JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

(JUDICIAL DEPARTMENT)

Criminal Appeal No. 206 of 2018

Rashid Ahmed
Versus
Muhammad Masood and another

Appellant by:	Ch. Abaid Ullah Riaz, Advocate.
Respondent No.1 by:	Mr. Zahid Farooq Cheema, Advocate along with respondent No.1.
State by	Mr. Zohaib Hassan Gondal, State counsel and Malik Mazhar Javaid, State Counsel along with Noor Islam, Sub-Inspector, Police Station Industrial Area.
Date of Hearing:	30.01.2020.

Ghulam Azam Qambrani, J. :- Appellant (Rashid Ahmed) seeks setting aside of impugned judgment dated 15.10.2018, passed by the learned Judicial Magistrate, Section-30, Islamabad-West, whereby respondent No.1 was acquitted.

2. Briefly stated, prosecution case is that the complainant/ appellant got registered F.I.R No.22 dated 09.01.2018 with Police Station I-9, Industrial Area, under Section 489-F PPC, Islamabad, with the averments that the accused issued a cheque No.44663098, drawn on HBL Chirah Chowk Branch, Islamabad, towards repayment of loan amount of Rs.10,00,000/- which upon presentation was dishonored due to insufficient funds. Where-after the complainant submitted application for registration of F.I.R but the same was not registered by the concerned police, thus the complainant filed an application under Section 22-A Cr.P.C which was accepted by the learned Justice of Peace on 15.11.2017, as a result of which, instant case was registered.

3. After registration of F.I.R, the accused filed pre-arrest bail which was confirmed on 15.02.2018 by the learned Additional Sessions Judge, Islamabad- West. Where-after report under Section 173 Cr.P.C was submitted on 21.04.2018 and on 14.05.2018 copies were supplied to the accused. On 21.05.2018, formal charge was framed, to which accused pleaded not guilty and claimed trial, therefore, the prosecution evidence was summoned.

4. In order to prove its case, the prosecution examined the following witnesses:-

i. PW-1 Rasheed Ahmed (complainant),
ii. PW-2, Mr. Saqib Mahmood, A.S.I,
iii. PW-3, Mr. Atif Ali, Area Operation Manager, HBL,
iv. PW-4 Mr. Sher Ahmed-S.I/ Investigation Officer,
v. PW-5 Raja Babar Ameer, Manager HBL Chirah Bank.

After closure of the prosecution evidence, the accused/respondent No.1 was examined under Section 342 Cr.P.C wherein he denied any receipt of loan and issuance of cheque; and alleged that there was business relation between the parties. Accordingly, an agreement was executed between the accused and Mr. Shahzad, Manager Technical of the complainant's company. On demand of complainant's company, in compliance of terms and conditions of the agreement, bank account was got opened and in respect of that account, the accused issued two guarantee cheques. Rest of the allegations were denied, and acquittal was prayed. The accused did not opt to record statement on oath as envisaged under Section 340 (2) Cr.P.C. The learned Trial Court, after hearing the arguments of the learned counsel for the parties, passed the judgment dated 15.10.2018, hereinafter be called as the impugned judgment.

5. The appellant/complainant being aggrieved of the impugned judgment has challenged the same through the instant appeal.

6. Learned counsel for the appellant contended that impugned judgment is against the law and facts of the case; that the judgment of acquittal passed by the learned Trial Court is not in accordance with law and facts of the case. Further contended that the impugned judgment is result of misreading and non-reading of the evidence on record and the same is unreasonable, perverse and manifestly wrong, as such, the same is liable to be set-aside.

7. Conversely, learned counsel for the accused/respondent submitted that the accused/respondent is totally innocent and there are material contradictions in the statements of the PWs. As per Clause 4 of the agreement dated 07.03.2016, executed between Muhammad Masood and the Manager Technical of Nariman Construction Company, the respondent Muhammad Masood issued two cheques as guarantee to the said company. Further, submitted that the prosecution failed to prove its case beyond any shadow of doubt. As such, the learned Trial Court has rightly acquitted the respondent. The learned State counsel supported the impugned judgment passed by the learned Trial Court.

8. Heard arguments of the learned counsel for the parties and perused the available record.

9. Minute perusal of the record reveals that PW-2 Saqib Mehmood A.S.I, during his cross-examination admitted that on receiving the application of the complainant he asked the complainant to produce the original cheque and dishonor slip, but he did not produce the same

and his application was sent to S.S.P Office with the report that the complainant has failed to produce the original cheque and dishonor slip. Therefore, the said cheque was not exhibited by the learned Trial Court rather it was placed on record as mark-A. PW-4, the Investigating Officer, who is very important witness of the prosecution case, has clearly deposed on oath that the accused is innocent, therefore, he has been placed in Column No.02 of the Report under Section 173 Cr.P.C. He deposed nothing against the accused/respondent. Further stated that the agreement was executed on 07.03.2016, whereby Shahzad Technical Manager of the construction company received two blank cheques as guarantee and after opening of the account by the accused, the amount started coming in his account and the accused worked for three months and after calculation, an amount of Rs.29,70,000/- were due towards Rasheed Khan/appellant and after checking the account of the accused, balance amount in the account of the accused was Rs.14,81,000/-. Thereafter, on account of payment of amount, a dispute arose between labourers of the accused with the complainant and a case F.I.R No.65/2016 was registered against Rasheed Khan at Police Station Nelore and due to non-payment of money, the accused Masood stopped the construction work. Further, stated that Saqib A.S.I lodged the F.I.R on account of dishonor of the cheque amounting to Rs.10,00,000/- and thereafter, on calculation an amount of Rs.11,00,000/- were found due towards Rasheed Ahmed/appellant. Further, stated that there were two cheques as per agreement, but only one cheque was produced before him, whereas, the other was not produced. PW-5 appeared along with bank record and he has clearly

