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JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Crl. Appeal No. 273 of 2009

Masood Ahmed Orakzai

Versus

Parveen Shoukat and another

Date of Decision : 06.04.2017
Appellant by : Syed Muhammad Tayyab Advocate
Respondents by : Mr. Ahsan Hameed Lilla, Advocate
alongwith respondent No.1, and Yasir
Barkat Chaudhry, State Counsel.

AAMER FAROOQ, J. - This appeal is directed against judgment dated 30.04.2008, whereby learned Judicial Magistrate Section 30, Islamabad acquitted respondent No.1 of the charge under section 420 PPC.

2. The facts, in brief, are that the appellant's mother namely Mst. Roshan Ara Begum filed a complaint against respondent No.1 on 03.07.2001 on account of the fact that she was dealing in leather products under the name and style of M/s Fahmina Enterprises and respondent No.1 was also running business in Islamabad and purchased 80 leather jackets from the complainant against the consideration of Rs. 4,00,000/- and in this behalf an agreement was also executed between the parties. Respondent No.1 tendered a cheque dated 10.04.1999 to the complainant drawn on Allied Bank Limited, F-7 Markaz Branch, Islamabad in the sum of Rs. 4,00,000/- which on its presentation before the Bank was dishonoured. Learned trial Court recorded cursory evidence, summoned respondent No.1 and after recording evidence, dismissed the complaint vide impugned judgment dated 30.04.2008. It

is pertinent to mention that during the course of trial, the complainant i.e. Roshan Ara Begum died on 15.11.2002. The appellant filed special leave to appeal before this court which was allowed vide order dated 30.06.2009.

3. Learned counsel for the appellant, inter alia, contended that complaint has been dismissed vide the impugned judgment on three counts; that the complaint was filed by the appellant without the knowledge of the complainant. In this behalf, it was contended that cursory statement was got recorded by the appellant and same bears her thumb impression; that various orders of the learned trial Court duly reflect that the appellant was present in the Court alongwith her counsel, therefore, observation made by the learned trial Court is factually incorrect. It was further contended that the death of the complainant was duly brought on record as is evident from the death certificate as well as order dated 25.02.2003. The learned counsel for the appellant also submitted that observation made by the learned trial Court regarding double jeopardy is not correct inasmuch as civil remedy is different from criminal case. It was further contended that the suit filed by the appellant against respondent No.1 was decreed.

4. In response to the query of the Court regarding maintainability of appeal as criminal complaint was filed by Mst. Roshan Ara Begum and the appellant is her son, the learned counsel has placed reliance on the cases reported as "[**PLD 2004 SC 875**], [**2010 MLD 1638**], [**2005 YLR 2258**] and [**2004 MLD 157**]".

5. Learned counsel for respondent No.1, inter alia, contended that the complainant never appeared before the trial Court as even in orders passed after 15.11.2002, her presence has been marked. It was further contended that the complaint was filed almost after two years

and offence under section 420 PPC is a cognizable offence. It was further contended that since receipt depicts agreement between the parties, therefore, same was required to be witnessed by two persons as provided in Article 17(2) of the Qanun-e-Shahadat Order, 1984. It was further contended that the case against respondent No.1 is of no evidence. In this behalf reliance is placed on the cases reported as **"[PLD 2011 SC 241], [PLD 1988 Cr.C (Karachi) 524], [NLR 1989, Cr.LJ 604], [1971 PCr.LJ 943] and [2002 SCMR 1089].**

6. Arguments on behalf the parties have been heard and record perused with able assistance of their counsels.

7. The appellant, after dismissal of criminal complaint vide the impugned judgment, applied for special leave to appeal as provided under section 417(2) Cr.P.C 1898. For the ease of convenience the referred sub-section is reproduced herein below:-

"If such an order of acquittal is passed in any case instituted upon complaint and the High Court on an application made to it by the complainant in this behalf grants special leave to appeal from the order of acquittal the complainant may present such an appeal to the High Court."

The bare perusal of the sub-section shows that where order of acquittal is passed in case instituted upon criminal complaint, application is to be made to the High Court for grant of Special Leave to Appeal and in case such leave is allowed, the complainant may present the appeal to the High Court. The special petition for leave to appeal is to be filed by the complainant and subsequently appeal also is to be filed by the complainant only. At the time of grant of leave to appeal this aspect of the matter was not considered however, as mentioned above, since appeal is also to be filed by the complainant only, therefore, it can be looked into at this stage.

8. The appellant in the caption of appeal has mentioned that the same is under section 417(2-A) Cr.P.C. The said provision of law is not applicable in the instant case. The impugned judgment was passed upon the case filed through criminal complaint and in case of acquittal section 417(2) Cr.P.C covers the situation. Sub-section 2-A of section 417 Cr.P.C is of general applicability i.e. in cases where accused has been acquitted, any person aggrieved of the order of acquittal may prefer an appeal. It is established principle of interpretation that where there is a special provision and a general provision, the special provision shall prevail over the general one. In instant case, the appellant is one of the legal heirs of the complainant Mst. Roshan Ara Begum and is not a complainant, therefore, could not have filed an appeal. The State can file appeal against acquittal under section 417(1) Cr.P.C and admittedly this has not been done in the instant case.

9. Even otherwise, the appellant does not fall within the definition of 'aggrieved person' as mentioned in section 417(2-A) ibid and elaborated by the august apex Court in case law reported as **"Muhammad Shafi Vs. Muhammad Asghar and Others (PLD 2004 SC 875)"**. The Hon'ble Supreme Court of Pakistan in this behalf observed as follows:-

"The perusal of subsection (1) would indicate that in case of acquittal, the right of appeal is given to the Provincial Government which may direct the Public Prosecutor to present an appeal to the High Court. If an acquittal is recorded in private complaint under section 200 Cr.P.C., the right of appeal under subsection (2) is granted to the complainant provided the High Court grants special leave to appeal. Subsection (2-A) was inserted in section 417 by Act XIX of 1994 which confers a right of appeal upon a person aggrieved by the order of acquittal passed by any Court other than a High Court. The very language of section 417 Cr.P.C would clearly indicate that it pertains only to those appeals which are preferable before the High Court. Section 417 (2-A), Cr.P.C., furnishes no answer as to where the

appeal would lie if acquittal is recorded by the High Court. Apparently it seems that the matter of an appeal before the Supreme Court is not dealt with by section 417, Cr.P.C but by Article 185 of the Constitution."

In case of "**Mst. Parven Vs. Bakhsheesh and Others**" (2014 **PCr.LJ 1207**), the Hon'ble Peshawar High Court held that in case under section 337-F(v) PPC, the acquittal can be challenged by the State, Complainant or any person aggrieved and legal heirs of the deceased victim including his widow had no right to file appeal against acquittal of the accused. Similarly in '**Khalid Hussain Vs. Naveed alias Qalb Ali and 02 Others (PLD 2007 Karachi 422)**', the appellant who was father of the deceased, was held not to be an aggrieved person for the purpose of filing of appeal against the acquittal.

10. In view of above case laws, the appellant is not competent to file instant appeal under section 417 (2-A) Cr.P.C., therefore, the same is not maintainable and is accordingly **dismissed** alongwith all enlisted applications.

(AAMER FAROOQ)
JUDGE

M.Shah/.

Approved For Reporting