IN THE HIGH COURT OF SINDH, AT KARACHI

PRESENT:-
MR. JUSTICE MUHAMMAD IQBAL KALHORO
MR. JUSTICE SHAMSUDDIN ABBASI.

Criminal Revision Application No.67 of 2018

Applicant	Zakir Hussain @ Aqeel @ Yasir son of Muhammad Shah.
Respondent	The State.
Applicant	Mr. Aamir Mansoob Qureshi, Advocate.
Respondent	Mr. Ali Haider Saleem, DPG.
Date of hearing	06.08.2018
Date of Judgment	13.08.2018

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J U D G M E N T

SHAMSUDDIN ABBASI, J:- Impugned in this Criminal Revision Application is the order dated 03.04.2018, passed by the learned Anti-Terrorism Court No.XII (ATC Judicial Complex), Central Prison, Karachi, in Special Case No.101 of 2010, arising out of FIR No.929 of 2010 under Sections 302, 353, 324, 427 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 and FIR No.963 of 2010 under Section 13-D of Arms Ordinance of Police Station Preedy, Karachi.

2. Facts relevant to this revision application are that the applicant alongwith other co-accused is facing trial in a case punishable under Sections 302, 353, 324, 427 & 34, PPC read with Section 7 of Anti-Terrorism Act, 1997 of Police Station Preedy, Karachi. The trial Court, after framing of charge, examined PW HC

Mehmood Ali on 13.04.2016. During course of the trial, the counsel for the State (APG) moved an application under Section 540, Cr.P.C. on 28.03.2018 seeking recall of PW HC Mehmood Ali on the ground that apart from mashir of arrest of applicant, this witness is also the mashir of seizure of DVD, recorded in his presence, wherein the applicant has confessed the commission of crime, but on account of bonafide mistake he has not deposed so in his examination-in-chief, which is mere an omission and can be cured.

3. The trial Court, after assessing the record and hearing the learned counsel for the parties, allowed application under Section 540-Cr.P.C. vide impugned order dated 03.04.2018. Feeling aggrieved by the said order, the applicant has preferred the present revision application.

4. Learned counsel for the applicant has argued that the impugned order is bad in law and facts inasmuch as the witness was examined on 13.04.2016 and the application for recalling and reexamining the said witness was filed on 28.03.2018 i.e. after about two years of his examination without furnishing any plausible explanation. It is next submitted that law does not allow the prosecution to fill up lacuna at a later stage and once a witness is examined by the prosecution, he cannot be recalled or reexamined to repair the admitted dents caused due to a mistake of the prosecution. It is also submitted that the object of Section 540, Cr.P.C. is to defend the interest of justice and not to defeat the same and there is a bar on allowing such an application when the sole object thereof is to diminish the sanctity of trial Court and to fill up dents in the prosecution version. In support of his contentions, the learned counsel for the applicant has placed reliance on a case of *Sh. Muhammad Amjad v The State* reported as PLD 2003 Supreme Court

704 and on a case of *Muhammad Saleem v Muhammad Azan & another* reported as 2011 SCMR 474 and prayed for setting-aside the impugned order and allowing the revision application.

5. On the other hand, learned DPG, while supporting the impugned order, has argued that the evidence so omitted was an important piece of evidence and essential for a just decision of the case, therefore, the trial Court has rightly discharged its duty and allowed the prosecution to recall its witness in terms of Section 540, Cr.P.C. just to rectify its mistake.

6. We have heard the learned counsel for the applicant and the learned Deputy Prosecution General on behalf of the State and perused the record available before us with their assistance.

7. To arrive at a just and fair decision, we deem it appropriate to reproduce Section 540, Cr.P.C., which reads as under:-

> ***S – 540 Cr.P.C. – Power to summon material witness or examine person present****: Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."*

8. This provision of law has two parts; first part confers the discretionary powers on the Court while the second part is mandatory which provides that if an essential piece of evidence is left at the time of examination of a witness, the Court is under the obligation to recall the witness sought to be summoned for reexamination. In the case in hand, the applicant during interrogation got recorded a DVD, wherein he has allegedly confessed his guilt with regard to commission of crime and such a DVD was

prepared in presence of PW HC Mehmood Ali, who is also a mashir of its seizure, but at the time of his examination such piece of evidence was omitted, which can be said to have happened due to a bonafide mistake and cannot be termed as a lacuna. The Court has wide and ample powers to call or recall any witness in a case under the provision of Section 540, Cr.P.C. if his/her evidence seems to be essential to the just decision of the case. Reliance is placed on the case of *Ansar Mehmood v Abdul Khaliq and another* reported in 2011 SCMR 713, wherein it has been held as under:-

