

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Revision No.27/2015

Atif Shahzad
versus
The State & another

Petitioner by: Mr. Asad Hussain Ghalib, Advocate along
with petitioner.

Respondents by: Mr. Adil Aziz Qazi and Raja Amir
Shahzad, Advocates for respondent
No.2.
Mr. Fareed Hussain Kaif, State Counsel.
Fawad, ASI.

and

Criminal Miscellaneous No.143-M/2015

Ch. Muhammad Zaman
versus
The State & another

Petitioner by: Mr. Adil Aziz Qazi and Raja Amir
Shahzad, Advocates.

Respondents by: Mr. Asad Hussain Ghalib, Advocate along
with respondent No.2.
Mr. Fareed Hussain Kaif, State Counsel.
Fawad, ASI.

Date of Hearing: 28.06.2019.

MOHSIN AKHTAR KAYANI, J: Through this common judgment, I intend to decide both the captioned criminal revision petition as well as criminal miscellaneous petition having similar parties and arising out of same case FIR No.253, dated 21.10.2013, under Section 489-F PPC, P.S. Sihala, Islamabad.

2. Through the captioned Criminal Revision No.27/2015, Atif Shahzad/petitioner impugns judgment dated 01.04.2015 of the learned Additional Sessions Judge (East), Islamabad, whereby appeal of the

petitioner filed against order dated 28.02.2015 was dismissed and his conviction was maintained.

3. Similarly, through the captioned Crl. Misc. No.143-M/2015, Ch. Muhammad Zaman/complainant of criminal case claims enhancement of sentence awarded to Atif Shahzad from 06 months simple imprisonment to 03 years. However, in order to simplify the case and decide the controversy, it is appropriate to refer the facts from the file of criminal revision.

4. Brief facts referred in the instant criminal revision petition are that Atif Shahzad (*hereinafter referred to as "petitioner"*) was booked in case FIR No.253, dated 21.10.2013, under Section 489-F PPC, P.S. Sihala, Islamabad, which was registered on the complaint of Ch. Muhammad Zaman (*hereinafter referred to as "complainant"*), who alleged therein that petitioner purchased poultry feed from him and defaulted in the payment of Rs.1,100,000/-, vis-à-vis he gave the complainant a cheque of the said amount vide cheque No.525945, drawn on Askari Bank (Sihala), however the same was dishonoured on its presentation due to insufficient funds. Pursuant to formal proceedings/investigation in the above said FIR, charge was framed against the petitioner, to which he pleaded not guilty and claimed trial. Ultimately, the learned Trial Court after recording of evidence and statement of petitioner under Section 342 Cr.P.C., convicted the petitioner under Section 489-F PPC and sentenced him to undergo 06 months simple imprisonment vide impugned judgment dated 28.02.2015. The petitioner feeling aggrieved thereby filed an appeal, which was dismissed by learned Additional Sessions

Judge-IV (East), Islamabad vide impugned judgment dated 01.04.2015.

Hence, the instant criminal revision petition.

5. Learned counsel for petitioner contended that the learned Trial Court based the conviction of petitioner on a document (Exh.PC), which is inadmissible in evidence as the same was objected by the petitioner side; that it is established that dispute between the parties was of civil nature relating to rendition of accounts, however the same was converted into criminal proceedings by the complainant; that Investigation Officer himself admitted that he has not brought on record the version of petitioner, which was in violation of order of Justice of Peace whereby Investigation Officer was directed to bring on record the version of accused/petitioner; that the element of dishonesty, which is crux of the offence under Section 489-F PPC, is missing in this case, therefore, petitioner has case of acquittal; that the impugned judgments are the result of misreading and non-reading of evidence, therefore, the same may be set aside.

6. Conversely, learned counsel for respondent No.2/complainant opposed the instant criminal revision petition and contended that both the Courts below have rightly appreciated the evidence together with facts and circumstances of the case in passing of the impugned judgments; that the dishonored cheque is admittedly issued by petitioner, over which the petitioner has not denied his signatures; that the evidence produced by prosecution is confidence inspiring and convincing, on the basis of which both the Courts below have rightly convicted the appellant, therefore, the same may be maintained and the instant revision petition may be dismissed.

