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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR

(JUDICIAL DEPARTMENT)

Criminal Appeal No.32 of 2019

Maqbool Ahmed Versus The State, etc

J U D G M E N T

Date of hearing	**08.02.2023**
The appellant by:	Mr. Ameer Ajam Malik, Advocate.
The State by:	Mr. Shahid Farid, Assistant District Public Prosecutor.
The respondent by:	Syed Dilbar Hussain Shah, Advocate with respondent No.2.

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MUHAMMAD AMJAD RAFIQ, J. Through this criminal appeal under Section 417 Cr.P.C., the appellant/complainant has assailed the judgment dated 01.12.2018 passed by the learned Magistrate 1st Class Bahawalpur, whereby Muhammad Ameer, respondent No.2 (**hereinafter called the respondent)** was acquitted of the charge in case FIR No.199 dated 09.09.2014 registered under section 489-F PPC at Police Station Abbas Nagar, District Bahawalpur.

2. Respondent had faced the trial in the aforementioned case with the allegation that on 29.12.2011, he came to the complainant/appellant and borrowed Rs.15,00,000/- from him in presence of witnesses, namely, Ghulam Yasin and Sajjad Ahmad; the loan formality was documented through a written agreement and for the return of said amount, he issued a cheque No.035815 amounting to Rs.15,00,000/- drawn on National Bank of Pakistan, Lal Sonhara Branch, Bahawalpur for 15.08.2014, in favour of the appellant/complainant which was dishonoured on presentation before the concerned bank.

3. Trial commenced with the charge to which he pleaded not guilty; prosecution produced as many as nine witnesses alongwith documentary evidence, whereas the respondent in his statement recorded under Section 342 Cr.P.C., denied and controverted the allegations levelled against him and professed his innocence.

4. Heard. Record perused.

5. Perusal of record evinces that as per story of prosecution, allegedly appellant paid Rs.15 lac to the complainant on 29.12.2011 as loan who promised to return the same on 15.08.2014. From 29.12.2011 till 15.04.2014, there is a huge gap of almost 2 ½ years for return of amount but the prosecution case is mum why the complainant gave this amount to the respondent/accused for such a long period. According to the cross examination of complainant, he runs his business of pesticides on cash as well as on credit (اُدھار). He admitted in his cross examination that he used to give pesticides to the accused Muhammad Ameer on credit (اُدھار), which strengthen the version of respondent that he purchased fertilizer on credit and issued cheque to the complainant as security for payment of amount.

6. According to cross examination of the appellant/ complainant, he, due to intervention of locals, attempted to resolve the matter and later entered into an agreement to sell with the respondent and his father for purchase of land measuring 105 acres in order to settle such loan amount but no proof with respect to such transaction was produced before the learned trial court so as to show a link of parties on the dispute of loan amount as alleged in the FIR. Further, Investigating Officer stated in his cross examination that no any fact appeared during the investigation that cheque was issued under some give and take (لین دین) relation over any monetary transaction.

7. Another very important aspect of the case is that according to the crime report, the accused came to the complainant on 29.12.2011 and the complainant paid Rs.15 lac to him in presence of witnesses which fact was documented through a written agreement and detail of which he has deposed during his examination-in-chief in the terms that on demand of respondent for giving him Rs.15 lac, he alongwith witnesses went to Bahawalpur from where they purchased stamp paper and after writing a loan agreement, handed over the amount in dispute to the respondent. Interestingly, neither that executed

loan agreement was exhibited during the evidence nor Sajjad Ahmed, the other witness of that agreement was produced in this Court which was necessary as per law. Learned trial court has rightly observed at the end of para No.22 of the judgment that:-

> "*The requirement of Article 79 of Qanoon-e- Shahadat Order 1984, is that to prove a document, two marginal witnesses are necessary to produce before the court but complainant did not produce marginal witnesses. Sale agreement Ex.DA which is admitted by complainant is contradictory to the version of complainant, in Ex.DA, complainant himself admitted the compromise that "when mutation attested then litigation between the parties came to end". There are lot of discrepancies in evidence. Further complainant has miserably failed to prove the date, time and place of issuance of cheque as well as delivery of an amount of Rs.15,00,000/-.*"

8. The claim of the appellant was based on agreement referred above but said document has not been produced which is the requirement of law as per Article 139 of Qanun-e-Shahadat Order 1984, which says that any witness when making statement before the Court is required to inform that whether such fact he is deposing about is mentioned/recorded in any document and if it is so, court can require production of such document because documentary evidence is always considered as best evidence and 'Best Evidence Rule' excludes the oral assertions. Article 139 of Qanun-e-Shahadat Order,1984 is reproduced as under:-

> *"Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he say that it was, if he is about to make any statement as to the contents of any document, which in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it."*

