

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-1855 of 2018

Present:

Mr.Justice Khadim Hussain M.Shaikh

Mr.Justice Amjad Ali Sahito

Petitioner : Dr. Aijaz Ali Pathan S/o Nadir Ali
Through Mr. Nisar Ahmed Tarar,
Advocate.

Respondent : National Accountability Bureau (NAB)
Through Mr. Muhammad Javed Akram,
Special Prosecutor for NAB.

Date of Hearing : 23.07.2018

ORDER

AMJAD ALI SAHITO, J – The petitioner, being aggrieved and dissatisfied with the order dated 12.02.2018 passed by the learned Judge, Accountability Court No.III Sindh, Karachi, in Reference No.12/2014 (The State vs. Dr. Agha Aijaz and another), whereby an application under section 17(c) of the National Accountability Ordinance, 1999 filed by the learned Special Prosecutor for NAB, Karachi, was allowed, seeks setting aside the aforesaid impugned order.

2. The brief background of the case is that the petitioner along with co-accused is facing trial in Reference No.12/2014 before the trial Court under section 9(a) of National Accountability Ordinance, 1999 for the alleged offence of corruption and corrupt practices by indulging into misuse of authority, the prosecution has examined 21 witnesses out of 30 witnesses and 22nd witness viz. Arsalan

Manzoor, who is a Forensic Expert of National Response Centre, Cyber Crime, Karachi, was partly examined on 19.5.2017 and his further examination-in-chief was reserved. On 07.12.2017 Special Prosecutor NAB moved an application under section 17(c) of NAO, 1999 in order to dispense with the provisions of the Code of Criminal Procedure and to allow the prosecution to examine Investigating Officer before the 22nd witness, who has been partly examined which has been allowed vide impugned order, hence this petition.

3. Learned counsel for the petitioner, *inter alia*, contended that the impugned order, is erroneous; that the impugned order is bad and perverse in law, as such, is illegal and not in conformity with the cardinal principle of a fair trial in Criminal Justice System and thus, the same is liable to be set aside.

4. Conversely, the learned Special Prosecutor for NAB contended that under section 17(c) of NABO, 1999, the Court may dispense with any provision of the Code; that two recovery witnesses were declared hostile and the defence counsel during evidence of PW Arsalan Manzoor (Forensic Expert) raised objection for production of recovery articles; that it is fruitless to examine forensic expert without exhibiting the recovery articles; that the trial Court has allowed the prosecution to examine the Investigating Officer prior to completion of the statement of PW Arsalan Manzoor in the interest of justice; and, that section 17(c) of NAO 1999 deals with the dispensation of Criminal Procedure Code only and in the present situation, Qanun-e-Shahadat Order 1984 may apply

because the evidence has been recorded under Articles 132 and 133 of the Ordinance *ibid*. He has lastly prayed that this petition may be dismissed.

5. We have heard the learned counsel for the petitioner, learned Special Prosecutor for NAB and examined the material available on record.

6. The main thrust of the arguments advanced by the learned counsel for the petitioner is that the prosecution has been allowed to defer the examination-in-chief of witness Arsalan Manzoor, who has been partly examined, and the prosecution was given a chance to examine the Investigating Officer before completion of the evidence of the witness Arsalan Manzoor.

7. For the sake of convenience and ready reference, it would be advantageous to reproduce here Section 17 of the National Accountability Ordinance, 1999, which reads as follows: -

“17. Provision of the Code to apply: (a) *Notwithstanding anything contained in any other law for the time being in force, unless there is anything inconsistent with the provisions of this Ordinance, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), shall mutatis mutandis, apply to the proceedings under this Order.*

(b) *Subject to sub section (a), the provisions of Chapter XXIIA of the Code shall apply to trials under this Ordinance.*

(c) *Notwithstanding anything contained in sub-section (a) or sub-section (b) or in any law for the time being in force, the Accountability Court may, for reasons to be recorded, dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case.*

8. We have examined the provisions of clause (c) of section 17 of the Ordinance, 1999, as reproduced hereinabove, which clearly permits adoption of any procedure to any case by dispensing with any provision of the Code depending upon the facts and

circumstances of each case. It is the well-settled principle of law that if there is no specific prohibition to a particular procedure in the Procedural Law then the same is deemed to be permissible. In the case in hand, the prosecution/NAB has filed an application under section 17(c) of the NAB Ordinance, 1999, with a prayer to examine the Investigating Officer prior to the evidence of PW Arsalan Manzoor.

9. It is prerogative of the prosecution to produce evidence as could be necessary in order to prove the charge. In this case, two recovery witnesses were declared hostile and when the prosecution intended to produce recovery articles through Forensic Expert (PW Arsalan Manzoor) learned counsel for the petitioner raised objection and thus, although there was no alternative except to examine the Investigating Officer to produce the recovery articles viz. one laptop, two mobile phones and one USB recovered from the petitioner/accused and the Investigating Officer is also the attesting witness of the recovery articles, therefore, he is the competent witness to produce the recovery articles and without producing the recovery articles, the same could not be confronted to the accused and by allowing the application the trial Court has rather given fair opportunity each to the defence to discard the recovery of the aforesaid material/articles made from the accused.

10. In view of the above discussion, we find no illegality in the impugned order dated 12.02.2018 passed by the learned Judge, Accountability Court No.III Sindh, Karachi and resultantly, the

instant Constitutional Petition was dismissed with no orders as to costs.

11. These are the detailed reasons for our short order dated 23.07.2018 announced by us.

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