JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

JUDICIAL DEPARTMENT

Criminal Appeal No.182/2017

Anwaar-ul-Haq

Versus

The Judicial Magistrate & others

Appellant by:	Mr. Talat Mehmood Zaidi, Advocate.
Respondents 3 & 4 by:	Mr.Zahid Ayub Rathore, Advocate.
State by:	Mr. Zohaib Hassan Gondal, State Counsel with Shahbaz Sub-Inspector & Ashfaq Warriach Assistant Sub-Inspector.
Date of Hearing:	01.09.2020

Ghulam Azam Qambrani, J.: This appeal has been filed against the impugned judgment dated 10.11.2017, passed by the learned Judicial Magistrate, 1st Class, Islamabad- West, in case F.I.R 09 dated 08.01.2016, under Sections 489-F/406/34 PPC registered at Police Station Ramna, Islamabad, whereby respondents No. 3 & 4 were acquitted.

2. Briefly stated, prosecution case is that the complainant of this case reported to the police that he is running the business of "*Rent a Car*" in the name and style of "*Awan Tours*" situated in Khayaban-e-Sirsayed, Rawalpindi. The accused/respondents No.2 & 3, namely Mohsin Khan and Ashfaq Hussain, used to obtain his vehicles on daily, monthly and on annual basis. The respondents/accused obtained five vehicles from him but did not pay the rent, when the rent of the vehicles exceeded to Rs.26,00,000/-, the complainant demanded rent of the vehicles, as well as the vehicles to which they firstly lingered on the matter on one pretext or the other and thereafter, the accused, Mohsin Khan, issued a cheque bearing No.1530539073 of MCB Pirwadai, Rawalpindi, for an amount of Rs.26,00,000/- in his favour. When the complainant deposited the said cheque online in Allied Bank, G-11/2 Branch, Islamabad, on

23.12.2015, the said cheque was dishonoured due to insufficient funds. After this, it came to his knowledge that both respondents/accused belong to a gang, which usually obtains vehicles on rent but neither pay rent nor return the vehicles and used to misappropriate the vehicles. The complainant suspected that his five vehicles have been misappropriated by the respondents/accused. Thereafter, he got knowledge that out of said five vehicles, one vehicle bearing No. YV-182, Toyota Corolla GLI, 2012, Red Wine Colour is in illegal possession of one namely Ayyaz, resident of Abbottabad. When the complainant approached the respondents/accused and demanded rent of the vehicles as well as for return of his vehicles, they flatly refused and extended threats of dire consequences against the complainant if he demanded any rent, vehicles or approach for any legal proceedings against them. Hence, the above said F.I.R was lodged.

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 respondents on 25.03.2017 to which they 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, Anwaaar-ul-Haq, (complainant),
ii. PW-2, Muhammad Saeed,
iii. PW-3, Ali Akbar Constable No.7302/C,
iv. PW-4, Shahbaz SI,
v. PW-5, Muhammad Waseem Abrro,
vi. PW-.6 Muhammad Yousaf SI.

After closure of the prosecution evidence, the accused/respondents were examined under Section 342 Cr.P.C, wherein they denied the allegations leveled against them. The accused did not opt to record their statements 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 10.11.2017, hereinafter be called as the "*impugned judgment*" whereby, both the

accused were acquitted of the charges. The appellant/ complainant being aggrieved of the impugned judgment has challenged the same through the instant appeal.

5. Learned counsel for the appellant has contended that while passing the impugned judgment the learned trial Court has failed to consider the material facts, as the accused/respondents are habitual offenders and so many other criminal cases are registered against them; that respondent No.3 is also convicted from the Court of learned Judicial Magistrate, Islamabad in same offence under Section 489-F P.P.C for one year and respondent No.2 was also absconder from the Court of learned Additional Sessions Judge Islamabad-West in offence under Section 365-B/34; that the impugned judgment suffers from legal perversity and untenable in the eyes of law as there is clear cut nomination of the respondents by the complainant and respondents deprived the appellant from a huge amount; that the impugned judgment is not sustainable in the eyes of law as the connection of respondents is established; that the respondents used to rent out the vehicles from the complainant including the vehicle No. YV-182 and EW-900 and misappropriated the said vehicle, some parts of the vehicle EW-900 and also the rent of the vehicles; that in repayment of the said rent the respondent/ Mohsin Khan issued a cheque of Rs.26,00,000/- to the complainant, which was dishonoured due to insufficient funds; that the renting documents and dishonouring slips are proof against the respondents; that they rented out the vehicles and for the payment of rent, dishonestly issued the cheque in-question knowingly that there will be no amount in his account at the date given for the encashment of the cheque; that the respondents were found guilty during investigation conducted by the police; that the prosecution has successfully proved the case against the respondents. Lastly, contended that impugned judgment is based upon presumption, surmises and conjectures, as such, the same is liable to be set-aside.