deposed that the account in the name of accused was opened on the basis of letter Exh.PJ and the original letter was in bank record and according to the letter Exh.PJ, the account No.2253-79000177-03 was opened for company transaction in accordance with agreement executed between the accused and Shahzad, Manager Technical of the complainant's company. The complainant has failed to produce on record any evidence showing that he had paid the amount to the accused/respondent. The record further reveals that as per Clause-4 of the agreement dated 07.03.2016, executed between Muhammad Masood and the Manger Technical of Nariman Construction Company, the respondent Muhammad Masood issued two cheques as guarantee to the said company, as such, the dispute between the parties *prima facie* is of civil nature, as the respondent has issued the said cheque to the appellant as a guarantee of the construction work and as per the agreement executed between the appellant and the respondent, the appellant was bound to return the said cheque to the respondent, meaning thereby that there is civil liability of contractual obligation. The appellant has tried to convert the civil litigation into criminal case.

10. It is admitted fact that the cheque was issued as a guarantee and not for re-payment of amount; as such, the provisions of Section 489-F P.P.C are not attracted in the instant case. Reliance in this regard is placed on the Judgment reported as "Tahir Masood Butt Vs The State & another", *[2019 YLR 2125]* and "Amanat Ali Vs The State, etc" *[2014 UC 530]*.

11. Provisions of Section 489-F P.P.C will only be attracted if the following conditions are fulfilled and proved by the prosecution:-

(i) Issuance of cheque;
(ii) Such issuance was with dishonest intention;
(iii) The purpose of issuance of cheque should be:
a) To re-pay a loan; or
b) To fulfill an obligation (which is wide term, inter alia, applicable to lawful agreements, contracts, services, promises by which one is bound or an act which binds a person to some performance).

(iv) On presentation, the cheque is dishonored.

12. First of all, it has been observed that the complainant/appellant in the F.I.R made a misstatement that the accused/respondent borrowed him the amount; during the Trial and evidence it transpired that there was an agreement for construction that the complainant will pay the amount and the respondent will construct through labour. It also came on record that the money paid by complainant was not sufficient as compared to construction raised by the respondent. On demand, dispute arose between the parties. The respondent had already issued cheques (guarantee cheques) which were to be returned but the same was not returned by the complainant. The information given by the complainant was not based on truth on the basis whereof instant report was lodged. From record it transpires that no loan was ever lent by the complainant to the accused rather amount was for the construction through labour. How much construction was done by accused, is a case of rendition of accounts, as such, it is a matter of civil nature.

13. To constitute an offence under this section, dishonestly on the part of the payer is a condition precedent in issuance of a cheque

towards re-payment of loan or fulfillment of an obligation. Thus, it is for the Court to consider that under what circumstances, the cheque was issued and what was the intention of the person, issuing it. The words "whoever dishonestly issues a cheque" used in this section shows the intention of the legislature that to constitute an offence, it must be proved that the cheque has been issued dishonestly. Dishonesty means a fraudulent act or intent to defraud others, especially creditors and lien holders. Similarly, the word "dishonor" used in this section means failure to honour a cheque with an intent to defraud and befool a payee towards re-payment of a loan or fulfillment of an obligation just to disgrace or put him in a state of shame. Hence, mere issuance of a cheque and it being dishonored by itself is not an offence, unless and until dishonesty on the part of a payer is proved.

14. Learned counsel for the appellant has relied on case law titled as "Muhammad Anwar & others Vs The State & others" **[2019 P Cr.LJ 1244]** wherein it was held as under:-

> *"The bare reading of Section shows that the salient features/ingredients of offence are dishonesty and issuance of cheques towards repayment of loan or fulfilment of an obligation which is dishonoured on presentation. Dishonesty being the mens rea of the offence and issuance of cheques towards repayment of a loan or fulfilment of an obligation being the actus reus. The prosecution had to prove both the elements beyond reasonable doubt in order to procure the conviction of the petitioners. Dishonesty is defined in Pakistan Penal Code as an act done to cause wrongful loss to other or himself. The bare presence of one element is not sufficient for the conviction of the accused. In case reported as " Malik*

