

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

Criminal Revision No.04 of 2020

Gulraiz
Vs.
The State and another

Petitioner By: Mr. Tahir Mehmood Abbasi and Mr. Shakeel Abbas, Advocate.

Respondent No.1 By: Mr. Abdul Rauf Chaudhry, Advocate

State By: Mr. Zohaib Hassan Gondal, State Counsel and Hafiz Malik Mazhar Javed, State Counsel along with Khalid Mehmood, Assistant Sub-Inspector.

Date of Hearing: 13.03.2020.

GHULAM AZAM QAMBRANI, J.:-The instant criminal revision petition under section 439 Cr.P.C. has been directed against impugned judgment dated 30.07.2019 passed by the learned Judicial Magistrate, Section-30 (East), Islamabad, and impugned order dated 21.11.2019, passed by the learned Additional Sessions Judge-V, (East) Islamabad, whereby the appeal filed by the petitioner against the order of the Judicial Magistrate has been dismissed.

2. Briefly stated facts of the prosecution case are that on 24.01.2011, complainant Sheikh Muhammad Aslam got lodged F.I.R No.115 dated 11.03.2018, under Section 489-F P.P.C with Police Station Koral, Islamabad, with the averments that the petitioner and the complainant entered into a sale transaction of a plot, situated in Margala Town, Islamabad, the complainant paid the whole consideration but the petitioner failed to transfer the subject plot. On demand of amount, the petitioner issued a cheque bearing No. 2269645684 for an amount of Rs.63,00,000/- which on presentation was dishonored.

3. After registration of the F.I.R, investigation was carried out by the police and after usual investigation; challan of the case was submitted before the learned Court of Judicial Magistrate, Section-30 (East), Islamabad.

4. The learned trial Court after fulfilling the codal formalities framed the charge against the petitioner to which he pleaded not guilty and claimed trial. In order to prove the accusation, the prosecution examined the following witnesses:-

- i. PW- 1, Khalid Mehmood, A.S.I,
- ii. PW- 2, Muhammad Aslam, Complainant,
- iii. PW- 3, Ghulam Abbas, SI/ Investigation Officer,
- iv. PW-4, Javed Nasir, Operational Manager, HBL
- v. PW- 5, Muhammad Ijaz-ul-Haq, Operational Manager, ABL.

5. After closure of the prosecution evidence, the accused/ convict was examined under Section 342 Cr.P.C wherein he has denied the entire allegation leveled against him, however he did not opt to record statement on oath, nor to produce any defence evidence. The learned Trial Court after hearing the arguments of the learned counsel for the parties, announced the judgment dated 30.07.2019, whereby convicted the petitioner and sentenced him for three years with fine of Rs.20,000/-, however, benefit of 382 Cr.P.C was extended. That the petitioner being aggrieved preferred an appeal before the learned Additional Sessions Judge-V (East) Islamabad, which was dismissed vide order dated 21.11.2019, by upholding the conviction and modifying the quantum of sentence from three years to two years. Both of these judgment and orders have been assailed through the instant revision petition.

6. Learned counsel for the petitioner contended that the impugned judgment and order passed by the learned Courts below are illegal, unlawful, arbitrary and are result of misreading and non-reading of the evidence on record; that both the Courts below have committed material irregularities and illegalities; that the prosecution has failed to establish its case beyond shadow of doubts; that both the Courts below have given undue importance to Ex.PH and ignored the spirit of Article-17(2) (A), 79, 129G of *Qanoon-e- Shahdat Order, 1984*, whereas, the contents of Ex.PH are neither part of F.I.R nor the complainant deposed about it in his evidence and Ex.PH has no legal and evidentiary value as per settled

principles in Evidence Act; that the prosecution has failed to examine the marginal witnesses of the alleged agreement which is violation of Article-79 of *The Qanoon-e-Shahadat Order, 1984*; that ingredients of Section 489-F P.P.C are not attracted to the case of the petitioner; that the documents produced by prosecution during the course of trial in order to prove the accusation have been improperly admitted in evidence because for want of original documents having being brought in evidence, no reliance for the purpose of conviction can be based on photostate copies; photostate copies of the documents on the basis whereof the petitioner has been found guilty were not admissible being secondary evidence; that prosecution evidence in quality and character is wanting so as to result in conviction of the petitioner; that both the Courts below ignored the above mentioned legal aspects of the case which are required to be attended to. The above noted grounds accordingly to the learned counsel if were considered by the Courts below, would not have resulted in conviction of the petitioner. Lastly, prayed that both, judgment and order, passed by the Courts below are liable to be set-aside and prayed for acquittal of the petitioner.

