

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR
Cr. Acquittal Appeal. No. S – 06 of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE
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Disposed of matter

1. For orders on office objection at flag 'A'
2. For orders on MA No.4540/2018
3. For hearing of main case

21.10.2019

Mr. Muhammad Arif Malik Advocate for the Appellant/complainant
Mr. Aftab Ahmed Shar, Additional PG for State

JUDGMENT

Aftab Ahmed Gorar, J; Through instant Criminal Acquittal Appeal, the appellant/accused has impugned the judgment dated 09.12.2017 passed by learned Civil Judge and Judicial Magistrate (Family Court) Bhiria, District Naushahro Feroze, whereby the private respondents has been acquitted of the offence under Section 489-F PPC arising out of FIR Crime No.23/2017 registered at Police Station, Bhiria Road.

2. After filing instant Criminal Acquittal Appeal, the appellant/complainant remained absent including his counsel, ultimately vide order dated 27.08.2019, the same was dismissed for non-prosecution. Thereafter, learned counsel for the appellant/complainant has filed an application being MA No.4540/3029, seeking restoration of the appeal at its original stage. In Criminal law there is no provision for restoration of the criminal matters, if disposed of, but even then learned Additional PG consented for deciding the same on merits and gave no objection, if the learned counsel proceed with the matter today, on such proposal of the learned Additional PG, learned counsel for the appellant agreed. Accordingly, the listed application is allowed and appeal is restored to its original stage. Learned

counsel for the appellant advanced his arguments as well as learned Additional PG for the State.

3. The facts of the prosecution case are that on 26.05.2017 the appellant/complainant Abdul Khalique lodged his report at police station Bhiria Road, stating therein that he deals with the business of Wholesale Grocery Items and on 05.01.2017, he along with his brother Mehboob Illahi and Abdul Rehman was sitting at his shop, there came private respondent and purchased sugar from him of valuing Rs.95,0000/- and issued such cheque of the equal amount in favour of the appellant/complainant, which as per commitment was presented in the concerned Allied Bank for encashment, which was dishonoured due to lack of funds in the Account of the private respondent, consequently, he registered the present FIR.

4. After usual investigation, the private respondent was sent up to face the trial. The charge against the private respondent was framed at (Ex.02) to which he did not plead guilty and prosecution in order to substantiate its case, examined PW-1 Abdul Khalique at (Ex.03); PW-2 Abdul Rehman at (Ex.04); PW-3 Faisal at (Ex.05); PW-4 ASI Muharam Kalo, I.O of the case at (Ex.06); PW-5 Muhammad Iqbal, Bank Manager at (Ex.07). Thereafter the learned ADPP closed the prosecution side at (Ex.08).

5. The statement of the private respondent was recorded u/s 342 Cr.P.C at (Ex.09), wherein he has denied the prosecution allegations and claimed innocence. He further stated that he has been falsely implicated by the appellant/complainant due to grudge, whereas, he has already filed a Suit for Settlement of Accounts i.e. F.C Suit No.287/2016 against the appellant/complainant and others which is pending adjudication before the Court of learned 2nd Senior Civil Judge Naushahro Feroze. He did not examined himself on oath nor led any evidence in defence, however claimed innocence.

6. Learned trial Court after hearing the counsel for the parties and on evaluation of the evidence, passed the impugned judgment and acquitted the private respondent, hence this appeal.

7. Learned counsel for the appellant contended that the trial Court has passed the impugned judgment in a hasty manner without considering the evidence adduced by the prosecution; the evidence of the complainant is fully supported by the P.Ws , although there are some minor contradictions in their evidence, which are not fatal for the prosecution to disbelieve the same; the evidence of complainant is supported by the documentary evidence in shape of cheque issued by the private respondent to him so also the bank memo; that the evidence of the prosecution witnesses clearly suggest that the private respondent has committed fraud with the appellant/complainant; that the evidence of the complainant is also supported by the Bank Manager, who has affixed the memo of dishonor on the said cheque. He lastly prayed that the impugned judgment is liable to be set-aside and the private respondent may be awarded punishment as per law.

