

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Acquittal Appeal No.153/2013

Appellant: Shaheen Khan through Mr. Ghulam Murtaza, Advocate.

Respondent No.1: Muhammad Nasir through Mr. Sarfaraz Ali Lashari, Advocate.

Respondent No.2: The State through Ms. Rahat Ahsan, APG.

Date of hearing: 12.02.2015

Date of judgment: 12.02.2015

JUDGMENT

ABDUL MAALIK GADDI, J:- Through this Criminal Acquittal Appeal, the Appellant has impugned the order dated 15-04-2013, passed by the learned XIXth Civil Judge & Judicial Magistrate Karachi East, in Criminal Case No.3241/2011, Re State V/s Muhammad Nasir in Crime No.404/2011, registered under Section 420 and 489-F PPC of Police Station Aziz Bhatti, Karachi East, whereby the Respondent No.1 has been acquitted under Section 245(1) Cr.P.C.

2. Briefly the facts of the prosecution case are that Appellant/Complainant paid a sum of Rs.450,000/- to Respondent No.1 for investment in some business, who promised to pay him profit at the rate of Rs.11,000/- per month. After receiving this amount, the Respondent No.1 did not make any contact with Appellant/Complainant, who after passage of sufficient time demanded his money back. The Respondent No.1 made lame excuses for payment of profit and then on the insistence, delivered him a cheque No.0240656 dated 18-04-2011 for a sum of Rs.450,000/- of Meezan Bank, Site Branch, Karachi. On presentation the cheque was bounced which was received back by the Appellant/Complainant from its bank i.e. NIB Bank, Gulshan-e-Iqbal, Karachi on 08-06-2011. Hence present case.

3. It is inter-alia contended by the learned counsel for the Appellant that the learned trial Court did not appreciate the evidence available on record while passing the impugned judgment and did not apply its judicious mind. According to the learned counsel for the Appellant, the learned trial court has passed the impugned judgment in favour of Respondent No.1/accused without going through the material available on record and arguments advanced by the Complainant's counsel. The Complainant and the prosecution witnesses have supported the case of the prosecution. It is further been contended by the

learned counsel for the Appellant that no material contradictions have come on record in between the statements of the prosecution witnesses which could prove that the Respondent No.1/accused has falsely been implicated by the Complainant. It is also contended by the learned counsel for the Appellant that the accused/respondent No.1 has usurped the amount against which he had issued a cheque with a malafide intention to pay back the same to the complainant/Appellant which admission at the part of accused is sufficient to constitute an offence U/S 489-F, therefore, his acquittal under these circumstances was not justified. It is also contended that the Respondent No.1/Accused has betrayed and cheated the Appellant/Complainant by committing fraud with him who has lost his hard earned money at the hands of the said Respondent/accused.

4. On the other hand, Mr. Sarafaraz Ali Lashari, learned counsel for the Respondent No.1 has vehemently opposed this Criminal Acquittal Appeal and has contended that the learned trial Court has rightly passed the judgment (impugned hereinafter). According to him, the learned trial Court has discussed each and every evidence brought on record before it and there is no need to be interfered in the impugned judgment by this Court.

5. Ms. Rahat Ahsan, learned APG has also supported the arguments of the learned counsel for the Respondent No.1 and has contended that there is no illegality or irregularity in the judgment passed by the trial Court.

6. I have heard the learned counsel for the parties and perused the entire material available on record with their able assistance.

7. As per record, prosecution in support of its case examined in all eight (08) witnesses namely PW-1, Shaheen Khan as Ex-3, he produced cheque No.0240656, alongwith memo of return at Ex-3/A & 3/B, FIR at Ex-3/C, memo of inspection at Ex-3/D. PW-2, HC- Jamil Ahmed was examined as Ex-4. PW-3 Syed Muhammad Nabeel examined as Ex-5, he produced Meezan Bank letter at Ex-5/A, PW-4 Asim, Raza was examined as Ex-6. PW-5 SIP Syed Waqar Mustafa was examined as Ex-7, he produced letter to bank alongwith TCS receipt as Ex-7/A to 7/B. PW-6 M. Shahid Khan was examined as Ex-8. He produced memo of arrest at Ex-8/A. PW-7, Farooq Ahmed was examined as Ex-9. PW-8 ASI Umer Deen was examined as Ex-10. Thereafter learned ADPP in trial Court closed the prosecution side by filing his statement on record as Ex-11.