7. Arguments heard, record perused.

8. Perusal of record reveals that the entire case revolves around issuance of cheque by petitioner bearing No.5259945, dated 16.07.2013, amounting to Rs.1,100,000/-, drawn at Habib Bank Limited, Rawalpindi Branch (Exh.PA), which was dishonored through cheque return memo for the reason that the bank account has been closed. Consequently, the complainant filed a complaint (Exh.PB) to the S.H.O., P.S. Sihala, Islamabad contending therein that the complainant is doing business of chicken feed supply with the petitioner, who usually received the feed on credit and paid the amount after selling the same in market, whereas an amount of Rs.1,100,000/- was due against him, against which the petitioner had issued a cheque bearing No.5259945, though the same was dishonored. The complaint was converted into FIR No.253, dated 21.10.2013, under Section 489-F PPC, P.S. Sihala, Islamabad (Exh.PD). The matter was investigated by PW-1 Shoukat Ali/ASI, who submitted challan against the petitioner. The learned Trial Court, after recording of evidence and statement of petitioner, sentenced him for 06 months simple imprisonment in terms of Section 489-F PPC vide impugned judgment dated 28.02.2015, passed by the learned Judicial Magistrate, 1st Class (East), Islamabad. Resultantly, the petitioner preferred an appeal against his conviction, whereas the complainant filed a criminal revision for enhancement of sentence awarded to the petitioner. The learned Additional Sessions Judge (East), Islamabad decided the appeal of petitioner as well as criminal revision of the complainant through separate judgments of even date i.e. 01.04.2015, whereby the appeal and revision petition have been dismissed maintaining thereby the

conviction awarded to petitioner. Feeling aggrieved with the said judgments, both the parties have approached this Court through the instant petitions.

9. I have gone through the evidence as well as judgments of the courts below and observed that the issuance of cheque (Exh.PA) is not denied by the petitioner, rather he acknowledged the same, though he has taken the specific stance that the negotiable instrument was issued blank as security at the time starting of poultry feed business in the year 2010. The said defence plea has specifically been taken in his statement under Section 342 Cr.P.C. by the petitioner and he has also placed reliance upon 37 documents, which are receipts issued by complainant and referred as Exh.DB/1-38 w.e.f. 13.12.2010 to 02.02.2013, whereby the complainant has issued different receipts of receiving payments from petitioner on Sihala Poultry Services.

10. The complainant has acknowledged in his evidence that he is in regular business with the petitioner and has also acknowledged the 37 receipts (Exh.DB/1-37), however he has heavily relied upon document Exh.PC (agreement dated 01.05.2013), which was exhibited on record, but the petitioner objected the same at the time when the said document was tendered in evidence. The learned Trial Court has not referred any explanation in the impugned judgment as to how and under what circumstances Exh.PC (agreement) has been exhibited without referring to the objection of the petitioner.

11. I have gone through the judgment of the learned Trial Court, whereby the sentence awarded by the learned Trial Court is only based

upon the document and findings of Exh.PC (agreement). The relevant extract of the learned Trial Court judgment is referred as under:

“During the course of evidence, the complainant Muhammad Zaman produced a document Exh.PC, whereby accused Atif Shehzad settled his accounts with the complainant and after settlement, undertook to pay an amount of Rs.1119510 to the complainant. Although learned counsel for the accused raised objections at the time of exhibition of document Exh.PC yet, during the cross-examination, not even a single suggestion was put to the complainant with respect to document Exh.PC. The complainant produced document Exh.PC in original in the Court and accused did not deny the stated documents in a categorical manner. It is not the version of the accused Atif Shehzad that the Exh.PC is a forged document. In my humble view, the complainant has been successful in proving the obligation on the part of the accused Atif Shehzad. As for as element of dishonesty is concerned, it has to be gathered the facts and circumstances of this case. The amount and signatures on the questioned cheque was admitted by the accused Atif Shehzad and the figure of an amount of Rs.1100000/- commensurate with the figure mentioned in the document Exh.PC.”