9. Every transaction where a cheque is dishonoured may not constitute an offence, rather three elements are required for the applicability of section 489-F PPC (i) cheque must be issued with dishonest intention or dishonestly, (ii) it should be for repayment of a loan or (iii) to fulfill an obligation. Obligation has also a close touch with loan and above three ingredients are not available in this case. Reliance is placed on judgments reported as *"Shah Jehan Khetran vs. Sh. Mureed Hussain and others"* **(2005 SCMR 306),** *"Naseeb Gul Vs. Amir Jan and another"* **(2013 P.Cr.L.J. 175),** *"Maj. (Rtd.) Javed Inayat Khan Kiyani vs. The State"* **(PLD 2006 Lahore 752),** *"Shaikh Muhammad Aamir and another vs. Government of Sindh through Home*

Secretary and 4 others" **(PLD 2013 Sindh 488),** *"Jalaluddin vs. Dileep and another"* **(2018 YLR 697),** *"Madawa through President vs. I.G.P. and 15 others"* **(PLD 2013 Lahore 442),** *"Muhammad Saleem vs. The State"* **(2011 P.Cr.L.J 428),** *"Mehmood Khan vs. Sohail Khan and another"* **(2017 P.Cr.L.J. 1305),** *"Usman Ali vs. ASJ/JOP and 4 others"* **(2016 P.Cr.L.J. 323),** and *"Muhammad Ayub vs. Rana Abdul Rehman and another"* **(2006 YLR 1852).**

10. It is trite that to constitute an offence under this section dishonesty on the part of the payer is a condition precedent in issuance of a cheque towards repayment of loan or to fulfill an obligation. Two terms, obligation and dishonesty are required to be thrashed for its reference to the situation of this case. The popular meaning of the term **"obligation"** is a duty to do or not to do something. In its legal sense, obligation is a civil law concept. An obligation can be created voluntarily, such as one arising from a contract, quasi-contract, or unilateral promise. An obligation can also be created involuntarily, such as an obligation arising from torts or a statute. An obligation binds together two or more determinate persons. Therefore, the legal meaning of an obligation does not only denote a duty, but also denotes a correlative right; one party has an obligation means another party has a correlative right. The person or entity who was liable for the obligation is called obligor; the person or entity who holds the correlative right to an obligation is called obligee. Some common uses of the term "obligation" in a legal sense include:-

i. *The term "contractual obligation" refers to the duty to pay or perform some certain acts created by a contract or an agreement.*

ii. *"Conditional obligation" means the duty to pay or perform certain acts depending on the happening of an event.*

iii. *"Current obligation" means the obligation that is currently enforceable.*

iv. *"Heritable obligation" means a legal obligation or the related right is not ended by the death of the person who was liable for the obligation or who held the right. The heritable obligation stipulates that an obligation is heritable when its performance may be enforced by a successor of the obligee or against a successor of the obligor.*

The legal sense of obligation from early Roman law claims that obligations are the bond of vinculum juris, or legal necessity, between at least two individuals or parties. In the original sense, the idea of obligation referred only to the responsibility to pay any money outlined in the terms of specific written documents. Obligation is the moral or legal duty that requires an individual to perform, as well as the potential penalties for the failure to perform. An obligation is also a duty to do what is imposed by a contract, promise, or law.

11. **Dishonesty** means a state of mind where an act is committed by a person with the intention of causing wrongful gain for himself, herself or another, or of causing wrongful loss to any other person. Dishonesty is an acquisitive offence but a crucial question is palpitated as to whether dishonesty is a "**state of mind"** or it is a **"course of action"** No law in Pakistan defines this difference so far as told to the court; therefore, seeking guidance from UK law which says that there were two views of what constituted dishonesty in English law. The first contention was that the definition of dishonesty (such as those within the Theft Act 1968) described a **course of action**, whereas the second contention was that the definition described a **state of mind**. A clear test within the criminal law emerged from **R v Ghosh [1982] QB 1053**. The Court of Appeal held that dishonesty is an element of mens rea, clearly referring to a state of mind, and that overall, the test that must be applied is hybrid, but with a subjective bias which "looks into the mind" of the person concerned and establishes what he was thinking. The test is two-stage:

- *"Were the person's actions honest according to the standards of reasonable and honest people?" If a jury decides that they were, then the defendant's claim to be honest will be credible. But, if the court decides that the actions were dishonest, the further question is:*

- *"Did the person concerned believe that what he did was dishonest at the time?*"

But this decision was criticized, and over-ruled, by the UK Supreme Court in the case of **Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67**. The position as a result is that the court must form a view of what the defendant's belief was of the relevant facts. Hence the test for dishonesty

was subjective and objective. An observation upon R v Ghosh was given in the above judgment in following terms;

> *"54. A significant refinement to the test for dishonesty was introduced by R v Ghosh [1982] QB 1053. Since then, in criminal cases, the judge has been required to direct the jury, if the point arises, to apply a two-stage test. Firstly, it must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people. If the answer is no, that disposes of the case in favour of the defendant. But if the answer is yes, it must ask, secondly, whether the defendant must have realised that ordinary honest people would so regard his behaviour, and he is to be convicted only if the answer to that second question is yes*."

