ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Acquittal Appeal No.73 of 2021

Date	Order with signature of Judge

For hearing of main case

30.11.2023

Mr. Ali Nasir Baloch advocate for the appellant
Respondents Nos. 2 to 4 are present in person.
Mr. Abrar Ali Kitchi Addl. PG.

O R D E R

Through instant Criminal Acquittal Appeal filed by the appellant Muhammad Sarfraz, under Section 417, Cr.P.C. against the acquittal of respondent No.2 to 4 vide Judgment dated 09.01.2021 passed by learned XXII Judicial Magistrate /Model Trial Magistrate II, Karachi East, in Criminal Case No.1171 of 2019, arising out of FIR No.304/2019 dated 01.06.2019, punishable for the offenses under Section 489-F, 420 and 34 PPC, registered at Ferozabad Police Station Karachi.

2. The case of the appellants is that on 01.06 2019, he lodged FIR No 304 of 2019, under section 489-F. 420, 34 PPC, at PS Ferozeabad against respondents No. 2, 3 and 4 on the premise that respondent No.2 issued a ***Cheque No. 738945374*** ***dated 29.01.2019 of Rs. 30,00,000/- of Meezan Bank Ltd, Gole Market Branch Nazimabad Karachi,*** which was deposited for clearance in Faysal Bank Shaheed-e-Millat Road Branch by the appellant and same was dishonored by the bank due to insufficient funds. It is further claimed that the subject cheque was issued to the appellant/ complainant for the fulfillment of an obligation arising out of a written ***agreement dated 29th January 2018*** executed between the appellant and Ms/ SHS. Textiles. After the investigation, the Investigating Officer submitted the Final Report under Section 170 Cr. P.C, before the trial Court. The learned Judicial Magistrate after taking cognizance of the offenses, framed charge against the respondents/accused persons and initiated trial. During the trial the prosecution examined four witnesses and the statements of the respondents/accused persons were recorded after hearing the arguments of the parties, the learned Judicial Magistrate acquitted the respondents from the aforesaid charge vide impugned Judgment dated 09.01.2021 and the legality of the same is under challenge.

3. The accusation against the respondents is that they cheated the appellant, by inducing him to invest the amount in Ms/ SHS. Textiles, who maintains his bank account in Meezan Bank Ltd Branch Nazimabad Karachi, and respondent Syed Muhammad Shahid Shams was the Branch

Manager of said bank and he introduced the appellant to Respondent No.2, who was/is running his company under the name and style of (SHS Textiles) and asked the appellant to invest money with the company and the appellant was induced to pay and invest Rs. 30,00,000/- with the company and such agreement was reduced into writing. As per the appellant, he demanded his amount back, upon that request, respondent No.2 issued Cheque No. 738945374 dated 29.01.2019 of Rs. 30,00,000/- of Meezan Bank Ltd, Gole Market Branch Nazimabad Karachi, and the same was presented for clearance in Faysal Bank Shaheed-e-Millat Road Branch but the said cheque was dishonored due to insuffiucent funds consequently such F.I.R was registered against the respondents for cheating and fraud.

4. It is inter alia contended by the learned counsel for the appellant that the dishonored cheque was issued from the account of a partnership firm namely (SHS Textile) which is jointly owned by the accused “Sultan Ahmed and respondent No.3. The learned counsel emphasized that the issuance of cheque and the failure in negotiation with a banker is not denied. It is also admitted by the respondents the cheque was issued in respect of certain obligation as such the respondents cannot be acquitted from the charge under section 420,and 489-F PPC as such the impugned judgment is illegal, unlawful, without merits and is passed without taking into consideration the evidence and record of the case presented by the prosecution; that while passing the impugned judgment, the learned trial court has not considered the essential facts of the case which involve the private respondents in the commission of the offences under charge; that the prosecution presented sufficient evidence against the private respondents and proved its case against them beyond the shadow of reasonable doubt but the learned trial court failed to appreciate the evidence against the accused persons; that the learned trial court has wrongly based the acquittal of the accused/ private respondents on the legal principles of "double jeopardy" and the principle laid down by this Court in the case of *Sheikh Rehan Ahmed v. Judicial Magistrate Karachi South and two others* (**2019 MLD 636**).; that by no stretch of imagination the principle of 'double jeopardy' is attracted to the present case and relying on the said principle the learned trial court has not properly appreciated the very facts of this case and has passed the judgment in a slipshod manner; that the conclusions of learned trial court that the previous ***FIR No 133 of 2019*** between the same parties was part of the same transactions is totally erroneous, baseless and devoid of the evidence produced by the prosecution.; that it is strange that the trial court held in the impugned judgment that the respondent No. 2 had already been convicted in the same transaction despite appreciating the facts that the