12. The above findings of the learned Trial Court revolve around document Exh.PC, against which the petitioner has taken a specific stance while answering Question No.3 in his statement recorded under Section 342 Cr.P.C., which is as under:

“Q.3. It is prosecution evidence that after settlement of accounts, an amount of Rs.1100000/- was found outstanding against you accused and a document Exh.PC was prepared whereupon you accused issued cheque Exh.PA amounting to Rs.1100000 to discharge your obligation and the same was dishonoured due to close of your account vide dishonoured slip Exh.PF. What do you say about it?

Ans: It is incorrect that settlement of account has taken place between the complainant and the accused person. Real facts are that the accused persons never issued dishonoured cheque Exh.PA for the satisfaction of accounts. It is further stated that the Exh.PC has never executed between the complainant and the accused persons. The alleged dishonoured cheque Exh.PA was given by the accused persons to complainant as guarantee

cheque while business transaction initiated between the parties in the year 2010. The complainant used such guarantee cheque dishonestly and lodged instant false and frivolous FIR against the accused persons. This version of accused persons has been brought on record not only during investigation but also during the proceedings before this Hon'ble Court."

13. While considering the above background and proposition generated before this Court, it is necessary to decide the fate of document Exh.PC, which is allegedly an agreement executed between the complainant as well as the petitioner, but surprisingly this document has not been collected by PW-2 Shoukat Ali/ASI. Qanun-e-Shahadat Order, 1984 fully attracts in criminal trials and it is settled law that a document not produced in accordance with the provisions of the Qanun-e-Shahadat Order, 1984 could not be taken into account. Even otherwise, Exh.PC is not a part of challan submitted by PW-2 Shoukat Ali/ASI and as such, the petitioner has neither been given due opportunity at the time of investigation nor he has been confronted with Exh.PC to explain his position, whereas the said document for the first time has been tendered by the complainant in the learned Trial Court, which was objected by the petitioner. However, the said objection has not been decided by the learned Trial Court, whereas this Court considers the tendering of the said document in violation of law, especially when the same is not a part of the investigation and the same was placed on record through a surprise. Although, the original has been seen and returned by the learned Trial Court.

14. The second important aspect of Exh.PC, which has not been taken into account by the learned first Appellate Court as well as by the learned Trial Court, is regarding the terms agreed between the parties.

However, there is no legal justification placed by the complainant on record as to why the cheque in question (Exh.PA) has not been referred in Exh.PC when every other aspect has been discussed and agreed between the parties therein. This shows that the cheque Exh.PA has subsequently been managed, which was not available at that time or Exh.PC has been managed later on. The burden of proof is upon the prosecution to prove the valid exhibition of Exh.PC along with reasons as to why the cheque has not been mentioned therein, however the said onus has not been discharged, therefore, the admissibility of Exh.PC is not within four corners of law, hence the same is excluded from consideration.

15. The other important limb of this case is the evidence of PW-2 Shoukat Ali/ASI, who has not investigated the matter in accordance with law, rather he converted a dispute of civil nature i.e. rendition of account into a criminal case, especially when the petitioner has taken the plea while answering Question No.3 in his statement recorded under Section 342 Cr.P.C., in which he has denied execution of Exh.PC and explained the circumstances, wherein the disputed cheque Exh.PA was given to the complainant as guarantee which was written through a different ink (pen).

