

Form No: HCJD/C

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Criminal Appeal No.77 of 2012

Muhammad Anwar
Versus
The State and 2 others

Criminal Revision No. 60 of 2012

Zafar Iqbal
Versus
The State and 2 others

Criminal Revision No. 49-M of 2012

Aamer Iqbal and 2 others
Versus
The State and 2 others

Appellants by : **Ms. Zareen Kanwal, Advocate for
petitioner in Criminal Revision
No.60 of 2012.
Mr. Saad Hassan Advocate for
petitioner No.2 in Criminal Revision
No.49 of 2012.**

Respondents by : **Mr. Kamran Amjad Kayani,
Advocate for respondent No.2 in
Criminal Revision No.60 of
2012/appellant in criminal Appeal
No.77 of 2012 and Criminal
Revision No.49 of 2012.
Ch. Zaheer Farooq, State Counsel.**

Date of hearing: **03.12.2018**

AAMER FAROOQ, J. - This judgment shall decide the instant appeal as well Criminal Revision No.60 of 2012 and Criminal Revision No.49 of 2012 as common questions of law and facts are involved.

2. The brief facts leading to filing of the instant appeal and the petitions are that an FIR was lodged bearing No.243 under Section 489-F PPC P.S. Kohsar, Islamabad on 08.08.2005 on the complaint of the appellant against respondent No.3 namely Zafar Iqbal. During the course of the investigation of the instant FIR there was a settlement between the parties in terms thereof various cheques amounting to Rs.22,000,00/- (approximately) were tendered to the complainant. The referred cheques were tendered by the petitioner in Criminal Revision No.60 of 2012 as well as the petitioners in Criminal Revision No.49 of 2012 namely Aamir Iqbal, Muhammad Islam and Najam-ul-Islam. Another FIR was lodged by Muhammad Anwar against the petitioners in Criminal Revision No.49 of 2012 and Criminal Revision No.60 of 2012 bearing No.124 dated 14.4.2006 under Section 489-F PPC P.S Margalla, Islamabad. The said petitioners were tried under the same FIR and were convicted and sentenced. They filed appeals which were dismissed vide judgment dated 29.9.2012. Meanwhile Zafar Iqbal was acquitted by the learned Trial Court on an application under Section 249-A Cr.P.C in F.I.R. No.243 of 2005, which order has been challenged in the instant appeal.

3. Learned counsel for the petitioners in Criminal Revision No.49 of 2012, *inter-alia*, contended that no criminal liability were imposed upon the petitioners inasmuch as the cheques were tendered as security. It was also contended that even otherwise, no *Mens rea* was proved against the petitioners. Reliance was placed on case reported as "Malik Safdar Ali Vs. Syed Khalid Ali and 2 others (PLD 2012 Sindh 464) and "*Mian Allah Ditta Vs. The State and others*" (2013 SCMR 51). It was also contended that the original agreement stood novated and the rights & obligation under the original agreement stood extinguished. Reliance was placed on case reported as "Muhammad Afaq Shamsi and 8 others Vs. National Accountability Court through Chairman National Accountability Bureau and 4 others" (PLD 2011 Karachi 24), *Messrs Ittefaq Foundries (Pvt.) Limited and 4 others Vs. Federation of Pakistan through Secretary, Ministry of Law, Islamabad and 2 others* (2015 CLD 1274).

4. Learned counsel for the appellant in the appeal contended that the respondent could not have been acquitted under Section 249-A Cr.P.C inasmuch as the liability still remains. It was further submitted that the cheques were issued dishonestly hence the accused were rightly convicted and punished.

5. Arguments advanced by the learned counsels for the parties have been heard and documents placed on record examined with their able assistance.

6. Criminal Appeal No.77 of 2012 has been filed against order dated 15.10.2012, whereby the learned Trial Court allowed application under Section 249-A Cr.P.C and acquitted the accused Zafar Iqbal in FIR No.243/2005. The said appeal has been filed under Section 417 (2-A) of Criminal Procedure Code (Cr.P.C). The limitation provided for filing such appeal is thirty (30) days from the date of the order. The impugned order was passed on 15.10.2012, whereas, the appeal was filed first before the Court of Sessions on 08.11.2012 which was dismissed on 20.11.2012 and was filed in this Court on 01.12.2012. The certified copy of the impugned order was applied on 05.11.2012 and was prepared and delivered on the same date i.e. 05.11.2012. The referred position makes the appeal barred by limitation; there is an application for condition of delay. However, it is trite law that where a particular statute provides period of limitation application under Section 5 of Limitation Act for condonation of delay is not be maintainable in light of Section 29 of the Limitation Act, 1908. Even otherwise, institution of the appeal in the wrong forum i.e. before Sessions Court Islamabad is no justification for condition of delay.

