

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)**

Present:

Mr. Justice Md. Riaz Uddin Khan

Criminal Appeal No. 6834 of 2014

In the matter of:

A petition of appeal under section 410 of the Code of Criminal Procedure

-And-

In the matter of:

Md. Ahsan Ali

...Convict-Appellant

-Versus-

The State and another

...Respondents

None

...For the parties

Heard and Judgment on: 16.05.2024

Md. Riaz Uddin Khan, J:

This appeal is directed against the judgment and order dated 05.08.2014 passed by the learned Sessions Judge, Sirajgonj, in Sessions Case No. 445 of 2014 arising out of C.R. Case No. 63 of 2010 (Sha) convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer rigorous imprisonment for 01(one) year and to pay a fine of Tk. 500,241/-(Five lac two hundred forty one) in default to suffer simple imprisonment for 3(three) months more.

Succinct facts for disposal of this appeal are that the accused Md. Ahsan Ali took loan of Tk, 300,000/- from the complainant BRAC BDP on 11.09.2008 and for repayment on 07.03.2010 he

issued a cheque of Tk. 166,747/- only being chequ No. 3758260 of his account maintained with the Janata Bank Ltd. Shahjatpur Branch in favour of the complainant. The complainant presented the aforesaid cheque for encashment before the said Bank, Shahjatpur Branch on 07.03.2010 but the cheque was dishonoured by the Bank concerned on the ground for insufficient fund on the same day. Thereafter, the complainant sent a legal notice on 10.03.2010 through his lawyer to the accused asking him to pay the cheque amount within 30 days but the accused did not pay the same. So, the complainant filed this case under section 138 of the Negotiable Instruments Act for proper adjudication.

The court of Magistrate took cognizance of the case and in course of time the case was transmitted to the Court of Sessions for trial on due completion of legal formalities. Since the accused neither appeared nor arrested by the police, there was a paper publication notifying the accused in accordance with law.

After receiving the case record the learned Sessions Judge framed charge under section 138 of the Negotiable Instruments Act against the accused in absentia and after conclusion of trial by his impugned judgment and order dated 05.08.2014 convicted and sentenced him as mentioned above.

Being aggrieved by and dissatisfied with the aforesaid judgment and order of conviction and sentence passed by the learned Sessions Judge, the convict-appellant filed the instant appeal under section 410 of the Code of Criminal Procedure before this Court and obtained ad-interim bail on 28.10.2014.

No one appears for the parties.

It appears from record that the learned Sessions Judge examined the sole prosecution witness on 05.08.2014 and on the same date he passed the impugned judgment and order of conviction without fixing any date for argument or judgment. However, the judgment and order was passed in absence of the convict-appellant. It transpires from the order sheet that the appellant was arrested by the police on 03.09.2014 and then on 07.09.2014 by depositing 50% of the cheque amount prayed for bail before the trial court and obtained bail on 09.09.2014.

The sole prosecution witness Bidesh Kumar Mandol deposed that accused Ahsan Ali on 07.03.2010 issued a cheque of tk-166,747/- which was dishonoured by the bank. The cheque was marked as exhibit-1 and dishonor slip as exhibit-2. He served legal notice upon the accused through registered post which is marked as exhibit-3 and the postal receipt as exhibit-4. Then he filed the petition of complaint which is

marked as exhibit-5 and his signature on it as exhibit-5/1. He was not cross-examined as the accused was not present on the dock.

I have examined the lower court records including the petition of complaint, deposition and the exhibits. There is no defence case as the convict was all through absent in the trial court. In other words the convict appellant did not deny the transaction and issuance of such cheque and of its dishonor for insufficient fund and nonpayment of the cheque amount. I also find no procedural mistake in the case. In the petition of appeal the appellant has taken a ground that since he did not know anything about the case he could not place his defence case. We have already noticed that the appellant was notified about this case through a paper publication and as per law he cannot take the plea of ignorance. No one can take advantage of his own fault. However, in the appeal he did not assign any reason why the impugned judgment of conviction was wrong. The prosecution has proved the case beyond all reasonable doubt. Thus the appellant was rightly convicted under section 138 of the Negotiable Instruments Act, 1881 by the trial court.

However, the sentence awarded against the convict-appellant is too harsh in the given facts and circumstances of the case. The cheque amount

was of Tk-166747/- only. The trial court sentenced him to suffer 1 year rigorous imprisonment which the law does not permit. The law permits imprisonment for a term which may extent to 1 (one) year and not rigorous imprisonment. The trial court also asked to pay a fine of Tk-500241/-, thrice the amount of cheque, the highest fine provided in the section. I find no reason in awarding such severe sentence by the trial court for which I am inclined to interfere with the sentence awarded against the convict-appellant. In the given facts and circumstances, my considered view, justice would be best served if the sentence is reduced to 2 (two) months simple imprisonment with a fine of Tk-166747/-, the amount of the cheque. The appellant has already paid 50% of the said cheque amount and thus he has to pay the rest 50%.

In the result the appeal is **allowed in part.**

The judgment and order of conviction passed by the learned Sessions Judge, Sirajgonj convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 is maintained, but the **sentence is modified and reduced** from rigorous imprisonment for 1 (one) year to **simple imprisonment for 2(two) months with a fine of TK-166747/-** only.

The convict-appellant is on bail hence directed to surrender before the trial court

within 2 (two) months from date of receipt of the notice issued by the trial court. The trial court is directed to notify the convict-appellant accordingly within 30 days from receipt of this judgment and order.

Send down the lower court's record along with a copy of this judgment at once.

Ziaul Karim
Bench Officer