6. Conversely, learned counsel for the respondents/accused submitted that the appellant has falsely got registered this case against them; that neither they have misappropriated the vehicles of the appellant, nor any part of the vehicles nor any amount of rent was due towards them nor they have issued any cheque for the payment of said rent; that during the investigation, neither the vehicle No. YV-182, nor any part of the vehicle EW-900 has been recovered from their possession or on their pointation; that the respondent Mohsin Khan did not issue the cheque in-question to the appellant; that there are material discrepancies in the prosecution evidence, which are very fatal for the case of prosecution; that the prosecution has miserably failed to prove the obligation of the respondents to pay the complainant. 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 respondents.

7. The learned State counsel opposed the impugned judgment passed by the learned Trial Court and supported the contentions of the learned counsel for the appellant.

8. I have heard the arguments of learned counsel for the parties and have perused the material available on record with their able assistance.

9. The case of the appellant is that he is running his business of "Rent a Car" in the name and style of “Awan Tours” situated in Khayaban-e-Sirsayed, Rawalpindi. Both the accused namely Mohsin Khan and Ashfaq Hussain used to obtain vehicles on daily, monthly and on annual basis. They obtained five vehicles from the appellant, but did not pay the rent and when the accumulative rent of the vehicle exceeded to Rs.26,00,000/-, the complainant demanded rent of the vehicles as well as the vehicles but they lingered on the matter on one pretext or the other but thereafter Mohsin Khan issued a cheque bearing No.1530539073 of MCB Pirwadhai, Rawalpindi, for an amount of Rs.26,00,000/- in favour of the complainant and when the complainant deposited the said cheque online in Allied Bank, G-

11/2 Branch, Islamabad, on 23.12.2015, the same was dishonoured due to insufficient funds. The respondents have misappropriated and misused the vehicles of the appellant, which was taken by them on rent.

10. Anwaar-ul-Haq son of Malik Nazir Ahmed, while appearing as PW-.1 stated that he had cordial relations with the respondents/accused, who used to take vehicles on rent from him and on 13.04.2015, the respondent Mohsin Khan contacted with him and asked for a vehicle on rent, upon which he asked him to come to his sub-branch office at Sector G-10/4, Islamabad, where he handed over to him his vehicle No.ICT-YV-182 on rent and prepared a rental deed and also handed over a photocopy of the Registration Book of the said vehicle; he further deposed that on 06.11.2015, Ashfaq Hussain respondent/accused also called him and asked for a vehicle on rent, thereupon, he asked him to come at the same office and handed over to him the vehicle bearing registration No.ICT-EW-900 on a rent of Rs.4000/- per day for which a rental deed was also prepared, which is Ex.PB. The vehicle YV-182 was given on rent for Rs.3500/- per day to respondent Mohsin Khan but after sometime, he neither paid the rent nor returned his vehicles, therefore, he insisted for the payment of rent and return of the vehicles and when the respondent/accused returned his vehicle No.EQ-900, it was found on checking that some parts of the said vehicle i.e. A.C Condenser, Jack Rod, Stepney etc were missing, he became suspicious about the conduct of the respondents and he asked for the return of his other vehicle No.YV-182 and the arrears of rent, but they neither paid the amount nor returned the vehicles. He further deposed that on 01.12.2015, the respondent Mohsin Khan, upon his repeated calls came to his house at Sector G-10, Islamabad, and after calculation of remaining rent, the respondent Mohsin Khan issued him a cheque No.1530539073, dated 21.12.2015 of Rs.26,00,000/- to be drawn at MCB Pirwadhai Branch, Rawalpindi; that when on 21.12.2015, he deposited the said cheque online in Allied Bank, Sector G-11/2 Branch, Islamabad, but

the same was dishonoured on 23.12.2015 due to insufficient amount in the account of the accused; he asked the respondent for return of his remaining rent and vehicle No.YV-182, he not only refused to return his vehicle and remaining amount, but also threatened him for dire consequences. Hence, the above said case F.I.R was lodged against the accused persons and his vehicle No.YV-182 was recovered by the police; he took his vehicle on Superdari from the concerned Areas Magistrate on 07.12.2016.