> *Safdar Ali Vs Syed Khalid Ali & two others " [PLD 2012 Sindh 464], the Hon'ble Sindh High Court observed that the word dishonesty used under section 489-F PPC required existence of mens rea to commit fraud by issuance of a cheque. Mere issuance of cheque and its becoming the dishonoured later, being actus reus, would not be able to attract the provisions of section 489-F PPC. Moreover, it was observed that a cheque being mode of payment must appear to have been issued against consideration of business transaction or any instant dealing of the date and time thereof, for which, he had issued such cheque, in order to discern whether there was mens rea. The Court should take into account all the relevant facts. Similar views were expressed in cases reported as " Basar Khan v. The State & another" [2009 P Cr.LJ 964), Shah Fahad & another V The State" [2014 YLR 2241) & Maj. (Retd) Javed Inayat Khan Kiyani V. The State " [PLD 2006 Lahore 752].*

15. Reliance is also placed on the judgment of the Hon'ble Supreme Court of Pakistan reported as " Mian Allah Ditta Vs The State and others" **[2013 SCMR 51]** wherein it has been held as under;-

> *"Every transaction where a cheque is dishonoured may not constitute an offence. The foundational elements to constitute an offence under this provision are issuance of a cheque with dishonest intent, the cheque should be towards repayment of a loan or fulfillment of an obligation and lastly that the cheque in question is dishonoured.*

16. The complainant has failed to produce a single evidence to prove dishonest intention of the appellant nor did he utter a single word to show his disgrace or feeling of shame due to dishonoring of the cheque. The evidence and the material available on record, do not constitute an offence under section 489-F PPC.

17. It is pertinent to mention here that considerations for interference in an appeal against acquittal and an appeal against conviction are altogether different because presumption of double innocence is attached with the former case. The well settled principles for appreciation of appeal against acquittal, as has been held by the Hon'ble Supreme Court of Pakistan in the judgment reported as Muhammad Iqbal Vs. Abid Hussain alias Mithu and six others *(1994 SCMR 1928)*, are as under:-

> *i. That with the acquittal, the presumption of innocence of accused becomes double; one initial, that till found guilty he is innocent, and two, that after his Trial a Court below has confirmed the assumption of innocence;*
>
> *ii. That unless all the grounds on which the High Court had purported to acquit the accused were not supportable from the evidence on record, Supreme Court would be reluctant to interference, even though, upon the same evidence it may be tempted to come to a different conclusion;*
>
> *iii. That unless the conclusion recorded by a Court below was such that no reasonable person would conceivably reach the same, the Supreme Court would not interfere;*
>
> *iv. That unless the Judgment of acquittal is perverse and the reasons therefore are artificial and ridiculous, the Supreme Court would not interfere; and*
>
> v. *That the Supreme Court, however, would interfere in exceptional cases on overwhelming proof resulting in conclusive and irresistible conclusion, and that too, with a view only to avoid grave miscarriage of justice and for no other purpose.*

18. Keeping in view the above principles, it transpires from the record that the important witness of the prosecution case, i.e. the Investigating Officer clearly deposed on oath that the accused is innocent, as such he has been placed in Column No.2 of the Report under Section 173 Cr.P.C. Further that PW-5 clearly deposed that the account was opened for company transactions, as result of the

agreement executed between the accused and Shahzad, Manager Technical of the complainant company. Therefore, the element of *mense rea* and dishonestly issuance of cheque is missing in the instant case. As such the learned Trial Court has rightly acquitted the accused person by giving him the benefit of doubt.

19. The Hon'ble Supreme Court of Pakistan in the case reported as Muhammad Karim Vs. The State *(2009 SCMR 230)* has held as under:-

> *"in case of doubt, the benefit thereof must be given to accused as a matter of right and not as a matter of grace, for giving the benefit of doubt it is not necessary that there should be many circumstances creating doubts, single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to benefit, not as matter of grace and concessions, but as matter of right."*

In the case of Ghulam Akbar and another Vs. The State *(2008 SCMR 1064)*, it has been held as under:-

> *"It is cardinal principle of criminal jurisprudence that the burden of proving the case beyond doubt against the accused securely lied upon the prosecution and it did not shift. Similarly, the presumption and probabilities, however, strong may be, could not take the shape of proof."*

In the case reported as Sanaullah Vs. The State through Prosecutor General (2015 P.Cr.L.J. 382 (Balochistan), it has been held that as under:-

> *"Rule of prudence, stipulated that prosecution had to prove its case beyond the shadow of doubt. Accused had not to prove his innocence, until and unless proved guilty. Benefit of slightest doubt would necessarily be extended in favour of accused and not otherwise."*

In the case reported as Raheel and others Vs. The State and others (2015 P.Cr.L.J. 470), it has been held that:-

"If any doubt would arise from the prosecution evidence, benefit of same was to be extended to accused."

20. The learned Trial Court after proper appraisal of evidence and material available on record has rightly concluded that the prosecution has failed to prove the case against the accused/respondent No.1.

21. I have found no illegality or irregularity in the impugned judgment, nor the same is suffering from any misreading or non-reading or miss-appreciation of evidence, warranting interference by this Court.

22. Resultantly, the instant appeal having no force is **dismissed.**

(GHULAM AZAM QAMBRANI)
JUDGE

ANNOUNCED IN OPEN COURT ON _____/2020.

JUDGE

"Rana.M.Ift."

APPROVE FOR REPORTING.