Giving it a final shape, it was formulated as under;

> *1. Was the act one that an ordinary decent person (normally considered to be the ubiquitous 'man on the Clapham omnibus') would consider to be dishonest (the objective test)? If so:*
>
> *2. Must the accused have realized that what he was doing was, by those standards, dishonest (the subjective test)? [This part of the test was overruled by the Supreme Court in the case of Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67]*

It is not essential for a person to admit that they acted in a way that they knew to be dishonest; it was probably enough that they knew others would think their behaviour was dishonest, or that they thought that what they were doing was wrong.

12. In Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67] a paragraph referred is worth mentioning here to further dilate upon the definition;

> *"Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree*."

Dishonestly is also an essential element of cheating therefore, as concept it cannot be defined but can be perceived from the acts or result of acts. Dishonestly and fraudulently, two concepts though intermingled but with distinct meaning and connotation have rightly taken their space in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67] as under;

> *"48. Where it applies as an element of a criminal charge, dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterised more by recognition when encountered than by definition. Dishonesty is not a matter of law, but a jury question of fact and standards. Except to the limited extent that section 2 of the Theft Act 1968 requires otherwise, judges do not, and must not, attempt to define it: R v Feely [1973] QB 530. In this it differs strikingly from the expression "fraudulently", which it largely replaced, for the judge did define whether a state of mind, once ascertained as a matter of fact, was or was not fraudulent: R v Williams [1953] 1 QB 660. Accordingly, dishonesty cannot be regarded as a concept which would bring to the assessment of behaviour a clarity or certainty which would be lacking if the jury were left to say whether the behaviour under examination amounted to cheating or did not*."

It has been referred in above case that The Criminal Law Revision Committee, in its eighth report, advised the substitution of the word "dishonestly", on the grounds that "fraudulently" had become technical and its meaning had departed somewhat from the ordinary understanding of lay people. It recommended that "dishonestly" would be more easily understood by lay fact-finders and the public generally. At para 39 the Committee advised that:

> *"'Dishonestly' seems to us a better word than 'fraudulently'. The question 'Was this dishonest?' is easier for a jury to answer than the question 'Was this fraudulent?'. 'Dishonesty' is something which laymen can easily recognize when they see it, whereas 'fraud' may seem to involve technicalities which have to be explained by a lawyer*."

13. Section 489-F PPC finds mentioned the word 'dishonestly' and not the 'fraudulently' which is somewhat different concept yet both sometime are intermingled. Section 24 & 25 of PPC defines the terms as under;

> ***24. "Dishonestly".***
>
> *Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".*
>
> ***25. "Fraudulently".***
>
> *A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.*

Section 23 of PPC further defines that "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled. Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled. A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully.

A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

'Fraudulently' on the other side means an intention to defraud and Indian Supreme Court has defined this term in a case reported as "*Dr. Vimla v. The Delhi Administration"* (**AIR 1963 SC 1572)** as under;

> *"The word "defraud" includes an element of deceit. Deceit is not an ingredient of the definition of the word "dishonestly" while it is an important ingredient of the definition of the word "fraudulently". The former involves a pecuniary or economic gain or loss while the latter by construction excludes that element. Further, the juxtaposition of the two expressions "dishonestly" and "fraudulently" used in the various sections of the Code indicates their close affinity and therefore the definition of one may give colour to the other. To illustrate, in the definition of "dishonestly", wrongful gain or wrongful loss is the necessary ingredient. Both need not exist; one would be enough. So too, if the expression "fraudulently" were to be held to involve the element of injury to the person or persons deceived, it would be reasonable to assume that the injury should be something other than pecuniary or economic loss. Though almost always an advantage to one causes loss to another and vice crease, it need not necessarily be so. Should we hold that the concept of "fraud" would include not only deceit but also some injury to the person deceived, it would be appropriate to hold by analogy drawn from the definition of "dishonestly" that to satisfy the definition of "fraudulently" it would be enough if there was a non-economic advantage to the deceiver or a non-economic loss to h deceived. Both need not co-exist."*

In the same judgment Supreme Court of India has referred a judgment of The Calcutta High Court which dealt with this question in Surendra Nath Ghose v. Emperor [(I) (I9II) I.L.R. 38 Cal. 75, 89-90.]. wherein Mookerjee J. defined the words "intention to defraud" as under;

