

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

JUDICIAL DEPARTMENT

Criminal Revision No.47 of 2021

Anees Ali

Versus

The State and another.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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24.02.2022	Mr. Farhat Ullah Jan, Advocate for the petitioner. Respondent No.2., in person. Malik Abdur Rehman, learned State Counsel. Imran Munir, A.S.I., Police Station Shalimar, Islamabad.
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Through the instant criminal revision petition filed under section 435 & 439 Cr.P.C. 1898, the petitioner has assailed judgment dated 30.06.2021, passed by learned Additional Sessions Judge-IV, West-Islamabad, as well as judgment dated 23.01.2021, passed by learned Judicial Magistrate Section-30, West-Islamabad, whereby, the petitioner was convicted under Section 489-F P.P.C. and sentenced to undergo three (03) years S.I. Benefit of Section 382-B Cr.P.C. was also extended to the petitioner.

02. In brief, prosecution's case was that complainant namely Muhammad Shahid / PW-1 made complaint with the assertions that he had business relationship with the petitioner / accused on account of which the petitioner issued cheque Ex-PA drawn at Meezan Bank F-10 Markaz, Islamabad which on presentation went dishonored due to insufficient funds. Consequently, complainant lodged formal FIR on 23.12.2016. The petitioner was arrested on 23.12.2018, and was sent to jail. After submission of challan and completion of codal formalities, the petitioner was formally charge sheeted on 17.04.2019, to which he pleaded not guilty and claimed trial. Prosecution in order to prove its case produced six witnesses and closed its evidence on 14.01.2021, whereafter the petitioner was examined u/s 342 Cr.P.C. on 23.01.2021. After hearing the parties, through impugned judgment, learned trial Court convicted the petitioner u/s 489-F P.P.C. and passed sentence of three years SI. Appeal filed by the petitioner was also dismissed by the Court of learned ASJ-IV,

West Islamabad vide impugned judgment dated 30.06.2021.

03. Learned trial Court in the impugned judgment has already discussed the facts of the case as well as the evidence in detail and there is no need to repeat the same in order to avoid unnecessary duplication / repetition.

04. Learned counsel for the petitioner *inter alia* contends that the prosecution story is highly doubtful; the trial Court has misread the evidence adduced during the trial; Courts below erred in law and facts while passing the impugned judgments; learned Courts below have not taken into consideration decisions of the superior Courts on the points involved and have failed to consider that there are material contradictions in the evidence of prosecution witnesses; the prosecution has failed to produce any evidence regarding amount paid by the complainant to the petitioner / accused.

05. On the other hand, learned State Counsel has opposed the acceptance of petition on the grounds that sufficient

evidence has been produced; impugned judgments are well reasoned and in accordance with law; the prosecution witnesses have fully implicated the accused with the commission of alleged offence. Learned counsel has supported the judgments passed by learned Courts below and has prayed for maintaining the same.

06. Arguments advanced by learned counsel for the petitioner and learned state counsel have been heard and the documents placed on record have been examined with their able assistance.

07. It would be appropriate to reproduce Section 489-F P.P.C which is as under;

"489-F. Dishonestly issuing a cheque:-

Whoever dishonestly issues a cheque towards repayment of a loan or fulfillment of an obligation which is dishonoured on presentation, shall be punished with imprisonment which may extend to three years or with fine, or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements

with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque."

08. To constitute an offence, dis-honesty on the part of person issuing the cheque is pre-condition towards the repayment of amount or fulfillment of an obligation. The word **"whoever dishonestly issued cheques"** used in the section clearly indicates to constitute an offence, it must be proved that the cheques have been issued dishonestly.

09. Dishonestly means a fraudulent act or intent to defraud others, it is also a pre-condition that the cheque should be dishonored on **"Presentation"**. The basic ingredients for attracting the Section 489-F P.P.C are as under;

- (i) Dishonestly issuing.*
- (ii) Towards re-payment of loan.*
- (iii) Fulfillment of an obligation.*
- (iv) Dishonored on presentation.*

Mere issuance of cheque and its dishonoring by itself is not an offence unless the aforementioned ingredients are fulfilled.

10. It has been held by the Hon'ble Supreme Court of Pakistan in a case titled as **"Allah Ditta Vs. The State" (2013 SCMR 51)**, that:

"Every transaction where a cheque is dishonored 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 dishonored."

