Court	High Court of Sindh, Karachi
Date	10 March 2023
Document	Judgment
Case reference	Criminal Revisions 38, 39 and 40 of 2023
Outcome	Acquitted. The High Court of Sindh acquitted Shoaib Ahmed Shaikh and the Axact management team, finding no evidence to support the allegations.
Pages	11
Key excerpt	*“Not one of the proverbial ‘shred of evidence’ was found by it to back up the allegations made by the State. Absolutely none.”*

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

Crl. Rev. Application No. 38 of 2023
Crl. Rev. Application No. 39 of 2023
Crl. Rev. Application No. 40 of 2023

DATE	ORDER WITH SIGNATURE OF JUDGES

Priority cases/for further arguments.

1. For orders on office objection
2. For hearing of main case
3. For hearing of MA No.2249/2023

10-03-2023

Mr. Anwar Mansoor Khan, Mr. Asim Mansoor Khan and Ms. Umaima Anwar Khan, Advocates for the applicant in Crl. Rev. No.39/2023.

Mr. Abid S. Zuberi, Mr. Ayyan Mustafa Memon, Ms. Easha Azmat, Mr. Muhammad Zaheer and Mr. Yar Muhammad Maitlo, Advocates for the applicant in Crl.Rev. No.40/2023.

Mr. Haider Waheed and Mr. Fahad Ali Hashmi, Advocates for the applicant in Crl. Rev. No.38/2023.

Mr. Muhammad Ahmed, Assistant Attorney General and Mr. Saeed Memon, Deputy Director, FIA for the State.

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Omar Sial, J.: Section 265-K Cr.P.C. empowers a Court to acquit an accused at any stage of the case, if, after hearing the prosecutor and the accused, and for reasons to be recorded, it considers that there is no probability of the accused being convicted of any offence. The applicants were of the view that there is indeed no possibility of their conviction in the trial which they face and thus moved an application before the learned 8th Additional Sessions Judge, Karachi seeking their acquittal pursuant to section 265-K. The learned trial court did not delve into the grounds raised by the applicants and on 20.02.2023 dismissed their respective applications primarily on the ground that as only 5 witnesses were left to be examined it would be better that the applicants wait for the final judgment. Of course, the applicants were not very happy

with the decision and therefore have approached this Court seeking redressal of their grievance.

2. The applicants in these proceedings are all nominated accused in a case arising out of F.I.R. No. 07 of 2015 registered at the F.I.A.'s Corporate Crime Circle. The case was registered on 27.06.2015 on behalf of the State by Mr. Saeed Ahmed Memon, who then was an Assistant Director at the F.I.A. An inquiry had revealed that Mr. Shoaib Ahmed Shaikh (**"Mr. Shaikh"**), incorporated a company in the U.A.E. by the name of Axact FZ LLC. He then incorporated a company in Pakistan by the name of Axact (Private) Limited (**"Axact"**). Nearly all the shares in Axact were owned by the company in the U.A.E., whereas Mr. Shaikh and his wife, Ms. Ayesha Shaikh, owned one share each of the said company. It was alleged by the F.I.A. that Mr. Shaikh, in his capacity as Chief Executive Officer of Axact, along with his management team, were involved in:

(i) preparing and selling bogus degrees and certificates of bogus universities and colleges located in the United States of America and the U.A.E.

(ii) to support Axact's business of making fake degrees, Axact had also set up fictitious and non-existent accreditation entities so that the degrees would appear to be genuine.

(iii) through the business of the fake degrees, Axact defrauded many persons and made them pay the requisite fee into the account of Axact's holding company in the U.A.E. The money received in the U.A.E. was then transferred to various bank accounts operated by Axact in Pakistan and categorized as proceeds of software exports.

3. It was alleged that Mr. Shaikh along with the other applicants were guilty of offences pursuant to sections 420,

468, 471, 472, 473, 474, 477-A, 109 and 34 P.P.C. as well as sections 3 and 4 of the Anti-Money Laundering Act, 2010 as well as sections 36 and 37 of the Electronic Transactions Ordinance, 2010.