7. Conversely, learned counsel for respondent No.2 contended that the petitioner had issued a cheque of his closed account; that the petitioner is directly charged for the commission of the offence; that statement of the PWs are consistence on material points and there is no discrepancy in their testimony; that the prosecution has proved the case against the petitioner, therefore, the learned Courts below have rightly convicted the petitioner. The learned State counsel supported the impugned judgment and order of the learned Courts below.

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

9. Perusal of the record shows that the allegation against the petitioner was that he issued a cheque amounting to Rs.63,00,000/- which was dishonored. In order to prove its case, the prosecution beside the oral evidence mainly relied upon the photocopies of the documents i.e. Ex.PA & Ex.PB, i.e. cheque and dishonor slip. Perusal of the record reveals that neither the original cheque nor dishonor slip were tendered in evidence by the prosecution or the same were part of the record. This fact is admitted by the complainant while appearing as PW-2 wherein he

has stated that he has produced the original cheque and dishonor slip and its photocopies before the investigation officer who had returned the original cheque and dishonor slip.

10. The documents produced in evidence by the prosecution unless admitted in writing before the trial Court by the petitioner within the meaning of Article 76(c) of Qanun-e-Shahadat Order, 1984, would not dispense with the requirement of the formal proof of the documents by primary evidence as provided by Articles 72 and 73 of the Qanun-e-Shahadat Order, 1984. Secondary evidence can be admitted only on one or more conditions laid down in Article 76 of Qanun-e-Shahadat Order, 1984, having been satisfied by the party tendering such evidence and; secondary evidence cannot be admitted of the contents of document without the non-production of the original having first been accounted for as required by the above-mentioned Article. The reception of secondary evidence without objection by the party against whom it is intended or required to be used in evidence, cannot ordinarily object to the admission of such evidence at any subsequent stage, subject to provisions of Article 162 of the Qanun-e-Shahadat Order, 1984.

11. Perusal of the record further shows that the documents tendered by the prosecution were received in evidence improperly without the production of their originals and the conditions pre-requisite for permitting secondary evidence were also wanting and mere consent or omission to object to the reception of inadmissible evidence cannot be treated as a valid and legal piece of evidence because such departure of the rule appears to have a substantial effect on the decision of the Courts below, which if excluded might have resulted in varying the decision, in view of the facts and circumstances of the case, and thus; the judgment and order impugned herein cannot sustain.

12. So far as the document Ex.PH is concerned, it is stated that the said document was not part of prosecution record, neither it was supplied to the petitioner/ accused as required under Section 241-A Cr.P.C. The learned trial Court erred while exhibiting the said document as Ex.PH abruptly produced by PW-2, in his cross-examination. Neither such document can be tendered in evidence nor

it can it be used against the accused in evidence. The document Ex.PH is altogether excluded from the evidence. Record shows that the learned trial Court after perusing the original agreement (Ex.PH), returned back the same to the complainant, PW-2, which fact has been mentioned on record, while the learned trial Court has not mentioned the same fact while exhibiting photocopies of the Ex.PA & Ex.PB, which proves that the original of the same i.e. cheque and dishonor slip were not produced. This fact has further been confirmed by the investigation officer while taking into possession the cheque and dishonor slip through recovery memo Ex.PD, that he took into possession only the photocopies of the said documents.

13. Since appraisal of evidence at the revisional stage would be improper and unjustified, therefore, the case has to be remanded to the learned trial Court.

14. In view of the foregoing reasons, the impugned judgment and order, dated 30.07.2019 and 21.11.2019 respectively, passed by the learned Judicial Magistrate, Section-30, East, Islamabad and learned Additional Sessions Judge-V, East, Islamabad, are set-aside and the case is remanded to the learned Judicial Magistrate/trial Court for rewriting of judgment after hearing the parties, on exclusion of the documentary evidence Ex.PA and Ex.PB originals whereof were not tendered in evidence by the prosecution/complainant, on its own merits. The petitioner be released from jail custody on furnishing bail bond in the sum of Rs.2,00,000 (Two lacs) with one surety and P.R. in the like amount to the satisfaction of Judicial Magistrate Section-30, (East)Islamabad, pending disposal of the case by the learned trial Court.

15. Consequently; the instant criminal revision petition stands partly **accepted** to the above-noted extent.

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open court, on 21 April 2020.

Approved for reporting

JUDGE