> *"The expression, `intent to defraud', implies conduct coupled with intention to deceive and thereby to injure: in other words, `defraud' involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him, but not necessarily deprivation of property."*

A difference in two terms has also been defined by this court in a reported case of Criminal Appeal No. 51224/17 "*Amir Hayat Vs The State etc*." (**2022 LHC 4393**) like as under;

> *"Above definition shows that a doer of a dishonest act may not have any interest in causing loss to any rightful claimant yet does the act for his own interest either to usurp the property or to alienate it in consideration of bribe given to him and the consequences of his act cause either wrongful loss or wrongful gain to any party in interest. Whereas fraudulent act contains malice, grudge, deception against a particular person with a targeted mind to ruin him or to deprive him*

> *from the property and for that end property is obtained from him through deception under grab or with temptation like increased value of the property. Example of above difference could be like that if a property is handed over by a person at his own to any other without any offer from any corner with the request to keep it as trust or use it under a contract between them, if it is misappropriated by the trustee, the matter is of criminal breach of trust but if a person persuades other with alluring offers to hand over the property for an increased benefit, misappropriation of such property shall be labelled as fraudulent which is not the subject matter of criminal breach of trust. Element of fraud is more serious and its proof requires evidence of precise and clear intention which is difficult to collect in ordinary circumstances unless ample material for deduction is brought on record that is the reason even in definition of cheating u/s 415 PPC both the words 'dishonestly' and 'fraudulently' has been used*."

From the above expression it is clear that two terms stand a part therefore, it is essential to prove dishonesty in issuing of cheque for the applicability of section 489-F PPC. In a case reported as *"(CoL.) F.S. WAHID-UD-DIN Versus THE CROWN"* **(PLD 1956 (W.P.) Karachi 489**) while referring definition of Criminal breach of trust (Section 405 PPC) wherein dishonestly is an essential ingredient, honourable court has held that *"in the absence of any allegation of dishonesty or allegations which necessarily lead to an inference of dishonesty as defined in section 24 and 23 PPC no charge under section 409 PPC can be spelled out."*

14. The above discussion is concluded in the terms that dishonesty is an acquisitive offence and in our law is a 'state of mind' (mens rea) and the fact that doer of an act knew of his act being dishonest (subjective test) is to be determined by the court from 'course of action' adopted for such act (objective test), depending upon the circumstances and evidence of the parties; therefore, it rests upon the Court to consider under which circumstances, the cheque was issued and what was the intention of the person issuing it but here in this case the prosecution has not only failed to prove the dishonesty on the part of the accused in issuance of cheque for repayment of a loan or fulfillment of any obligation but also failed to prove the transaction between the parties for which cheque was issued which facts adversely affect the prosecution case. Reliance is placed on cases reported as "*Malik SAFDAR ALI Versus Syed KHALID ALI and two others*" **(PLD 2012 Sindh 464)**, "*RASHID AHMED Versus MUHAMMAD MASOOD and another*" **(2020 P Cr.L J 1126)**, "*MUHAMMAD IQBAL Versus STATION HOUSE OFFICER and 2 others*"

(2009 CLD 1149), "*MUZAFFAR AHMAD Versus The STATE AND 2 others*" **(2021 P Crl. L J 1393)**.

15. After going through the entire record, I have not seen any misapplication of judicious mind in appreciation of prosecution evidence qua acquittal of the respondent. In this respect, reliance is placed on cases reported as "*MUHAMMAD SALEEM Versus MUHAMMAD AZAN and another*" **(2011 SCMR 474)**, "*Haji AMANULLAH versus MUNIR AHMED and others*" **(2010 SCMR 222)** and "*NAWAZUL HAQ CHOWHAN versus THE STATE and others*" **(2003 SCMR 1597)**. The Hon'ble Supreme Court of Pakistan in the case reported *"MUHAMMAD AZAM and others Vs THE STATE*" (**2009 SCMR 1232**) while laying down the criteria for interference in a judgment of acquittal, held that: -

> *"Findings of Court acquitting the accused must be proved to be perverse, arbitrary, whimsical, unreasonable, fake, concocted, artificial, ridiculous, shocking, false, based on misreading of material evidence, on inadmissible evidence, on a view not possible to gather from the evidence on the record, highly conjectural, or based on surmises and unwarranted in law. Acquitted accused is credited with two advantages, one his innocence at the pre-trial stage and the other earned by him after his acquittal by a Court of competent jurisdiction."*

16. For what has been discussed above, the learned trial court, taking stock of all above factors has rightly passed the impugned judgment which appears to be fully justified in the facts and circumstances of the instant case. The instant appeal is, therefore, ***dismissed***. Record of learned trial court be sent back immediately and case property, if any be disposed in accordance with law.

(Muhammad Amjad Rafiq)
Judge

*Jamshaid**

APPROVED FOR REPORTING

JUDGE