previous FIR No. 133/2019 arose out of different agreements and different transaction; that the trial court has failed to appreciate the essence of the principle laid down in the case of *Sheikh Rehan Ahmed* supra as the same is not applicable on two separate transactions/ businesses between the same parties; that the trial court has also failed to appreciate that the principle laid down in the *Sheikh Rehan Ahmed* case is based on a condition that the complainant did not lodge FIR on an already bounced cheque 'with intention to use it at some future stage as a tool of recovery, then subsequent FIR should not be allowed', whereas the complainant/ appellant has not lodged the subject FIR with intention to use it as a tool of recovery; that the learned trial court has not given any reasons for not attraction of section 420, PPC in the case, which shows that the judgment is not speaking to that extent.; that the learned trial court has failed to appreciate the evidence produced by the prosecution in connection with the section 420, PPC; that the learned trial court has discussed the admissions made by complainant during his testimony but has failed to appreciate and even discuss the explanations given by the complainant in that regard; that the learned trial court has failed to consider, discuss and appreciate the arguments and the case-law referred by the counsel for the complainant. He lastly prayed for allowing the Criminal Acquittal appeal and prayed for setting aside the order of the learned Judicial Magistrate and awarding conviction to the respondents.

5. Respondents Nos. 2 to 4 are present in person have refuted the allegations leveled by the appellant and supported the impugned judgment and prayed for dismissal of the instant acquittal Appeal.

6. learned Additional PG has supported the impugned judgment and prayed for dismissal of the instant acquittal Appeal.

7. I have heard the learned counsel for the parties and perused the record with their assistance.

8. The questions involved in the present proceedings are whether there was /is sufficient evidence against the private respondents to convict them by the trial Court and whether the prosecution failed to prove its case against the respondents beyond the shadow of a doubt and whether the respondents could be vexed twice for the same offense as earlier F.I.R No. 133/2019, under section 489 F PPC lodged by the appellant ended in the acquittal of two respondents and conviction of the respondent-Sulatn, thus they cannot be saddled with the same set of allegations, if allowed which amounts double jeopardy and against the basic sprit of Article 13 of the Constitution and Section 403(1), Cr.P.C. I have attended to each of such aspects in some detail with reference to the relevant provisions and the precedent cases. Primarily, Section 403(1), Cr.P.C. provides as follows:

> ***"403. Persons once convicted or acquitted not to be tried for the same offence. (1) A person who has once been tried by a Court of competent jurisdiction for an offense and convicted or acquitted of such offense shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offense, nor on the same facts for any other offense for which a different charge from the one made against him might have been made under section 236 Cr.P.C. or for which he might have been convicted under section 237 Cr.P.C."***

9. In the present case, the respondents were tried and the trial ended in the acquittal of two respondents, and conviction was awarded to one respondent in F.I.R No. 133/2019, registered for offenses under section 420,489-F 406, and 34 PPC on the same business transaction arising out of agreements and subsequently issuance of different cheques of same transactions, therefore Section 403(1), Cr.P.C. is fully attracted in the present case as opined by the trial court. The Supreme Court in the case of *Abdul Malik and others v. The State and others* (**PLD 2006 SC 365**) has held that when the conviction or acquittal of a person is under challenge in appeal or revision the proceedings are neither fresh prosecution nor there is any question of second conviction or double jeopardy. It is by now a well-settled principle of law that an appeal or revision is a continuation of trial and any alteration of sentence would not amount to double jeopardy.