11. Muhammad Saeed PW-2 deposed that he is employee of the appellant for the last five years; that on 13.04.2015 two rental vehicles bearing Registration No.YV-182 and EW-900 were handed over to the Investigating Officer in his presence. Ali Akbar Constable No.7302/C deposed that the accused Mohsin Khan, in his presence, during the physical remand made disclosure regarding the place where he had sold the vehicle No.YV-182.

12. Shahbaz Sub-Inspector while appearing as PW-4 deposed that on 07.11.2016 the accused Mohsin Khan disclosed that he has sold the vehicle No.YV-182 to one Ayyaz for Rs.12,00,000/- at Iqra Motors, Mansehra Road, Abbottabad. He further deposed that on 06.11.2016, the complainant produced the original cheque Ex.PC alongwith dishonoured slip and Registration Book of the vehicle.

13. Muhammad Waseem Abrro, Business Development Officer, ABL while appearing as PW-5 deposed that on 22.12.2015 a cheque of Rs.26,00,000/- was submitted by the complainant through online, which was sent through NIFT for clearance but the same was dishonoured due to insufficient funds.

14. Muhammad Yousaf Sub-Inspector while appearing as PW-6 deposed that upon the orders of the learned Justice of Peace, Islamabad-West, he chalked out F.I.R No.09/2016 on 08.01.2016 under Section 489-F, P.P.C; that the complainant also produced original cheque along with a copy of dishonour slip; that he arrested the accused Ashfaq on 05.02.2016 whereas the complainant

produced vehicle No.EW-900 and rental of the vehicle No.YV-182; he further deposed that the accused during his physical remand disclosed that he took the said vehicle to his native village and sold some of its parts; that he prepared the report under Section 173 Cr.P.C. and submitted to the S.H.O.

15. The accused in their statements under Section 342 Cr.P.C. denied the allegations leveled against them and claimed their innocence. In reply to the question “why the PWs have deposed against them”, they replied that the PWs have failed to produce any incriminating evidence against them. In reply to the question that *“they have misappropriated one vehicle No.YV-182 and some parts of the other vehicle No.EW-900 of the complainant, after renting the same and the accused Mohsin Khan issued a cheque of Rs.26,00,000/- for payment of the rent, which was dishonoured”* they replied that neither they have misappropriated the vehicle of the complainant nor any part of the other vehicle, the accused Mohsin Khan stated that he did not issue any cheque of Rs.26,00,000/- to the complainant but issued some blank cheques for payment of professional fee to the complainant, being his attorney in case F.I.R No.136/2015. In reply to question about the exhibited documents, they replied that they did not sign any rental Exh.PB and also objected the admissibility of other documents exhibited during prosecution evidence. They also produced two Vakalatnamas as Exh.DA and Exh.DB in their defence.

16. A minute perusal of the record reveals that the complainant in his statement as PW-1 deposed that the accused Mohsin Khan has misappropriated his vehicle No.YV-182 and attributed the allegation with regard to misappropriation of parts of vehicle No.EW-900 to the accused Ashfaq Hussain whereas, during the physical remand neither the vehicle No.YV-182 nor any parts of vehicle No.EW-900 were recovered from possession of the accused. Perusal of the record further reveals that the complainant deposed that after one year and eight months the police of Police Station Ramna informed

him that his vehicle No.YV-182 has been recovered and he has taken the same on Superdari from the concerned Area Magistrate on 07.12.2016 but there is nothing on record to show that from where the police of Police Station Ramna got recovered the said vehicle and no recover memo regarding recovery of the said vehicle is available on record, which makes the prosecution case highly doubtful.

