

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Criminal Miscellaneous Application No.98 of 2019

Date	Order with signature of Judge
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Present: Mr. Justice Nazar Akbar

Applicant : Pervaiz Ahmed son of Fazal Haq
Through Syed Suleman Badshah, advocate.

Versus

Respondent No.1 : Muhammad Zahid Khan,
Through Mr. Ali Abbas Khan, advocate

Respondent No.2 : The State.

Respondent No.3 : Abdul Aziz. (Nemo).

Respondent No.4 : Manzoor Ali. (Nemo).

Date of hearing : **09.05.2019**

Date of decision : **24.05.2019**

JUDGMENT

NAZAR AKBAR, J. Through this Criminal Miscellaneous Application under Section 561-A Cr.P.C the applicant has sought quashment of the order dated **05.03.2019** whereby the VIII-Additional Sessions Judge, South Karachi has allowed Criminal Revision Application No.66/2018 filed by Respondent No.1 and set aside order dated **11.08.2018** passed by the learned XXIII Judicial Magistrate, South Karachi dismissing application under **Section 540** of the Cr.P.C filed by Respondent No.1/complainant for calling witness namely Mr. Naseem Hassan Khan son of (Late) Aziz Hassan Khan in Criminal Case No.2730/2016.

2. Learned counsel for the applicant has contended that the order dated 05.03.2019 passed by the Revisional Court directing the trial Court to call witness namely Nasim Hassan Khan is bad in law

arbitrary and against the facts and procedure as such it is liable to be set aside. He further contended that the learned Revisional Court has not applied its judicial mind to the fact that the FIR of the case was registered on 10.01.2012 and after five months challan was submitted and the I.O of the case miserably failed to examine the said Nasim Hasan Khan as witness. His statement under Section 161 of the Cr.P.C was never recorded. He further contended that the Revisional Court also failed to apply its judicial mind to the fact that in an earlier application under **Section 540** of the Cr.P.C, the complainant has called two PWs namely FIA Inspector Saib Akhtar Sohail and Ghulam Habib and even at that time he has failed to mention the name of the proposed witness. He argued that since the proposed witness has neither been examined under **Section 161** nor under **Section 164** of the Cr.P.C and his name was also not mentioned in the FIR, therefore, on his examination before the trial Court the accused will be deprived of their valuable right of confronting him with his previous statement.

3. Learned counsel for the applicant has relied on the case of Ali Gul vs. The State reported in **2016 P.Cr.L.J 197** authored by me. In the said judgment I have maintained the order of Sessions Judge whereby an application under **Section 540** read with **Section 265-F(3)** of the Cr.P.C for calling witnesses for their evidence was dismissed. However, while relying on the sole judgment of this Court, the learned counsel for the applicant seems to have avoided the judgments of the Hon'ble Supreme Court which have been relied upon by the learned Additional Sessions Judge in the impugned order for allowing application under **Section 540** of the Cr.P.C filed by the Respondents and setting aside the order of dismissal of the

said application by the trial Court. The contentions of learned counsel that such as delay in filing application for calling witnesses and that the name of the witness was not mentioned in the calendar of prosecution witnesses and or it is an attempt to fill a lacuna has been answered by the Hon'ble Supreme Court in the case of Muhammad Murad Abro vs. The State through A.G Balochistan reported in **2004 SCMR 966** and also in the case of The State vs. Muhammad Yaqoob and others reported in **2001 SCMR 308**. The learned Additional Sessions Judge has relied on these cases in the impugned order and this Court is also bound by the observations of the Hon'ble Supreme Court in these two judgments. The Hon'ble Supreme Court in the case of The State vs. Muhammad Yaqoob at pages 320 and 325 side note "B" and "C" has held as follows:-

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*This section has two parts; in the first one the discretion lies with the Court to examine or not to examine any person as a witness **but according to second part of the section the Court is bound to examine any person as a witness if his evidence appears to be essential for just decision of the case irrespective of the fact that any party had requested for it or not.** This legal proposition has been exhaustively explained/clarified in the case of Muhammad Azam v. Muhammad Iqbal and others" reported in PLD 1984 SC 95). Therefore, reference to various portions of the judgments would be helpful. It had been observed at page 118 of the judgment: ---*

"The duty nevertheless lay squarely on the trial Court to summon the entire available evidence on this controversy and record/admit the same by virtue of power under section 540, Cr.P.C. It reads as follows: '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 the 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."

