not by way of concession but as of right.

12. As such the appeal is allowed by extending the benefit of the doubt to the appellant and the appellant is acquitted of the charge and his bail bonds stand released.

13. The appeal is disposed of in the above terms.

Announced in open Court on 11/11/2020