17. With regard to issuance of cheque by Mohsin Khan/ accused, it is proved through oral as well as documentary evidence on record but the prosecution has failed to prove any obligation of the accused, Mohsin Khan as the rental of vehicle No.EW-900 Exh.PB shows that it was dated 06.11.2015, according to which the said vehicle was obtained by accused Ashfaq Hussain whereas, Mohsin Khan was only a guarantor, as such, the obligation for the payment of rent of the said vehicle was upon Ashfaq Hussain accused and not the accused Mohsin Khan.

18. To convict an accused under Section 489-F P.P.C all the ingredients of Section 489-F P.P.C mentioned above must be proved through cogent evidence and beyond any shadow of doubt. 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. Mere issuance of a cheque and its being dishonored by itself, is not an offence, unless and until dishonesty on the part of a payer is proved. Provisions of Section 489-F P.P.C will only be attracted if the following essential ingredients 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.

In the instant case, as per rental of vehicle No.EW-900, the said vehicle was obtained on rent by the accused Ashfaq Hussain whereas, the accused Mohsin Khan was only a guarantor, as such, the obligation for the payment of rent of the said vehicle was upon Ashfaq Hussain and not upon Mohsin Khan.

19. Perusal of the record reveals that Ashfaq Hussain was charged for offence under Section 406 P.P.C to the extent of misappropriation of some parts of vehicle No. EW-900 and its rent but nothing has been recovered from the possession of the said accused nor on his pointation. Further, the prosecution also failed to establish any specific amount of rent due towards the accused. Moreover, mere non-payment of rent of vehicle does not constitute the offence of criminal breach of trust. Two things are essential to constitute an offence under Section 406 P.P.C, in the first place there must be a trust of dominion with property or with dominion over it; that the accused misappropriated it or converted it to his own use or used it or disposed-of it; that he was in violation of any direction of law prescribing the mode in which such trust was to be discharged or any legal contract, expressed or implied, which he had made touching the discharge of such trust or he willfully suffered some other persons to do as above. The principal ingredient of the offence being dishonest misappropriation or conversion, which may not ordinarily be a matter of direct proof, entrustment of property and failure in the breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. In the case of "*Rafiq Haji Usman v. Chairman, NAB and another"* (**2015 SCMR 1575**) it was held as under:-

> *"an essential element for making out and establishing a case of criminal breach of trust is the entrustment of property or money or with any dominion over property, which is dishonestly misappropriated or dishonestly used or disposed in violation of any direction prescribed by law or the mode in which such trust was to be discharged or in the context any contract etc., however the promise to sell the property for which consideration/money is paid or an agreement to sell is*

> *entered upon and the money has been paid pursuant to such an agreement, it shall not the same as entrustment of property within the concept of noted provision. In case of entrustment, the money/property received is to be retained for return to the giver at a later time as opposed to a promise or contract where investment is made or money is paid for the purposes of fulfillment of a specific agreed upon purpose/contract. In such a case where money/property has been entrusted to a person, using such amount/property for any other purpose would not attract the penal consequences of section 405 ibid. For the purposes of above view, we draw support from the judgment of this Court reported as Shahid Imran v. The State and another (2011 SCMR 1614), wherein it has been held "The law clearly recognizes a distinction between payment/investment of money and entrustment of money or property as in the former case the amount of money paid or invested is to be utilized for some purpose whereas in the latter case that sum of money or property is to be retained and preserved for its return to the giver and the same is never meant to be utilized for any other purpose...a mere breach of a promise, agreement or contract does not ipso facto attract the definition of criminal breach of trust contained in section 405, P.P.C. and such a breach is nor synonymous with criminal breach of trust without there being a clear case of entrustment".*

Keeping in view all the facts and circumstances of the case, it is clear from the record that ingredients of the offence under Section 406 P.P.C. is not made out against the accused/ respondents.