> "*Bare reading of section 540, Cr.P.C. transpires that where an evidence is essential for just decision of the case, it is obligatory upon the Court to allow its production and examination. Examining the law on the subject, reference can be had to Muhammad Murad Abro v. The State through A.G. Balochistan (2004 SCMR 966), wherein it was held that provision of section 540, Cr.P.C., is to enable the Court to go at the truth of the matter, so as to come to a proper conclusion. In the case under trial, it is obligatory to summon a person whose evidence is essential for just decision of the case. Similar view was taken in Painda Gul and another v. The State and another (1987 SCMR 886), with addition that the Court has widest powers under section 540, Cr.P.C. and can summon a witness for examination at any stage of the case. However, while exercising discretion it must guard itself against the exploitation of this power by a litigant party and keep in view the guiding principle, what the ends of justice demand. Cases titled as Dildar v. State through Pakistan Narcotics Board, Quetta (PLD 2001 Supreme Court 384) and the State v. Muhammad Yaqoob (2001 SCMR 308), lay down guide. Observations made in 2001 SCMR 308, are quoted: --*
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> *"It is thus manifest that calling of additional evidence is not always conditioned on the defence or prosecution making application for this purpose but it is the duty of the Court to do complete justice between the parties and the carelessness or ignorance of one party or the other or the delay that may result in the conclusion of the case should not be a hindrance in achieving that object. It is salutary principle of judicial proceedings in criminal cases to find out the truth and to arrive at a correct conclusion and to see that an innocent person is not punished merely because of certain technical omission on his part or on the part of the Court. It is correct that every criminal case has its own facts and, therefore, no hard and fast rule criteria for general application can be*

laid down in this respect but if on the facts of a particular case it appears essential to the Court that additional evidence is necessary for just decision of the case then under second part of the section 540, Cr.P.C., it is obligatory on the Court to examine such a witness ignoring technical/formal objection in this respect as to do justice and to avoid miscarriage of justice."

6. In the case of Pervaiz Ahmad v., Munir Ahmad (1998 SCMR 326) this Court allowed examination of witnesses, which promote the ends of justice. Again section 540, Cr.P.C. was examined in the cases of Muhammad Aslam alias Accha and others v. The State (1984 SCMR 353); Shakir Muhammad and another v. The State (PLD 1985 Supreme Court 357); Mehrzad Khan v. The State (PLD 1991 Supreme Court 430); Miss Benazir Bhutto v. President of Pakistan and another (1992 SCMR 140); and Abdul Hamid Mian v. Muhammad Nawaz Kasuri (2002 SCMR 468), wherein it was laid-down, that the Court has no choice to refuse examination of witnesses under section 540, Cr.P.C, when the same is essentially required for just decision of the case. The technicalities should not be allowed to come in the way to sacrifice justice. In Muhammad Azam v. Muhammad Iqbal others (PLD 1984 Supreme Court 95), it was held that Court has unfettered powers to examine any witness at any stage of the proceedings, it the evidence is 'essential for just decision and in such a situation rule of "avoidance to fill gaps" negates the very concept of justice. In Abdul Salam v. The State (2002 SCMR 102), the trial Court refused permission to examine, Chairman of a Medical Board, on the ground that his name was not mentioned in the calendar of witnesses, which order was affirmed by the High Court. This Court allowed the petition and directed examination of the Chairman, Medical Board holding him a material witness notwithstanding, omission of his name in the calendar of witnesses.

7. In the case of Karam Din (supra) it was held:--
"Section 540 of the Code of Criminal Procedure, 1898 empowers the trial Court to call or recall any witness at any stage of the trial if his testimony was considered relevant and necessary to reach truth. Keeping in view the circumstances of the case, we disagree with the view of learned judge of the High Court that trial Court, in summoning and examining the Partwari (C.W.1) and Gardawar (C.W.2) as Court Witnesses had filled the lacunae of the prosecution case. We are of the view, that their statements were not only relevant but necessary to decide the controversy. Section 540, Cr.P.C. clearly enabled the trial Court to adopt such a course.

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10. Survey of the law undertaken by us, in no uncertain

> *terms, declares that powers of a Court under section 540, Cr.P.C. are widest in its amplitude; it is obligatory upon the Court to summon evidence of a material witness whose evidence is essential for just decision; the Court exercising power under section 540, Cr.P.C. has to guard itself from the exploitation and shall keep the guiding principle, what the ends of justice demands; the avoidance to fill gaps is in negation of justice, when a Court arrives at the conclusion that evidence is essential for a just decision, and, that the delay in moving an application is not relevant as the Court itself is empowered, even, without application from any of the parties to summon the witness deemed essential for just decision by applying its judicial mind.*

9. To determine the point involved in this case, the request of the prosecution appears to be reasonable and in no way the case of the applicant would be prejudiced, if the said witness is recalled and reexamined because he is also a mashir of seizure of DVD, which fact the applicant/accused knows from inception of the trial through relevant copies provided to him in compliance of provision of Section 265-C, Cr.P.C.

10. Keeping in view the above facts and circumstances, we are of the considered view that the impugned order is just and appropriate and based on proper findings, hence calls for no interference. Resultantly, this Criminal Revision Application is dismissed.

JUDGE

JUDGE

Naeem