11. Preconditions to make out an offence under Section 489-F P.P.C have also been elaborated by the Hon'ble Supreme Court Pakistan while deciding Criminal Appeal titled as **"Muhammad Sultan Vs. The State" (2010 SCMR 806)**, wherein it has been held that:

"A perusal of section 489-F, P.P.C. reveals that the provision will 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 cheques should be:---

(a) to repay a loan;

or

(b) to fulfill an obligation (which in wide term inter alia applicable to lawful agreements, contracts, services, promises by which one is bound or an act which binds person to some performance).

(iv) on presentation, the cheque is dishonoured.

However, a valid defence can be taken by the accused, if he proves that: ---

(i) he had made arrange meets with his bank to ensure that the cheques would be honoured; and

(ii) that the bank was at fault in dishonoring the cheque. If the accused establishes the above two facts through tangible evidence and that too after the prosecution proves the

ingredients of the offence then he would be absolved from the punishment”.

12. On the basis of aforementioned principles laid down by the Hon'ble Supreme Court of Pakistan, instant case has to be decided.

13. In complaint Ex.PA as well as in FIR Ex.PB, it is mentioned that complainant had business dealing with the petitioner / accused but in his statement recorded on 22.06.2019, complainant / Muhammad Shahid (PW-1) has not given any detail / evidence of any business dealing with the petitioner / accused; complainant is admittedly serving as Constable in Islamabad Police and deposed in his statement that he was not doing any business; the stance of complainant that he was not doing any business is also self-contradictory as in the FIR he mentioned that he has given an amount of Rs.25,00,000/- to the petitioner / accused for business purposes.

14. On one hand he says that he had

business dealing with the petitioner / accused. On the other hand, he has stated that he was not doing any business. The petitioner / accused was also an employee of AGPR. Complainant has also admitted in his cross-examination that he has not filed any suit for recovery against the petitioner / accused and other than the cheque in question, he has no receipt or agreement regarding business dealing with the petitioner / accused.

15. Complainant has stated that he cannot tell that for which business, the amount was paid to the petitioner / accused. No evidence regarding payment of single penny to the petitioner / accused has been produced in the learned trial Court. He has also stated that he has no evidence that from which source he brought / obtained the amount of Rs.25,00,000/-. There is no documentary evidence / eye-witness of the said transaction. He has stated that on different occasions he paid amount to the petitioner / accused but not a single witness of any transaction has been produced

before the I.O or the Court.

16. It is admitted that complainant has neither produced any witness nor any other evidence regarding payment to the petitioner / accused before the I.O or the learned trial Court.

17. An important factor of the instant case is that learned trial Court in the impugned judgment dated 23.01.2021 has not mentioned the name of complainant Muhammad Shahid / PW-1, rather in para-4 of the impugned judgment, it is mentioned that:

"Muhammad Jahangir,

(Complainant) (PW-1):

He deposed that accused Anees Ali received an amount of Rs.25,00,000/- (Rupees 2.5 million) from him and issued him cheque-in-question (Ex-PB). That on 23.09.2016, he presented the cheque-in-question before the concerned bank for encashment but same was dishonoured due to insufficient balance vide dishonor slip (Ex-PC). That he moved an application (Ex-PA) against above named accused

for registration of FIR which bears his signature as Ex-PA/1.

18. Neither Muhammad Jahangir is complainant of the case nor any witness of the said name is mentioned in the challan / report under section 173 Cr.P.C. ~~are~~ submitted in the Court. It is surprising that from where the learned trial Court has mentioned / derived the name of Muhammad Jahangir, complainant (PW-1) in the impugned judgment dated 23.1.2021.

19. PW-1 / Muhammad Shahid has produced an undertaking / compromise deed allegedly executed and signed by the petitioner / accused in the evidence as "Mark-B", wherein the petitioner / accused has admitted his liability which was presented in the Court at the time of granting bail after arrest of the petitioner / accused but it is admitted that when "Mark-B" executed, the petitioner / accused was in police custody.

20. Compromise deed (Mark-B) has been made the sole ground of awarding

conviction to the petitioner / accused by the learned trial Court but it is also an admitted fact that the document / compromise deed (Mark-B) was neither exhibited in the evidence nor it was put to the petitioner / accused in his statement under Section 342 Cr.P.C.