16. The above referred discussion persuaded this Court to hold that the requirement for application of Section 489-F PPC is based upon the terms "*dishonestly issues a cheque*", which can only be considered applicable if the executor or author of cheque has not issued the negotiable instrument towards repayment of loan or fulfillment of obligation. However, prosecution is duty bound to prove both

ingredients of any offence i.e. *mens rea* and *actus rea* beyond reasonable doubt in order to procure conviction of petitioner. Similarly, a learned Single Judge in Chambers in case reported as 2019 PCr.LJ 1244 Islamabad (Muhammad Anwar vs. The State) has defined and appreciated the term “dishonestly” in the following manner:

“8. In view of the above legal position during the course of trial the settlement/compromise was tendered in evidence as Exhibit-PL. The prosecution did not allege or prove dishonesty on part of the petitioners. In this behalf even the complainant appearing as PW-06 reiterated the nature of transaction between himself and Zafar Iqbal. The tendering of cheques and dishonouring have been categorically stated, but from the entire reading of his examination-in-chief dishonesty is not borne out. The learned trial Court as well as Appellate Court has also not given any due finding on the referred aspect of the matter that the prosecution has not proved the *mens rea*. In this behalf the concept of dishonesty was elaborated in case reported as “Maj. (Retd.) Javed Inayat Khan Kiyani vs. The State” (PLD 2006 Lahore 752) by the Hon’ble Lahore High Court in the following terms:

“8. In The Law Laxicon edited by Justice Y.B. Chandrachud, at page 567 “dishonesty” defined as “giving the ordinary meaning the word “dishonestly” means “dishonesty”. It further elaborates dishonesty as disposition to lie, cheat, deceive, or defraud; untrustworthiness, lack of integrity. Lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness, disposition, to defraud, deceive or astray. Like Pakistan Penal Code, in Section 24 of Indian Penal Code “dishonestly” is defined in the similar words:—

“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.”

Section 24 is further elaborated on the same page as below.---

“The word dishonestly in Section 24 Indian Penal Code has a technical meaning which is at variance with its popular sense as employing deviation from probity. It is used in connection with property and has nothing to do

with probity. If a person causes wrongful gain or wrongful loss by unlawful means in respect of property to which he is not legally entitled, "he acts dishonestly within the meaning of Section 24, though he may act from laudable motives. The word dishonestly does not necessarily imply wrongful gain to accused himself."

17. The entire prosecution evidence establishes that parties i.e. the petitioner and the complainant had been running a business and payments were made by the petitioner to the complainant, however the details of accounts could not be established independently that claim of complainant amounting to Rs.1,100,000/- is due, which is the subject matter of a civil suit. Even otherwise, the document Exh.PC could only be appreciated by the civil court, therefore, the cumulative effect of the entire discussion reveals that serious doubt emerges on record, which has not been considered by the learned Trial Court while awarding the sentence of 06 months simple imprisonment to the petitioner, which has further been upheld by the learned first Appellate Court. However, both the Courts below have not appreciated the technicalities of documentary evidence and concept of onus of proof, rather heavily relied upon the document (Exh.PC), which is not the part of challan filed under Section 173 Cr.P.C., therefore, the petitioner has been given a surprise by tendering Exh.PC, which is in violation of fundamental guarantees of due process of law for the reason that a document could not be placed in evidence which was not earlier available as no former permission was sought through any order of the learned Trial Court.

18. Keeping in view the above background, the judgments passed by the learned Trial Court as well as by the learned first Appellate Court suffer from misreading of evidence and misapplication of the Qanun-e-

Shahadat Order, 1984, as such prosecution case suffers from legal defect. Similarly, the dispute between the parties is of civil nature and the same is presently pending before the learned first Appellate Court in Regular First Appeal, therefore, at this stage, I could not find any valid justification of conviction of the petitioner, hence, the captioned Criminal Revision No.27/2015 (Atif Shahzad vs. The State & another) is hereby ALLOWED and the conviction awarded by the learned Trial Court to the petitioner and maintained by the learned first Appellate Court vide the impugned judgments are hereby SET ASIDE. The petitioner is acquitted from the case FIR No.253, dated 21.10.2013, under Section 489-F PPC, P.S. Sihala, Islamabad. The petitioner is on bail, therefore, the sureties stand discharged.

19. In consequent to above findings, the captioned Criminal Misc. No.143-M/2015 (Ch. Muhammad Zaman vs. The State & another) is hereby DISMISSED as no valid reason for enhancement of sentence of the petitioner is made out.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 21 Aug 2019.

JUDGE

Khalid Z.