

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Revision No. 34 of 2021

Mazhar Iqbal

Versus

The State and another.

Petitioner by:	Syed Iqbal Hussain Shah Gillani and Mr. Naeem-ur-Rehman, Advocates.
Respondents by:	Ch. Zubair Mehmood Gujjar, Advocate. Syed Shahbaz Shah, State Counsel. Adnan Hussain, A.S.I.
Date of hearing:	09.09.2021.

TARIQ MEHMOOD JAHANGIRI, J.: Through

the instant criminal revision filed under Sections 435 & 439 of Cr.P.C, 1898, the petitioner has assailed judgment dated 28.05.2021, passed by learned Additional Sessions Judge, West-Islamabad (*Appellate Court*) in Criminal Appeal No. 40/2021 as well as judgment dated 08.04.2021, 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 years simple imprisonment, benefit of Section 382-B Cr.P.C was also extended to the petitioner.

02. Precisely prosecution case is that the complainant moved an application (Ex.P-A) for registration of FIR, wherein he has stated that his brother sold his joint property. They paid a sum of Rs. 16,00,000/- (1.6 Million) to the accused who was already known to them, for the purpose of investment in some nice project, through a formal agreement which was in the name of his brother, subsequently when the amount was demanded, the accused paid a sum of Rs. 2,00,000/- in cash and issued a cheque of the remaining amount, one cheque amounting to Rs. 5,00,000/- was issued in the name of his brother, whereas a cheque bearing No. D-3259124 dated 15.04.2006, amounting to Rs. 9,00,000/- drawn on Prime Commercial Bank Limited, F-10 Markaz, Islamabad (*herein after referred as Cheque in question*) was issued in his name and when the cheque in question was presented before the bank for encashment the same was dishonored due to the reason **"insufficient balance"**, hence the instant FIR.

03. After the registration of above FIR, investigation in the case was carried out. Upon conclusion of the investigation, the accused was placed in column No. 3 of the report submitted under Section 173 Cr.P.C, charge was framed on 20.09.2019 under Section 489-F P.P.C, however the accused

denied the charge and claimed trial.

04. In support of its case, the prosecution produced five witnesses, after closing of evidence the accused was examined under Section 342 Cr.P.C, he opted not to appear as his own witness under Section 340 (2) Cr.P.C in defence evidence, he produced certified copies of suit titled as "Abdul Rashid Vs. Mazhar Iqbal" filed under Order XXXVII, CPC, application for leave to appear and defend, complete order sheet, decree sheet dated 11.11.2019 and agreement dated 31.08.2005 (25 pages) and closed his evidence.

05. Learned trial Court after hearing the parties and evaluating the evidence, convicted and sentenced the petitioner in aforesaid terms, the appeal filed by the petitioner was also dismissed by the appellate Court.

06. 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 the unnecessary duplication / repetition.

07. 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; suit filed by the complainant under order XXXVII, CPC has also been dismissed, the prosecution has not produced any evidence regarding the presentation of cheque in the bank and has prayed for setting aside the impugned judgments.

08. On the other hand, learned State Counsel assisted by learned counsel for the complainant has opposed the acceptance of the 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. Both the learned counsel have supported the judgments passed by learned Courts below and have prayed for maintaining the same.

09. Arguments advanced by learned counsel for the petitioner and learned counsel for the respondents have been heard and the record / documents, placed on record have been examined with their able assistance.

10. 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."

11. 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.

12. 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 dis-honor by itself is not an offence unless the aforementioned ingredients are fulfilled.

13. 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."

14. That the 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”.

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

16. The date of occurrence mentioned in the FIR is 16.06.2006, whereas the date of registration of FIR is 11.05.2009, there is no plausible explanation for reporting of the matter to police after an inordinate delay of about three years.

17. In complaint (Ex.P-A) as well as in FIR (Ex.P-C), it is mentioned that brother of the complainant sold his land and paid an amount of Rs. 16,00,000/- (1.6 Million) to the petitioner / accused by executing a formal agreement but in statement recorded on 30.09.2020 before the learned trial Court, complainant / Abdul Rashid (PW-1) has not narrated the fact of execution of formal agreement between the petitioner / accused and his brother.

18. No evidence of selling the joint property of the complainant and his brother was produced before the learned trial Court, as the main reason for arranging the amount was the sale consideration of the said land, sold by the complainant and his brother, no agreement of investment / paying the money to the accused executed between the accused and brother of the complainant has been produced in the evidence.

19. Neither any witness nor any other evidence regarding payment of Rs. 9,00,000/- to the petitioner / accused was produced by the complainant before the learned trial Court.