"This provision is divided into two parts: one where it is only discretionary for the Court to summon a Court-witness suo motu or on application, and the second part where it is mandatory for the Court to do so. The main condition to be satisfied with regard to the second part is that the evidence to be summoned under this part should appear to the Court to be essential to the just decision of the case. As has already been observed the evidence in question relating to Nikah was undoubtedly essential for the just decision of the case. In the circumstances of this case the failure of the learned trial Judge to act under the said part of section 540, Cr.P.C. has not only, deprived the Appellate Courts of essential material for the just decision of the appeal, but has also occasioned miscarriage of justice."

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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 or 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 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.***

The relevant observation of the Hon'ble Supreme Court at page 968

from the case of Mohammad Murad Abro is reproduced below:-

The purpose of section 540, Cr.P.C. is to enable the Court to go at the truth of the matter to come to a proper conclusion in the case under trial and in the peculiar circumstances, imposes a duty on the Court to summon a person in the witness-box, whose evidence is essential for just decision of the case. Under first part of the

section, the Court may in its discretion summon or recall a person or a witness for examination or re-examination but under the second part, it is obligatory for the Court to summon and examine or recall and re-examine any person if his evidence appears essential for just decision of the case but the Court cannot use the power under section 540, Cr.P.C. to advance the case of prosecution or that of the defence. However, this discretionary power should liberally be used in a case in which the examination of a person is material and is essential to come to the proper conclusion.

4. Beside the above authoritative legal position as dictated by the Hon'ble Supreme Court, the learned trial Court has already examined the proposed witness Nasim Hasan Khan during pendency of this Criminal Miscellaneous Application and the counsel for the applicant has also availed the opportunity of cross-examination of the said witness, therefore, in changed facts and circumstances the judgment passed by this bench and relied upon by the counsel for the applicant stand distinguished and has no relevance with the case in hand.

5. Conversely, learned counsel for Respondent No.1 has contended that the learned Revisional Court has rightly passed the impugned order as the witness was in possession of the original documents which goes to the root of the case. The case against the applicant is a case of forgery in certain documents and the said documents were in possession of the proposed witness, who has by now already been examined by the trial Court.

6. In view of the above facts and law, the Revisional Court while following the law laid down by the Hon'ble Supreme Court has rightly passed the impugned order in the following terms:-

8. *Perusal of the record, it reveals that instant crime/ FIR lodged under section 420/448/470/471/34 PPC by the applicant/complainant against the*

accused persons/respondents dishonestly induced the complainant/applicant to deliver the amount of Rs.26,00,000/- towards the sale consideration of Bungalow No.63/R, Block 6, PECHS, Karachi committed criminal house trespass and forgery for the purpose of cheating, prepared fake/forged documents and fraudulently used the sale agreement undertaking same as genuine. No doubt the documents/witness which are proposed to be produced by the complainant/applicant as agitated by the accused persons/respondents side, but prime facie the case in hand is of forgery with regard of documents, which could only be ascertained and justified by producing the subject documents through the concerned person in order to decide the matter on merits in light of the scheme of Criminal Administration of Justice.

9. *Besides to above, bare reading of section 540 Cr.P.C., it transpired that where evidence is essential for just decision of the case, it is obligatory upon the court to allow its production and examination. In this respect, I am fortified with the case law reported in 2004 SCMR 966, 1987 SCMR 886 and 2001 SCMR 308. Moreover, the accused persons/respondents will have ample opportunity to discredit the evidence on the touch stone of cross examination.*

7. In view of the above, no case is made out for interference in the impugned order, therefore, instant Criminal Miscellaneous Application is dismissed with no order as to cost.

JUDGE

Karachi, Dated:24.05.2019

Ayaz Gul