4. All the applicants pleaded not guilty and claimed trial. The initial calendar of witnesses filed by the State had 91 persons on it. 64 were given up by the State whereas 22 have been examined at trial and 5 witnesses are yet to be examined. The trial is still on-going.

5. I have heard the learned counsels for the applicants as well as the learned Assistant Attorney General who was assisted by Mr. Saeed Memon, the complainant of the case as well as the officer who investigated the case. Their individual arguments are not being reproduced for the sake of brevity but are reflected in my observations and findings below.

6. It would be appropriate to first address the view the learned trial court took in dismissing the section 265-K Cr.P.C. applications i.e. as few witnesses are left to be examined it would be better if the applicants wait for the end of the trial. I appreciate the approach taken by the learned trial court which was not an incorrect approach. Indeed, in a plethora of cases the Supreme Court and the High Courts of Pakistan have repeatedly held that when a trial is at an advanced stage, it is preferable that the trial process is not aborted by resorting to a section 265-K Cr.P.C. acquittal. The Supreme Court recently in the case of **Model Custom Collectorate, Islamabad vs Aamir Mumtaz Qureshi** reported at **2022 PTD 1683** reaffirmed this principle with reference to precedents and observed that even if there is a "*remote possibility of conviction then the court is required to record the evidence and then decide the case on evidence brought on record during the trial*". Later in the judgment it is observed that "*if there is slight probability of conviction then of course, instead of deciding the said application should record the*

evidence and allow the case to be decided on its merit after appraising the evidence available on record." Having said that, the courts have also acknowledged that a section 265-K can be filed at any stage of the trial and that recourse to its provisions could very well be made even at advanced stages if the court comes to the conclusion that there is no probability of a conviction. Law in this area was further clarified by the Supreme Court of Pakistan in another recent case, **Abbas Haider Naqvi vs Federation of Pakistan** reported at **PLD 2022 SC 562**. In this case the Court re-affirmed that it was a rule of propriety and practice that a fate of a case should not ordinarily be decided under section 265-K Cr.P.C. but that there could be exceptional circumstances which may justify departure from the said rule. The Court also noted that usually an application under section 265-K Cr.P.C. is made by an accused on any one of the following 4 grounds:

(i) that even if the facts alleged by the prosecution are taken to be true on their face value, they do not make out/constitute the commission of any offence by the accused;

(ii) that there is no evidence or incriminating material on record of the case in support of the commission of the alleged offence by the accused;

(iii) that the evidence or incriminating material collected during investigation in support of the commission of the alleged offence and proposed to be produced during trial is insufficient and, even if recorded, will not sustain conviction of the accused, of any offence in the case;

(iv) that the prosecution evidence so far recorded does not make out a case for conviction of the accused, of any offence in the case and the remaining prosecution evidence, even if recorded, will not improve the prosecution case against the accused in any manner.

7. The Supreme Court laid down that it was the ground listed at serial (iv) above that attracts the application of the rule of practice and priority i.e. when the trial is at its conclusion and almost the whole of the prosecution evidence has been recorded, it would be better if the trial is allowed to conclude. This rule thus has no relevancy or application to grounds listed at serials (i) to (iii), which do not involve the appraisal of the prosecution evidence recorded during trial. The situation in the present case is a blend of the scenarios listed at serials (ii), (iii) and (iv). The rule of practice and propriety may therefore be diverted from specially keeping the exceptional circumstances in mind where the State itself acknowledges that it was unable to collect the requisite evidence to prove its case.