10. From the above it is quite obvious from a plain reading of the aforesaid section that the principles of autrefois acquit and autrefois convict contained in section 403(1), Cr.P.C. forbid a new trial after a conviction or acquittal on the basis of the same facts has attained finality. However, the aforesaid principles of autrefois acquit and autrefois convict contained in section 403(1), Cr.P.C. has no relevance to a case wherein the question under consideration in an Appeal is not as to whether a new trial of the convict should be held or not, but the issue is as to which sentence would be the appropriate sentence for a convict. In the case of *Iftikhar Ahmed Khan v. Asghar Khan and another* (**2009 SCMR 502**), the Supreme Court has reiterated the same view.

11. Having said so on the aforesaid proposition the second question needs to be appreciated this it is expedient to have a look at the factual and legal aspects of the case as the entire edifice of the prosecution rests on the cheque in question. The pre-conditions to make out an offense under section 489- F, P.P.C. was also determined by the Supreme Court in the case of *"Muhammad Sultan v. The State*", **2010 SCMR 806**, wherein it was held as under:-

> **"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 a person to some performance).

(iv)on presentation, the cheque is dishonored". However, a valid defence can be taken by the accused, if he proves that:

(i) he had made arrangements with his bank to ensure that the cheques would be honored; 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 offense then he would be absolved from the punishment."

12. The absence of even one of these elements would take the case out of the ambit of Section 489-F, P.P.C. Section 489-F, P.P.C. does not stipulate any period within which the holder must present the cheque to the bank for encashment. From the perusal of the record it evinces that the petitioner had in fact issued the cheque in question with mala-fide intention and to deprive the complainant of a huge amount.

13. Furthermore it is evident from the record that the appellant/complainant lent an amount of Rs. 50,00,000/- to the accused/Respondent No.2 Sultan Ahmed for his business investment and the rest of the respondents/accused had no role to play, and he promised to pay profit to the appellant as well as principal amount after three years. On-demand, the accused Ali Sulemen delivered cheque No. 0753649 of Rs.15 Lac only and another cheque No.0753648 of Rs.10 Lac, issued from the bank account of accused/Respondent No.3 Ali Suleman. It is claimed by the appellant that on presentation, both the cheques were dishonored by the concerned bank due to a dormant account. Such a report of the incident was given to Police Station City Court, Karachi, who registered the F.I.R., under 420,489-F and 34 PPC. After the usual investigation, the challan was submitted before the learned trial Court in the aforesaid case. It is alleged that the appellant/complainant was already in possession of the cheque involved in the present proceedings, when he lodged FIR No.133/2019, under Section 489-F/420/406/34 PPC at Police Station Nazimabad. However, after the conclusion of the aforesaid case, the learned trial Court vide judgment dated 20.02.2020, acquitted the respondents Saleem Ahmed and Syed M. Shahid from the aforesaid case, while the accused Sultan Ahmed was awarded a conviction. The record further reveals that cheque No.D-73895374 for an amount of Rs.30,00,000/- dated 29.01.2019 was presented in Meezan Bank, Goal Market, Nazimabad Karachi for payment, however, before payment could have been made, the drawer stopped the payment and the concerned Bank returned the cheque with the reason that the subject cheque having no rubber stamp of the company besides drawer stopped the payment.

14. The Bank Manager deposed that the subject cheque was returned for the reason that the drawer stopped the payment; however, funds were insufficient in the account of the drawer, with further remarks for want of rubber stamp of the company. It has also come on record that the subject cheque was issued from the account of SHS Textile Mills in favor of the appellant. It is also important to note that the Bank Manager admitted in his evidence that the subject cheque was presented twice i.e. 30.05.2019 and 21.05.2019, prior to the presentation in the branch, and the same was returned on the aforesaid analogy; and, he also admitted that the subject cheque bears the signature of one signatory only i.e. account holder. The appellant/complainant admitted that the disputed cheque was presented on 19.02.2019 in the territorial jurisdiction of District Central Karachi. He also admitted that there were other 13 cheques, which were in his possession; and, he also admitted that the cheque was returned on account of the requirement of stamp of the company. He also admitted that the subject cheque bears the writing of different pens; and, he also admitted that the subject cheque was dishonored from Nazimabad first and such FIR No.139/2019 was lodged by him for the subject cheque. He admitted that he paid an amount of Rs.30,00,000/- in cash. He admitted that he received a profit of approximately Rs.10,00,000/- to 15,00,000/- in all transactions and admitted that there is overwriting in the agreement.