7. In so far as Criminal Revision No.49 of 2012 and Criminal Revision No.60 of 2012 are concerned they are against the conviction. The petitioners in Criminal Revision No.49 of 2012 tendered post dated cheques as guarantors and the petitioner in Criminal Revision No.60 of 2012 also tendered a post dated cheque.

In this behalf, even an affidavit was sworn by Zafar Iqbal. The bare reading of the affidavit shows that the arrangement between the parties was one of business. The complainant Muhammad Anwar invested sum of Rs.10,000,000/- and the petitioner undertook to pay profit of Rs.26,0000/- per month. After the settlement the original agreement was novated between the parties. As mentioned above the petitioners were charged and tried for offence under Section 489-F PPC. The referred Section reads as follows:

(Section 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 punishable 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.

The bare reading of Section shows that the salient features / ingredients of offence are dishonesty and issuance of cheques towards repayment of loan or fulfillment of an obligation which is dishonoured on presentation. Dishonesty being the *mens rea* of the offence and issuance of cheques towards repayment of a loan or fulfillment of an obligation being the *actus reus*. The prosecution had to prove both the elements beyond reasonable doubt in order to procure the conviction of the petitioners. Dishonesty is defined in Pakistan Penal Code (PPC) as an act done to cause wrongful loss to other or himself. The bare presence of

one element is not sufficient for the conviction of the accused. In case reported as "Malik Safdar Ali Vs. Syed Khalid Ali and 2 others" **(PLD 2012 Sindh 464)** the Hon'ble Sindh High Court observed that the word dishonesty used under Section 489-F PPC required existence of *mens rea* to commit fraud by issuance of a cheque. Mere issuance of cheque and its becoming the dishonored later, being *actus reus*, would not be able to attract the provisions of Section 489-F PPC. Moreover, it was observed that a cheque being mode of payment must appear to have been issued against consideration of business transaction or any instant dealing of the date and time thereof, for which, he had issued such cheque, in order to discern whether there was *mens rea*. The Court should take into account all the relevant facts. Similar views were expressed in cases reported as "Basar Khan Vs. The State and another" **(2009 P CR. LJ 964)**, Shah Fahad and another Vs. The State **(2014 YLR 2241)** and Maj. (Retd.) Javed Inayat Khan Kiyani Vs. The State **(PLD 2006 Lahore 752)**.

8. In view of the above legal position during the course of trial the settlement/compromise was tendered in evidence as Exhibit-PL. The prosecution did not allege or prove dishonesty on part of the petitioners. In this behalf even the complainant appearing as PW-06 reiterated the nature of transaction between himself and Zafar Iqbal. The tendering of cheques and dishonouring have been categorically stated, but from the entire reading of his

examination-in-chief dishonesty is not borne out. The learned Trial Court as well as Appellate Court has also not given any due finding on the referred aspect of the matter that the prosecution has not proved the *mens rea*. In this behalf the concept of dishonesty was elaborated in case reported as "Maj. (Retd.) Javed Inayat Khan Kiyani Vs. The State" (**PLD 2006 Lahore 752**) by the Hon'ble Lahore High Court in the following terms:

...."8. In The Law Laxicon edited by Justice Y.B. Chandrachud, at page 567 "dishonesty" defined as "giving the ordinary meaning the word "dishonestly" means "dishonesty". It further elaborates dishonesty as disposition to lie, cheat, deceive, or defraud; untrustworthiness, lack of integrity. Lack of honesty, probity or integrity in principle; lack of fairness and straightforwardness, disposition, to defraud, deceive or astray. Like Pakistan Penal Code, in section 24 of Indian Penal Code "dishonestly" is defined in the similar words:--

"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly."

Section 24 is further elaborated on the same page as below:--

"The word dishonestly in section 24 India Penal Code has a technical meaning which is at variance with its popular sense as employing deviation from probity. It is used in connection with property and has nothing to do with probity. If a person causes wrongful gain or wrongful loss by unlawful means in respect of property to which he is not legally entitled, "he acts dishonestly within the meaning of section 24, though he may act from laudable motives. The word dishonestly does not necessarily imply wrongful gain to accused himself."

9. The prosecution has hence failed to prove the *mens rea* which was one of the essential elements hence failed to prove the offence. The conviction recorded against the petitioners are not tenable hence merits setting-aside. For the above reasons Criminal Appeal No.77 of 2012 is dismissed as being barred by limitation and

Criminal Revision No.49 and Criminal Revision 60 of 2012 are allowed and the convictions recorded against the petitioners are set-aside and they are acquitted of charges in the aforementioned FIR.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 28 /02/2019.

JUDGE

APPROVED FOR REPORTING

Niqab M