8. In this particular case the situation is that the State, which had initiated this case, albeit on, what appears in retrospect, to be a flimsy source, itself at this stage, quite categorically admits that not one of the proverbial "*shred of evidence*" was found by it to back up the allegations made by the State. Absolutely none. It is an admission made in no uncertain words by the main witness in this case i.e. the complainant and the investigating officer, Mr. Saeed Memon. Mr. Memon was the main investigating officer of the case, associated with the case since its inception. He testified before the learned trial court that not one piece of incriminating evidence was found to prove the case. He has repeated the same before this court during the hearing of this case. He was not declared hostile by the prosecution and thus what he said at trial is accepted by the State. It seems to me after hearing him that Mr. Memon's investigation was hampered by the reluctance of foreign authorities and business entities to provide the requisite evidence. It was also hampered by the reluctance of persons to come testify as witnesses. Upon a specific query made to Mr. Memon, he informed the court that when he had completed the investigation in the case, he was

aware at that time only that sufficient evidence has not been collected against the applicants; this finding he had conveyed to his superior officers, however, his recommendation was not taken into account. Be that as it may, courts of law must decide a case before it on the evidence before it without favour or fear.

9. Money laundering charges made against the applicants pursuant to sections 3 and 4 of the Anti-Money Laundering Act, 2010 were earlier dropped by the State because, as Mr. Memon explained, it was a unanimous opinion that if need be a separate challan will be filed for those alleged offences. It appears however that that was not done to date. It is an admitted position that all transfers of money have been through formal banking channels and that full disclosures have been made to the regulators. Perhaps that is the reason that the charges under the anti-money laundering legislation were dropped for the time being at least.

10. Sections 36 and 37 of the Electronic Transactions Ordinance 2010 pertain to violation of privacy of information and causing damage to information systems, respectively. I notice that the prosecution witness Abdul Ghaffar who was the Deputy Director, Forensics, F.I.A. Lahore, was examined at trial in connection with the forensics carried out on the electronic and computer evidence collected by the investigation and has given a clean bill of health to the applicants. While reading his testimony I also notice that he admitted that the equipment he was entrusted to examine was handed over to him in an unsealed condition. The safe custody of data was therefore compromised. He also admitted that Axact had been operating all its business activities pursuant to valid licences and permissions issued to it. He found nothing incriminating in what he examined. Yet another witness, Arsalan Manzoor who was a forensic expert working in the F.I.A's NR3C unit in Quetta testified at trial that "*it is correct to suggest that in the*

conclusions of our report we have not determined the criminal liability of the accused or highlighted any incriminating material of any accused."

11. As regards the allegation of preparing and selling false degrees and certificates was concerned, the record shows that not an iota of evidence is on record in this regard. 3 witnesses who had received the disputed degrees from Axact were called at trial to testify. Witness Sohail Gulzar said that he had made no complaint to anybody and that he had not ever received an email from Axact. Witness Mohammad Ahmed and Syed Shahrukh Naqvi also made somewhat similar statements. Neither one of them has implicated Axact or the applicants in any manner.

12. As far as the offences alleged under the Penal Code are concerned section 420 pertains to cheating and dishonestly inducing delivery of property. The State admits that not one person who complained he was cheated by the applicants came forward as a witness. Section 468 addresses forgery for purpose of cheating. The State admits that no evidence of forgery was found. Section 471 concerns using as genuine a forged document. The State admits that no forged document was found let along a forged document being used as an original. Section 472 and section 473 relate to making or possessing counterfeit seals etc., with intent to commit forgery. The State admits that it could not determine that seals etc. seized by it from Axact's premises were counterfeits. Section 474 pertains to having possession of document described in section 466 or 467, knowing it to be forged and intending to use it as genuine. The State admits that no such evidence was found. Section 477A makes falsification of accounts an offence. The State admits that it could not establish any falsification of accounts. These admissions are made by the State in clear and categorical terms. It is simply

mind boggling to find a reason as to why the F.I.A. initiated this action to start of with.

