JUDGMENTSHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

Criminal Appeal No. 67 of 2016

Muhammad Asif Jamal
Versus
Abdul Qadeer and another

Appellant by: Mirza Haseeb H. Baig, Advocate.

Respondent No.1 by: Sardar M.Aftab, Advocate with respondent/ accused in person.

State by Hafiz Mazhar Javed and Mr. Zohaib Hassan Gondal, State counsel alongwith Waheed A.S.I. Police Station Abpara, Islamabad.

Date of Hearing: 06.07.2020.

Ghulam Azam Qambrani, J.:- Appellant (Muhammad Asif Jamal) seeks setting aside of impugned judgment dated 22.02.2016, passed by the learned Judicial Magistrate, Section-30, Islamabad-West, whereby respondent No.1 was acquitted in case F.I.R No.115 dated 20.03.2014 under Section 489-F P.P.C register at Police Station Abpara, Islamabad.

2. Briefly stated facts of the prosecution case are that Muhammad Hanif, brother of respondent No.1/accused (hereinafter be called as ***"respondent"***) received loan from the complainant/ appellant and when he did not return the said amount, the appellant lodged F.I.R No.180 dated 02.11.2011 against brother of respondent, who was arrested. It is further stated that respondent, met the appellant and took the responsibility of repayment of loan amounting to Rs.2,00,000/- which were given by the appellant to his brother, namely Mr. Muhammad Hanif. Respondent paid an amount of Rs.50,000/- to the appellant and issued two cheques dated 15.05.2012 and 02.10.2012 which were dishonored on presentation. Thereafter, the appellant got lodged F.I.R No.115 dated 20.03.2014 against the respondent under Section 489-F P.P.C with Police Station Abpara, Islamabad.

3. After registration of F.I.R,the investigation was completed and report under Section 173 Cr.P.C was submitted. Formal charge was framed against the respondent to which he 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 Muhammad Asif Jamal (complainant),
ii. PW-2, Mr. Aftab Ahmed, Operation Manager, Meezan Bank,
iii. PW-3Waheed Ahmed, A.S.I/Investigation Officer,

After closure of the prosecution evidence, the accused/respondent No.1 was examined under Section 342 Cr.P.C wherein he denied the allegations leveled against him. 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 22.02.2016, hereinafter be called as the impugned judgment.

5. The learned counsel for 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 the judgment of acquittal passed by the learned Trial Court is not in accordance with law and facts of the case; that the learned trial Court has given undue benefit to the respondent while acquitting him of the charge. 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; that it is admitted fact that the respondent has got no money from the appellant rather his brother had got loan from the appellant for which the appellant already got lodged F.I.R No.180 on 02.11.2011 against brother of the respondent and this fact is admitted by the appellant in

his application Exh.PA. It is further submitted that the main issue is between the appellant and brother of the respondent and that the F.I.R No.180 is still pending. 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 the appellant had given a loan to the brother of the respondent namely Raja Muhammad Hanif and in this regard the appellant had already got lodged F.I.R No.180 dated 02.11.2011 under Section 489-F P.P.C with Police Station Secretariat, Islamabad which is still pending. It is an admitted fact that the respondent did not take any loan from the appellant, rather as per the appellant, the respondent took the responsibility to pay an amount of Rs.2,00,000/- to the appellant which were lent by the appellant to the brother of the respondent namely Raja Muhammad Hanif. Provisions of Section 489-F PPC 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 ct which binds a persons to some performance).
iv. On presentation, the cheque is dishonored.

The elements of *mensrea* and dishonestly issuance of cheque are missing in the instant case. The respondent has issued the cheques to the appellant on the ground that the brother of the respondent will make payment outstanding against him after his release from the jail but brother of the respondent could not pay the loan amount to the appellant due to his termination from Government Service on account of the F.I.R No.180 lodged by the appellant against him and

it is proved on record that the respondent has not issued the cheques to the appellant dishonestly, which fact is admitted by the appellant in his application Exh.PA, wherein he has stated that he had given loan to the brother of the respondent, as such, the prosecution has failed to prove dishonesty against the respondent in issuing the cheques to the appellant whereas the F.I.R No.180 lodged against the brother of the respondent is still pending. Further the appellant/complainant has also filed a suit for recovery against brother of the respondent regarding his outstanding amount. It is also proved on record that the complainant did not pay the loan to the brother of the respondent on his guarantee of repayment whereas the respondent took the responsibility after payment of loan to his brother. In this way, it cannot be said that the respondent has cheated the complainant.

10. It is admitted fact that the cheque was issued as a guarantee and not for re-payment of any loan 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. To constitute an offence under this section, dishonesty 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.

12. Reliance is also placed on the judgment of the Hon'ble Supreme Court of Pakistan reported as "Mian Allah DittaVsThe 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.*

13. The complainant has failed to produce a single evidence to prove dishonest intention of the respondent 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 P.P.C against the respondent.

14. 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 have 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.*

15. Keeping in view the above principles, it transpires from the record that the important witness of the prosecution case, i.e. the complainant/appellant himself admitted during cross examination that loan was taken by Raja Muhammad Hanif from him and that he had never given any loan to the accused/respondent. He further admitted that he had also filed a suit for recovery against Raja Muhammad Hanif. Therefore, the element of *mensrea,* and dishonestly issuance of cheque, fulfillment of obligation or repayment of loan are missing in the instant case. As such, the learned trial Court has rightly acquitted the accused person/respondent by giving him the benefit of doubt holding that the prosecution could not prove its case beyond any shadow of doubt.

16. 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 prosecutionevidence, benefit of same was to be extended to accused."

17. 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.

18. 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.

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

(GHULAM AZAM QAMBRANI)
JUDGE

Announced In Open Court On 07 July /2020.

JUDGE

"Rana.M.Ifz."