21. It is a well settled law that document which has not been exhibited, cannot be read in the evidence. It is also settled that no conviction can be based upon the evidence which has not been put to accused in his statement under Section 342 Cr.P.C.

22. In this regard, reliance is placed on a case titled as **"State Life Insurance Corporation of Pakistan and another Vs. Javaid Iqbal" (2011 SCMR 1013)**, wherein it has been held by the Hon'ble Supreme Court of Pakistan that:

"We are not convinced that, such document, which has not been produced and proved in evidence but only "marked", can be taken into account by the Courts as a legal evidence of a fact".

Reliance is also placed on the cases titled as **"Mst. Shaukat Bibi and another Vs. The State and another" (2021 YLR Note 1), "Muhammad Akram and others Vs. Irshad Mahmood and others" (2016 CLC 1208) and "Federation of Pakistan through Secretary Ministry of Defence and another Vs. Jaffar Khan and others" (PLD 2010 Supreme Court 604).**

23. As the compromise deed (Mark-B) was not put to the petitioner / accused under Section 342 Cr.P.C, hence the same cannot be used against him. In this regard guidance has been sought from the dictum laid down in a case titled as **"Ameer Zeb Vs. The State" (PLD 2012 Supreme Court 380),** by the Hon'ble Supreme Court of Pakistan, wherein it has been held that:

"It is trite that a piece of evidence not put to the accused person at the time of recording of his statement under section 342, Cr.P.C. cannot be used against him by the

prosecution". (emphasis added)

24. The same principle has been laid down in a case titled as **"Qaddan and others Vs. The State" (2017 SCMR 148)**, wherein it has been held by the Hon'ble Supreme Court of Pakistan that:

"The law is settled that a piece of evidence not put to an accused person at the time of recording of his statement under Section 342, Cr.P.C. cannot be considered against him".

25. It has also been held by the Hon'ble Supreme Court of Pakistan in a case titled as **"Mst. Anwar Begum Vs. Akhtar Hussain alias Kaka and 2 others" (2017 SCMR 1710)** that:

"It is well settled by now that a piece of evidence not put to an accused while examining him under Section 342, Code of Criminal Procedure cannot be used against him for maintaining his conviction".

26. This Court while exercising the revisional jurisdiction in terms of Section

435 Cr.P.C has to examine the record for the purpose of satisfying its conscious to check the correctness, legality or propriety of any findings / sentence passed by learned lower Courts, therefore, duty conferred upon the High Court on its revisional side compel it to reprise the entire evidence on the touch stone of principle of fair trial as referred in Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973, if the first appellate Court in disposing of the appeal did not discuss the evidence at all.

27. In view of above, coupled with the other above mentioned reasons, I hold that the prosecution has failed to prove its case against the petitioner beyond a reasonable doubt. There are so many defects and contradictions in the prosecution case / evidence; thus, the prosecution case appears to be doubtful and benefit of the same should be extended in favour of the petitioner. In this regard, reliance is placed upon a case titled as **"Tariq Pervez Vs. The State" (1995 SCMR 1345)**, wherein

it has been observed by the Hon'ble Supreme Court of Pakistan that:-

"It is settled law that it is not necessary that there should many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right".

28. The same principle has been laid down by the Hon'ble Supreme Court of Pakistan in a case titled as **"Muhammad Aslam Vs. The State (2011 SCMR 820)"**, wherein it has been held that:

"It is well settled legal principle regarding dispensation of justice in criminal case that if any reasonable doubt is created in the case of the prosecution then its benefit is to be extended to the accused party".

29. Therefore, instant petition is **accepted**, judgment dated 30.06.2021, passed by learned Additional Sessions Judge-IV, West-Islamabad (*Appellate Court*) as well as judgment dated 23.01.2021, passed by learned Judicial Magistrate Section-30, West-Islamabad are hereby **set aside** and by extending the benefit of doubt, the petitioner is acquitted from the charge in case FIR No. 351/16, dated 23.12.2016, offence under Section 489-F, registered at police station Shalimar, Islamabad and he is ordered to be released forthwith, if not required in any other case.

~~(TARIQ MEHMOOD JAHANGIRI)~~
JUDGE

Ahmed Sheikh