13. This case was initiated in the year 2015. It is indeed sad that even after 8 years there has not been a decision, either way, in it. I believe that all players in the criminal justice system are responsible for this delay. Liability cannot be pinned on any one person or entity. Having said that, I also believe that the persons adversely impacted the most by the delay are the applicants themselves in person. It is not fair to a person that a person waits for so many years for a final decision in a criminal trial. Citizens merely demand of the State that the State gives them speedy justice. It is incumbent upon the State to take this right of the people seriously and take measures for improvement in the entire criminal justice system. In this particular case, I also notice that there has been an overall reluctance to address it conclusively because of a rather controversial history, magnified tremendously by the media hype around it. Courts of law are however expected to not be swayed by media hype or the opinion of commentators and are under solemn duty to decide cases in accordance with the evidence before it. It simply must not be lost sight of that Article 25 of the constitution guarantees that all citizens are equal before law and are entitled to equal protection of law.

14. I am saddened to see that a case that had begun with the State claiming laurels and credit for its remarkable work ends with the State itself admitting that it is not in a position to justify its allegations in light of the evidence collected. It is certainly time for the State to introspect. It must be kept in mind that actions such as these if not well thought and initiated with good intentions have the massive potential of impacting Pakistan's economy in a negative way. Flow of foreign currency into the country, confidence of the foreign investor as well as the financial potential of businesses

connected with information technology and its many facets can all be adversely impacted. Pakistan's integrity and goodwill in the international world is put at stake through such misconceived actions. It is obvious at this stage that it was an ill-conceived action that was initiated by the State almost immediately upon the publication of an article in a newspaper written by a person, who himself was declared by the State to be a persona non grata and expelled from Pakistan allegedly due to false journalism against Pakistan and violating his terms of stay by visiting prohibited areas without a no objection certificate. Unfortunately, it seems that damage was already done by then. It is hoped and expected that the law enforcement agencies of the country will focus less on their exuberance to arrest and incarcerate persons who are not hardened or desperate criminals or accused of heinous offences and concentrate more on their capabilities and resources to collect evidence which can bear the test of scrutiny in the courts of law.

15. What I strongly disapprove is the fact that a woman who had only one share in Axact and by no stretch of imagination in any manner whatsoever was involved with the running of the company was dragged into this controversy by the State. The applicability of an unbiased mind to a case by an investigating agency is essential. When a person like the lady in this case is put through the rigors of trial for no apparent reason it reflects the presence of *malafide* somewhere in the prosecution case. Nothing in the case shows why members of the management team were implicated and made to go through trying times. If after 8 years the State acknowledges and admits that they did not gather any meaningful evidence when the final challan was submitted, then it had no right to make citizens go through such tribulations. Such conduct cannot be reprimanded enough. This is an area of the criminal justice system where capacity building is much required.

16. In this particular case there are repeated categorical and non-clandestine admissions by the complainant itself, that the evidence to establish its case was not sufficient, in fact it will not be a stretch to say that perhaps there was no evidence. If this is not a situation where section 265-K will not come into play, then I cannot imagine what will be. Amongst the remaining witnesses are the landlord of the premises in which Axact had its offices, 2 F.I.A. officials who had collected hardware and software from the premises and 1 F.I.A. official who was a witness to the recovery. It is not in dispute that the premises in question where the raid was conducted was in the use of Axact. It is also not in dispute that the offices were basically stripped of all the hardware and software that was at that time present inside. Even if the 5 witnesses come and say exactly what they did, it will hardly have any impact on the prosecution case as massive doubt in its' case is already created after the testimony recorded by the complainant, investigating officer and the forensic experts. Why should the applicants be asked to face the rigors of trial even for one day when they deserve to be acquitted now? In such a situation what they demand is the enforcement of their fundamental right of the right to security contained in Article 9, the right of inviolability of the dignity of man contained in Article 14 and right of equality before law as contained in Article 25 of the Constitution.

17. In my opinion there is no probability of a conviction for the applicants. The applications are therefore allowed and they are acquitted of the charge. All of them are on bail. Their bail bonds stand cancelled and sureties discharged.

18. Before parting with the order, I feel it is necessary to record appreciation for the assistance given to me by the learned counsels for the applicants and especially to Mr. Mohammad Ahmed, learned AAG as well as Mr. Saeed Memon, Assistant Director, F.I.A. for the very comprehensive,

professional, honest and fair assistance that they have given me, without beating around the bush.