15. Section 489-F in its present form was inserted in the Pakistan Penal Code, 1860, by the Criminal Law Amendment Ordinance, 2002. It reads as follows:

> **"489-F. Dishonestly issuing a cheque.– Whoever dishonestly issues a cheque towards repayment of a loan or fulfillment of an obligation which is dishonored 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 honored and that the bank was at fault in not honoring the cheque."**

16. A bare perusal of section 489-F PPC shows that every dishonor of a cheque may not constitute an offense. This provision is attracted when the following conditions are fulfilled:

> **(i) the cheque was issued with a dishonest intention;**
> **(ii) the cheque was for the repayment of a loan or fulfilment of a financial obligation; and**
> **(iii) the cheque was dishonoured on presentation.**

17. Section 489-F PPC seeks to protect the public from financial fraud committed through dishonest cheques. According to it, section 420 PPC applies to all types of fraud, deceit, and deception that cause loss to a

person, but section 489-F PPC defines a separate offense when fraud or cheating is perpetrated using a cheque.

18. The first question that requires determination is whether cheques given as security (or as "guarantee", as sometimes described would attract section 489-F PPC if they are returned unpaid. These cheques may bear the same date as the execution date or be post-dated or inchoate instruments. The general rule is that the cheques, which are not intended to settle any specific transaction but to foster trust between the parties in their usual business operations, are not susceptible to criminal prosecution under section 489-F PPC. This issue was raised before the Supreme Court of Pakistan in the case of *Mian Allah Ditta v. The State* (**2013 SCMR 51**). In that case, the Investigating Officer informed the Court that during the investigation, he found that the parties had a dispute, which they agreed to resolve through arbitration. The arbitrator took the cheque from the accused as security before initiating the proceedings, and the sum written on it was never adjudicated against him. The Supreme Court observed that if the cheque was not issued to repay an outstanding loan or fulfillment of an existing obligation but to meet a prospective future liability that may be determined as a result of another exercise, then one of the key elements of section 489-F PPC is lacking. Given the facts of the case, the Supreme Court held that the cheque in question was furnished as security and admitted the accused to pre-arrest bail. However, it avoided detailed deliberation on the issue "lest it may prejudice anyone during investigation or trial."

19. Dishonesty is "to act without honesty". It is used to describe a lack of integrity, cheating, lying, deliberately withholding information, or being intentionally deceptive, knave, perfidious, corrupt, or treacherous. "Dishonesty" is something that laymen can easily see. In this sense, it is distinguishable from "fraud" which seems to involve technicalities that a lawyer must explain. Dishonesty provides the men's rea for a range of offenses under statute and the common law. Thus, issuing a cheque and its subsequent dishonor does not ipso facto attract section 489-F PPC. The drawer's dishonesty must also be established, and for that purpose, every transaction must be carefully scrutinized. The Supreme Court in the case of *Ahmed Shakeel Bhatti and others v. The State and others* (**2023 SCMR 1**), where the complainant sought cancellation of the pre-arrest bail of the accused, alleging a lack of commercial integrity. The Supreme Court dismissed his application.

20. The general concept of criminal law is that actus reus and men's rea, as necessary elements of an offense, must coincide in time. This is known as the contemporaneity rule or the coincidence principle. However,

courts frequently take a flexible approach while interpreting this synchronicity requirement, or as some would say, make exceptions to it. As a result, “one-transaction theory” and “the continuing act theory" have emerged. The former postulates that having the mens rea for the crime at some point during a series of acts is sufficient. On the other hand, the continuing act theory holds that a person can be guilty of an offense if he forms the mens rea at some point while the actus reus is still taking place. If the threshold requirement that the cheque was issued towards repayment of a loan or fulfillment of an obligation is met, the “one-transaction theory” or the “continuing act theory” may be used to superimpose the mens rea element of dishonesty in determining whether criminal liability is attracted under section 489-F PPC.