8. Statement of accused under Section 342 Cr.P.C has been recorded as Ex-12 in which he has denied the

allegations and taken the plea that he has no committed any offence and he had friendly terms with complainant and he had already returned all amount to the Complainant. In his statement he further stated that he had already filed a suit for declaration, cancellation of cheque in question and permanent injunction before the Court of law much prior to present FIR which is pending.

9. I have carefully scrutinized the evidence of the aforesaid witnesses. The whole case of the prosecution revolves towards the evidence of Complainant, Shaheen Khan at Exh-3 and Syed Muhammad Nabeel, Bank Manager of Meezan Bank at Exh-5, whereas evidence of the remaining witnesses, who are police officials either they prepared the memo of place of incident, Mashirnama of memo of arrest or they have investigated the matter and submitted challan, therefore, they are formal witnesses.

10. It is the case of the complainant that he had a friendly terms with accused as such he delivered him Rs.450,000/- to invest the same in some profitable business and to pay him Rs.11,000/- per month but he did not pay the profit nor returned the said amount, however, a false cheque was given to him which was returned for want of insufficient amount in the account of accused.

11. This witness was cross-examined by the advocate for the accused at length. Perusal of cross-examination of Complainant in which he admitted that he knows accused since 2004. During cross-examination, Complainant admitted that in the year 2004, accused had received Rs.450,000/- and paid him profit per month as per his promised. He also admitted that accused returned amount of Rs.500,000/-. He admitted that he himself wrote date i.e. 08-06-2011 on cheque. He also admitted that the date on cheque written 18-04-2011 and cheque deposited on 08-06-2011. He also admitted that in FIR, reason for delay of depositing cheque has not been mentioned. He also admitted that the police called the accused at Police Station. He also admitted that accused had filed Civil Suit against him and so also police official. He also admitted that Civil Suit filed by accused for cancellation of cheque was prior to the present FIR. He further admitted that in FIR, date of issuance of cheque has not been mentioned.

12. From the perusal of the cross-examination, it appears that accused has already paid the amount. It is admitted fact that FIR lodged of the incident after delay of one month. Complainant did not explain the reason of delay in lodging the FIR. Complainant did not mentioned in FIR with regard to the nature of business for which the amount was invested. FIR also does not mentioned date and year of giving the said amount to accused. No proof is

on record with respect of giving money to accused. Nothing mentioned in FIR before whom Rs.450,000/- was given to accused.

13. It is admitted fact that accused prior to lodging of this FIR, had also filed suit for declaration, cancellation of cheque and permanent injunction against the complainant of this case before the Court of law which is still pending, therefore, false implication of the accused in this case cannot be ruled out.

14. The evidence of Bank Manager namely Syed Muhammad Nabeel available at Exh-5 of the trial Court shows that on 08-06-2011 a cheque bearing No.0240656 amount of Rs.450,000/- was present and the same was returned due to insufficient amount. This witness was cross-examined and on suggestion of advocate it is admitted by the manager of the said bank that the account maintained by the accused was old one.

15. In my view mere allegedly issuance of cheque which was subsequently dishonoured does not constitute an offence under Section 489-F PPC unless it is proved that the same was issued dishonestly and for repayment of loan or for discharging of any obligation. In this matter admittedly parties had friendly terms with each other. Nothing on record to show before whom the alleged amount was given to accused. Admittedly the Civil Suit

filed by accused is pending before the trial Court for cancellation of the disputed cheque. Admittedly the suit filed by the Accused is prior to lodgment of FIR by the complainant. The evidence of the complainant is vague and sketchy, therefore, no reliance can be placed on the evidence of the complainant.

16. I have perused the evidence of other witness but their evidence appears to formal in nature. They are not the witness of the incident. They either simply prepared the memo of incident, memo of arrest of accused, conducting the investigation, so also submission of challan even otherwise they have not deposed directly against the accused, therefore, their evidence in this matter is formal. Under these circumstances the learned trial court in the aforementioned facts and circumstances has rightly acquitted the accused.

17. It may be observed that it is a legal parlance that every accused is blue eyed child of law and is presumed to be innocent unless and until he is held guilty by due course of law. Maxim exists that an error in acquittal is better than the error in conviction and more so, after yielding acquittal dual presumption of innocence is attached with an accused.

18. Under these guidelines, the record has been perused and arguments have been appreciated, when much water

has flown under the bridges from many year. Under these circumstances, impossibility exists to reverse the order of acquittal into conviction. Even otherwise, no perversity illegality and incorrectness have been found in the impugned judgment. I, therefore, dismissed this Criminal Acquittal Appeal.

19. This criminal acquittal appeal was dismissed in Court by short order dated 12.02.2015 and these are the detailed reasons for the same.

JUDGE