20. For facilitation, Section 406 is reproduced below for ready reference and assistance:-

> *"**Section.406**. Punishment for criminal breach of trust. Whosoever commits criminal breach of trust shall be punished with imprisonment of either description of a term which may extend to (seven) years, or with fine, or with both.*
>
> *The essential ingredients of the offence of criminal breach of trust are as follows:-*
>
> a) *Entrustment.*
> b) *Dishonest misappropriation or conversion to his own use by the person in whom the confidence reposed.*
> c) *Dishonest use or disposal of property in violation of any direction of law.*

> *d) Dishonest use or disposal of property in violation of any legal contract.*
> *(e) Offence of dishonest misappropriation of conversion to one's own use is not contingent upon time spent rather it is the co-incidence of actus rea and mens rea.*

Keeping in view the above ingredients of criminal breach of trust, the breach of any condition of rental do not fall within the above-mentioned criteria. With regard to Iqrarnama dated 01.12.2015,executed in between the complainant and the accused Mohsin Khan, the record shows that the complainant neither mentioned the said document in his application for registration of the F.I.R nor produced before the Investigation Officer. Further no marginal witnesses of the said Iqrarnama was produced by the prosecution to prove its contents, hence, the prosecution miserably failed to prove the liability of Mohsin Khan accused with regard to payment of Rs.26,00,000/- to the complainant mentioned in the cheque. Reliance in this regard is placed upon the case reported as *Mst.Maryam Bibi and others versus Muhammad Rafique Anwar and others* (**2012 SCMR 1384**) wherein it has been held as under:-

> *"In our opinion, the said sale in favour of Boray Wala Bus Service has not been proved since it was not done in accordance with law i.e. The marginal witnesses were not examined etc. it is not sufficient for a party to a case just to place certified copies on the record and then claim that they have been proved without following the procedure prescribed by the law."*

In the case reported as "*Hafiz Tassaduq Hussain Versus Muhammad Din through Legal Heirs and others*" (**PLD 2011 SC 241**), it has been held as under:-

> *"The resume of the above discussion leads us to an irresistible conclusion that for the validity of the instruments falling within Article 17 the attestation as required therein is absolute and imperative. And for the purpose of proof of such a document, the attesting witnesses have to be compulsorily examined as per the requirement of Article 79, otherwise, it shall not be considered and taken as proved and used in evidence. This is in line with the principle that where*

> *the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise."*

21. Keeping in view the above facts and circumstances, it transpires from the record that no material was available on record against the accused/ respondents. The learned trial Court, after proper appraisal of evidence available on record, has rightly concluded that the prosecution has miserably failed to prove its case against all the accused/ respondents, as such, acquitted them.

22. The interference of this Court would be warranted, if the reasoning of the trial Court in acquitting an accused is perverse, artificial or ridiculous. It is only in an exceptional case that this Court will interfere by setting aside the acquittal of an accused. In the instant case, the learned trial Court has properly appreciated the evidence available on record and acquitted the accused/ respondents through a well-reasoned judgment, by giving them benefit of doubt. The learned counsel for the appellant has also not been able to show that there has been any misreading or non-reading of evidence. Reliance is placed on the cases titled as *"Muhammad Zaman versus The State and others"* [**2014 SCMR 749**], *"Muhammad Rafique versus Muhabbat Khan and others"* [**2008 SCMR 715**], *"Jehangir versus Amin Ullah and others"* [**2010 SCMR 491**], *"Mst. Askar Jan and others versus Muhammad Daud and others"* **[2010 SCMR 1604]** and *"Mst. Sughra Begum and another versus Qaiser Pervez and others"* **[2015 SCMR 1142].**

23. 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."*

24. It is important to note that an appeal against acquittal has distinctive features and the approach to deal with the appeal against conviction is distinguishable from appeal against acquittal, as presumption of double innocence is attached, in the latter case. Reliance in this regard is placed upon the case of "*Inayatullah Butt v. Muhammad Javed and 2 others"* [**PLD 2003 SC 562**]. Until and unless the judgment of the trial Court is perverse, completely illegal and on perusal of evidence, no other decision can be given except that the accused is guilty or there has been complete misreading of evidence leading to miscarriage of justice, the Court will not exercise jurisdiction under section 417, Cr.P.C.

25. The learned counsel for the appellant has failed to advance any ground to justify the setting aside of the acquittal judgment. There is no misreading or non-reading of evidence nor the findings of the learned trial Court are patently illegal. The findings of acquittal, by no stretch of the imagination, can be declared as perverse, shocking, alarming or suffering from errors of jurisdiction and misreading or non-reading of evidence.

26. For what has been discussed above, there is no merit in the instant appeal; therefore, the same is hereby **dismissed**.

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court on this 8th day of September, 2020.

JUDGE

"Approved for reporting."

S.Akhtar