20. Post-dated cheques may be classified into three broad categories:

> ***(a) cheques issued to discharge a liability that has already accrued or that is determined and would accrue on a specific date;***
>
> ***(b) cheques issued to satisfy a future liability which may or may not occur; and***
>
> ***(c) cheques provided for the payee’s comfort under an express agreement and are not the product of any specific transaction.***
> ***Criminal liability under section 489-F PPC generally arises only in respect of the cheques falling in category***
> ***(a) unless the one-transaction or the continuing act theory can be applied.”***

21. From the above, the foundational elements to constitute an offense under section 489-F PPC are: (a) the cheque should be valid; (b) it should be issued with a dishonest intent; (c) it should be for repayment of a loan or fulfillment of an obligation; and (d) it should have been dishonored.

22. It is well settled that once a charge for an offense, duly tried, results in acquittal, the accused person acquires a very right and he should not therefore be put in jeopardy of his life again. It would be advantageous to summarize the principles governing the appeal against acquittal under section 417 Cr.P.C.

> ***i)*** ***Parameters to deal with the appeal against conviction and appeal against acquittal are different because the acquittal carries a double presumption of innocence and the same can be reversed only when found blatantly perverse, illegal, arbitrary, capricious, speculative, shocking, or rests upon impossibility.***
>
> ***ii)*** ***It is well settled law by now that in criminal cases every accused is innocent unless proven guilty and upon acquittal by a court of competent jurisdiction such presumption doubles. Very strong and cogent reasons are required to dislodge such a double presumption of innocence.***
>
> ***iii)*** ***Acquittal recorded by the trial court based on cogent reasons and not perverse would not be interfered. The appellate court should not lightly interfere with the judgment of acquittal unless it arrives at a definite conclusion that evidence has not been properly analyzed and the court below acted on surmises or conjectures.***
>
> ***iv)*** ***Acquittal cannot be reversed merely because a contra view is possible, where the findings of the trial court are not unreasonable, improbable, perverse, or patently illegal. Where based on evidence***

on record two views are reasonably possible, the appellate Court should not substitute its view in the place of that of the trial Court.

v) The presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.

vi) Judgment of acquittal can be reversed where the trial Court committed glaring misreading or non-reading of evidence and recorded its findings in a fanciful manner, contrary to the evidence brought on record.

vii) The appellate Court, while dealing with an appeal against acquittal, must proceed with the matter more cautiously and only if there is absolute certainty regarding the guilt of the accused considering the evidence on record, acquittal can be interfered with or disturbed.

23. In the present case, it has come on record that the Complainant has failed to produce any supportive evidence which could show that the Cheque was issued by the accused with any dishonest intention. In the absence of dishonest intention, and missing ingredients of the offense then the accused would be absolved from the punishment of Section 489-F, P.P.C. Besides that the drawer stopped the payment thus there was no occasion for the bank to say that the subject cheque was dishonored, rather the cheque was returned to the drawer for want of company stamp as no case for section 489-F PPC was made out as discussed supra.

24. In view of the above-stated facts and circumstances, the learned trial court was well within the remit of settled law to acquit the respondent. Learned counsel for the appellant has failed to point out any misreading or non-reading of evidence, glaring illegality, perversity, unreasonableness, or arbitrariness in the impugned judgment.

25. In the light of principles as summarized in the preceding paragraphs I am persuaded to hold that no grounds are available warranting interference with the impugned judgment. The impugned judgment rendered by the trial court is well-reasoned and based on judicial prescriptions laid down in various judgments of the Supreme Court.

26. There is no finding contained in the impugned judgment inviting interference by this Court. The instant appeal is squarely devoid of any merits, which is accordingly dismissed.

JUDGE