8. Learned Additional PG appearing for the State has supported the impugned Judgment of the trial Court by stating that there is civil dispute in between the appellant/complainant and the private respondent and such Suit is also pending adjudication in the competent Court of law; that the learned trial Court has passed the judgment while considering the entire aspect of the case, therefore, the same is liable to be upheld and the instant Criminal Acquittal appeal may be dismissed.

9. I have heard the learned counsel for the appellant/complainant as well as learned Additional PG for the State and perused the record. The root-cause of the dispute in between the appellant/complainant and the private respondent is the transaction of sugar, whereas, there is no such documentary proof produced

by the appellant/complainant in his evidence with regard to the said transaction. As per claim of the appellant/complainant, the private respondent had issued him the cheque of Rs.9,50,000/- of his Bank Account maintained in the Allied Bank of Limited Bhiria Road. In this respect, the evidence of Bank Manager who was examined by the trial Court as Court witness carries weight. In his deposition, P.W Muhammad Iqbal, the Bank Manager deposed that bank authority did not verify the signature of accused available on the cheque and the cheque was returned to the drawer as the same had been stopped by the accused for the reason of its misplacement. Moreover, the complainant has failed to produce on record the deposit slip of the cheque. The important aspect of the prosecution case is that the memo of the cheque in question does not disclose that the cheque has been dishonored due to having insufficient funds rather it revealed that the cheque was returned to the drawer due to stopping of the payment by the private respondent. The learned trial Court has rightly held that mere issuance of cheque and its becoming dishonored later, being actus reus, would not be able to attract the provision of Section 489-F PPC simply for want of presence of element of dishonesty in the matter. Moreover, no independent witness to the transaction between complainant and private respondent has been examined. Even no documentary evidence has been produced either to prove the sale and delivery of sugar. There is no quantity of sugar disclosed either in the FIR or in the evidence by the appellant/complainant or his witnesses. Furthermore, prior to registration of FIR by the appellant/complainant, the private respondent had already filed F.C Suit No.287/2016 "*re- Shahzd Ahmed and another vs. Muhammad Ishfaq and others*" for Settlement of Accounts and Perpetual Injunction, which was pending adjudication before the Court of learned 2nd Civil Judge Naushahro Feroze, wherein the appellant/complainant has been arrayed as defendant No.6. In the said Suit the private respondent has stated that though there had been business relations in between him and the appellant/complainant and nothing was outstanding against him. In such

circumstances, the learned trial Court has rightly observed that the evidence of the prosecution witnesses is not confidence inspiring and cannot be made basis of conviction to the private respondent.

10. In the recent judgment in the case of **Zulfiqar Ali v. Imtiaz and others (2019 SCMR 1315)**, Hon'ble Supreme Court has held as under:

“2. According to the autopsy report, deceased was brought dead through a police constable and there is nothing on the record to even obliquely suggest witnesses’ presence in the hospital; there is no medico legal report to postulate hypothesis of arrival in the hospital in injured condition. The witnesses claimed to have come across the deceased and the assailants per chance while they were on way to Chak No.504/GB. There is a reference to M/s Zahoor Ahmed and Ali Sher, strangers to the accused as well as the witnesses, who had first seen the deceased lying critically injured at the canal bank and it is on the record that they escorted the deceased to the hospital. Ali Sher was cited as a witness, however, given up by the complainant. These aspects of the case conjointly lead the learned Judge-in-Chamber to view the occurrence as being un-witnessed so as to extend benefit of the doubt consequent thereupon. View taken by the learned Judge is a possible view, structured in evidence available on the record and as such not open to any legitimate exception. It is by now well-settled that acquittal once granted cannot be recalled merely on the possibility of a contra view. Unless, the impugned view is found on the fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled. Criminal Appeal fails. Appeal dismissed.”

11. Learned counsel for the appellant / complainant has not been able to point out any serious flaw or infirmity in the impugned judgment. View taken by the learned trial Court is a possible view, structured in evidence available on record and as such not open to any legitimate exception. It is by now well settled that acquittal once granted cannot be recalled merely on the possibility of a contra

view. Unless, impugned view is found on fringes of impossibility, resulting into miscarriage of justice, freedom cannot be recalled.

12. In view of the above, instant Criminal Acquittal Appeal fails and is dismissed accordingly.

Judge

ARBROHI