20. Muhammad Yousaf, S.I. (PW-3), first Investigating Officer and Javed Iqbal, ASI (PW-4), second Investigating Officer of the case have admitted in their cross examinations that complainant has not produced any evidence regarding

payment of amount to the petitioner / accused.

21. That the complainant has also not handed over original cheque and dishonour slip to the I.O during the course of investigation. Investigating Officer, Muhammad Yousaf, S.I (PW-3), has also admitted the same. He has further stated in his evidence while appearing as PW-03 that due to non production of original cheque and dishonor slip, he could not verify the same from the concerned bank.

22. The second Investigating Officer Javed Iqbal, ASI (PW-4), has also stated that the complainant has not produced cheque and its dishonor slip and he has not verified the said facts from the bank through formal application, as it is requirement of bank that the original cheque and dishonor slip should be presented in the bank for the purpose of verification.

23. Zaeem Sajjad, Branch Service Officer, appeared and recorded his statement as PW-2. It is pertinent to mention here that his name was not mentioned in the list of witnesses in a report under section 173 Cr.P.C rather the name of Nusrat Wafa, Manager (Operational), Prime Commercial Bank presently in Faisal Bank was mentioned in the list of witnesses of challan / report under Section 173 Cr.P.C.

24. Neither any application under Section 540 Cr.P.C nor

any other petition from prosecution side was filed for producing Zaeem Sajjad, Branch Service Officer as a prosecution witness during the trial. It is quite surprising that how and under which provision of law statement of Zaeem Sajjad, Branch Service Officer was recorded as PW-02.

25. It is trite that during the trial, prosecution can only produce the witnesses, whose names are mentioned in the calendar of witnesses but when the prosecution wishes to examine the witness whose name is not included in list of witness, it could not claim as a right but shall be required to file a petition under Section 540 Cr.P.C or other provisions of law, and shall be required to satisfy the conscious of the Court that such examination is needed for discovery of truth. Reliance in this regard is placed on the cases titled as **"Rafiullah Vs. 11th Additional District and Sessions Judge (West), Karachi and another" (2020 MLD 942), "Mukhtiar and another Vs. The State and another" (2018 YLR 2490), "Nazir Ahmad Vs. Khalid Pervaiz and 4 others" (1997 MLD 2077), "Shahbaz Masih Vs. The State" (2007 SCMR 1631), "Ghulam Mustafa and another Vs. The State and 2 others" (2021 PCr.L.J 417), "Muhammad Sajjad and two others Vs. The State" (PLD 1960 520), "Muhammad Sadiq and 2**

others Vs. The State” (2006 YLR 3212) and Wasiullah Vs. Ali Mohseen and 2 others (2016 P.Cr.L.J 1124).

26. Zaeem Sajjad, Branch Service Officer (PW-02) has categorically stated in his statement that he cannot identify the signature of the bank officer on the dishonor slip and there is no signature / stamp of any bank officer on the cheque (Ex.P-1). He has further stated that it is correct that whenever the cheque is presented in the bank, it is signed by the presenter as well as signed and stamped by the officer of the bank, so he can say that cheque (Ex.P-1) has not been presented in any bank, as neither it contained signatures of the presenter nor signatures and stamp of any bank officer.

27. The complainant (PW-1) produced a compromise deed allegedly executed and signed by the petitioner / accused in the evidence as Mark-A, wherein the petitioner / accused admitted his liability, which was presented in the Court at the time of granting of bail after arrest of the petitioner / accused but the complainant has also admitted in cross examination that it is correct that when compromise deed (Mark-A) was executed, the accused / petitioner was in police custody.

28. The compromise deed (Mark-A) 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-A) was neither exhibited in the evidence nor it was put to the petitioner / accused in his statement under Section 342 Cr.P.C.

29. 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.

30. 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).

31. As the compromise deed (Mark-A) 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 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)

32. 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".

33. 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".

34. As per record produced by the petitioner / accused, civil suit filed by the complainant under order XXXVII, CPC has also been dismissed by the Court of learned Additional Sessions Judge, West-Islamabad.

35. This Court while exercising the revisional jurisdiction in terms of Section 35 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.

36. In view of above, coupled with the other above mentioned reasons, I hold that in this case 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".

37. 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".

38. Therefore, instant petition is **accepted**, judgment

dated 28.05.2021, passed by learned Additional Sessions Judge, West-Islamabad (*Appellate Court*) in Criminal Appeal No. 40/2021 as well as judgment dated 08.04.2021 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. 211/2009, dated 11.05.2009 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

Announced in open Court on this 16th day of September, 2021.

JUDGE

Approved for Reporting

Bilal /-