

Judgment SheetIN THE PESHAWAR HIGH COURT,
PESHAWAR**JUDICIAL DEPARTMENT****Cr.R No. 14-P of 2018.****JUDGMENT**

Date of hearing.....10.09.2018.....

Appellant: (Hasnain Obaid): By Mr. Muhammad Alamzeb
Khan, Advocate.Respondents/State: By Malik Akhtar Hussain, AAG assisted by
Mr. Muhammad Zarshad Khan, Advocate.

QALANDAR ALI KHAN, J:- Hasnain Obaid,
petitioner, assailed order of learned Additional
Sessions Judge-III, Nowshera, dated
10.01.2018, through the instant criminal
revision under Section 439 Cr.PC, whereby

his application under Section 428 Cr.PC for **further evidence** was dismissed.

2. The facts leading to filing of the instant criminal revision, as narrated in the revision petition, briefly stated, are that the petitioner was charged for dishonestly issuing cheque for payment of Rs.6800000/- to the complainant/respondent No.1, Asif Shakoor, vide FIR No.237 dated 06.08.2014 under Section 489-F P.S Nowshera Cantt, Nowshera; and on conclusion of trial in the trial Court, he was awarded punishment of imprisonment for three years and fine of Rs.30,000/-, with benefit of Section 382-B Cr.PC; by the learned Judicial Magistrate-III, Nowshera. According to the petitioner, he had already completed his two years term, approximately, and is on bail from the Court of Learned ASJ-III, Nowshera, in appeal pending before the said Court. The petitioner claimed that he was psychological patient and that the cheque in question for Rs.6800000/- had fraudulently been obtained from him, and

further that he had already paid Rs.2700000/- to the complainant as against Rs.2400000/- due against him. The petitioner further claimed that the said record could not be placed on the file as he was in jail and was having no access to the same, so was handicapped. In order to place the said record on appeal file, an application under Section 428 Cr.PC was submitted to the appellate Court, but his request was not acceded to by the appellate Court; hence the instant revision petition.

3. The impugned order dated 10.01.2018 of the learned appellate Court/ASJ-III, Nowshera, would show that the Court observed that the alleged cheque was for Rs.6800000/- and that even if the appellant/petitioner proved payment of Rs.2700000/-, even then a huge amount of Rs.4100000/- would remain unpaid, and that the proceedings before the Court were not civil proceedings to prove as to how much amount was unpaid and how much paid, but

in criminal proceedings it was to be seen that whether the offence had been committed or not, “though the amount may be a small amount”. The learned Additional Sessions Judge further observed that under the provision of Section 428 Cr.PC, the appellate Court could take further evidence, however, there was no justifiable reason to allow the appellant to produce evidence. The learned appellate Court concluded that at the stage of statement of the accused, during trial, the appellant was provided opportunity to produce defence evidence but he “denied”.

4. Arguments of learned counsel for the petitioner, learned counsel for respondent No.1 and learned Assistant Advocate General for the State heard; and record perused.

5. Although, the petitioner had neither placed on file copy of judgment of the learned trial Court/Judicial Magistrate-III, Nowshera, nor copy of the appeal preferred by him against the judgment of the learned trial Court, for proper assistance of the Court in order to

arrive at a just and fair conclusion; and even during the course of arguments the main stress of the learned counsel for the petitioner was on the mental ill health of the petitioner; which, indeed, had never been pleaded as a defence either in the criminal case under discussion or in the civil suit by respondent No.1 against the petitioner for recovery of Rs.6800000/-, as is evident from written statement in the civil suit by the petitioner/defendant and also his statement under Section 342 Cr.PC in the criminal proceedings against him, subsequently brought on record by respondent No.1 besides affidavit of the petitioner and another FIR under the same Section i.e.489-F PPC registered in P.S Gulgasht Multan vide FIR No.456 of 2015; yet during his statement under Section 342 Cr.PC recorded on 11.04.2017, the petitioner was specifically asked whether he wanted to produce any defence evidence, and his answer to the question was “**No**”. It was only after his

conviction in the case and during pendency of his appeal against the conviction and sentences awarded to him that, apparently as an after-thought, he moved application for recording **“further evidence”** while raising the plea of his being a psychological patient.

6. No doubt, Section 428 Cr.PC, whereunder application has been moved by the petitioner for “recording further evidence or direct to be taken”, empowers an appellate Court to take further evidence or direct to be taken, in its discretion; but the question here is that whether the appellate Court could, nevertheless, take further evidence or direct to be taken on application of an appellant/accused who was provided an opportunity to produce his defence evidence, but refused to do so; and later on, as an after-thought after his conviction in the case, moved application for recording further evidence; which was, obviously, out of question, when the appellant/accused had refused to **‘avail the opportunity’ of recording ‘defence**

evidence' so as to invoke the jurisdiction of the appellate Court for taking '**further evidence'**. Needless to say that for recording "**further evidence**", as the word **further** would suggest, earlier recording of evidence by a party would be an essential pre-requisite, which is non-existent in the instant case, as the petitioner did not avail the opportunity of recording his defence evidence during trial proceedings.

7. As such, there is no substance in the criminal revision petition under Section 439 Cr.PC, which is dismissed, accordingly.

Announced.
10.09.2018.

J U D G E

Ayub

(S.B) Hon'ble Mr. Justice Qalandar Ali Khan.