

# IN THE HIGH COURT OF SINDH AT KARACHI

## **Criminal Revision Application No.204 of 2011**

Present: **Mr. Justice Nazar Akbar**

Applicant : Masood Ahmed Abbasi  
Through Mr. Abdul Hafeez, Advocate.

### **Versus**

Respondent No.1 : Syed Nehal Ahmed. (Nemo).

Respondent No.2 : Hassan Imam Ghazi. (Nemo).

Respondent No.3 : The State,  
Through Ms. Rahat Ahsan, Additional P.G.

Date of Hearing : **17.05.2019**

Date of Decision : **31.07.2019**

### **JUDGMENT**

**NAZAR AKBAR, J.-** The applicant through this Criminal Revision Application has impugned the order dated **05.11.2011** passed in Special Case No.55/2005 whereby the learned Special Judge, Anti-corruption (Provincial), Karachi has been pleased to dismiss an application under **Section 540** of the Cr.P.C filed by the applicant.

2. To be very brief, the applicant is a complainant on whose complaint dated **21.5.2001** the Anti-corruption establishment after comprehensive enquiry on **17.9.2005** registered **FIR No.36/2005** against accused Hassan Imam Ghazi and others and submitted an interim challan on **31.10.2007** for offences under Section 409/217/420/34 PPC read with Section 5(2) Act-II, 1947. The final challan was submitted on **17.9.2009** and charge was framed on **30.10.2010**. Then prosecution witnesses were examined by the trial Court. When the evidence of prosecution was concluded, the

complainant noticed that several documents available with the prosecution have not come on record through the relevant witnesses. Therefore, the applicant/ complainant filed miscellaneous application under **Section 540** of the Cr.P.C and prayed for re-examination of PW-5 Gul Hassan Shaikh and PW-6 Haq Nawaz, Investigation Officer, for production of original documents which were received by them during investigation but the same were not produced at the time of recording of their evidence. The applicant claimed that their re-examination was essential for the proper and just decision of Special Case No.55/2005.

3. The prosecution was put on notice and no objection to the said application was brought on record from the prosecution side. However, the defense counsel has taken the plea that the application has been filed by the complainant who can only assist the prosecution and he cannot file such application to fill the lacuna in the prosecution evidence. It was further contended by the counsel for the accused that this being an old matter pending since 2005 the application for recalling the prosecution witnesses is liable to be rejected.

4. The learned trial Court after hearing learned counsel, dismissed the application by very short order for the following reasons:-

*I have considered the respective contentions of learned counsels and perused the record, it appears that the case is almost its conclusion as prosecution evidence is closed on 07.04.2011 and matter is fixed for statement of accused. The cited PW have already been examined at length and were subjected to cross examination.*

*Now at this belated stage, to advance the case of prosecution the power u/s 540 Cr.P.C can not be used as no witnesses can be summoned merely to fill in the lacuna by the prosecution/complainant.*

The perusal of impugned order shows that the trial Court has not only ignored the law and facts but also relevant judgments of the Supreme Court mentioned even in the memo of application.

5. Being aggrieved from the above order the applicant has filed instant Criminal Revision Application and raised the same contention which were not even mentioned/discussed by the trial Court in the impugned order though these contentions were available in written form in the memo of application. The learned Additional P.G has, however, only pointed out that the case was very old and the provisions of **Section 540** of the Cr.P.C are not designed to fill up the lacuna.

6. The record reflects that the prosecution from day one has been avoiding to proceed with the case on merit on the complaint filed by the applicant on being cheated by the management of the Citizens Cooperative Housing Foundation, Karachi. In this context it may be noted that complaint was filed on **21.5.2001** and the Anti-corruption establishment took more than four years to register the FIR on **17.9.2005**. Then after interim challan filed on **31.10.2007** instead of submitting final challan, the case was re-investigated and through the report under **Section 173** of the Cr.P.C request was made to the Special Court, Anti-corruption (Provincial), Karachi to discharge all the accused. Such report was accepted by the Court, however, it was challenged by the applicant/complainant in earlier **Cr. Misc. Application No.13/2009** before this Court which was allowed by order dated **24.2.2009** and the trial Court was directed to record the evidence and proceed with the matter in accordance with law. In this background the contentions of the counsel for the accused before the trial Court that the case is an old matter pertaining to the year 2005

even otherwise had no force since proceedings have been started on **09.5.2009** when final challan was filed after the order of this Court dated **24.2.2009** in Criminal Miscellaneous Application No.13/2009. Besides the above, prosecution has examined PW-5 on **19.2.2011** and PW-6 was examined on **19.3.2011** and the application under **Section 540** of the Cr.P.C was moved on **27.4.2011**. Therefore, even on facts the observations of trial Court that it was filed at a belated stage was not justified. The grounds on which the application was dismissed were already anticipated by the applicant and countered aptly in para-9 and 12 of the application.

7. The learned trial Court while dismissing the application under Section 540 of the Cr.P.C with the two short reasons reproduced above has failed to comment on the importance of the need for re-examining the witnesses. The criteria for deciding an application for additional evidence or recalling the witnesses is neither the stage of the case nor the fact that the witnesses have already been examined by the trial Court. It has been repeatedly held and discussed by the superior Courts that the provision of **Section 540** of the Cr.P.C has empowered the Court without any impediment to examine any witness at any stage of the case and even summon the witness who otherwise have not been brought before the Court including any person already examined by the Court or to re-examine him for the sole purpose to reach **“the just decision of the case”**. The Court has to examine only essential nature of the evidence proposed to be brought on record through the proposed witness or on re-examination of the witness called through the application under **Section 540** of the Cr.P.C. In the case in hand the applicant even in the memo of application has very elaborately discussed the importance of the documents which ought to have been produced by

the prosecution witnesses but have not been placed on record. The applicant was complainant and he was definitely going to be adversely effected by a willful failure of the prosecution to bring on record the material evidence against the accused party. Therefore, in the given facts of the case it cannot be said that there was any lacuna going to be filled on re-examining of the witnesses. In the case of **Anwar Mehmood vs. Abdul Khaliq and another** reported in **2011 SCMR 713** the Hon'ble Supreme Court has observed that *“complainant is not supposed to suffer for the fault of prosecution who was negligent in discharging duties and functions”*. In the case in hand as discussed in the preceding paragraphs the failure of the prosecution witnesses to bring on record relevant documents was definitely going to cause a prejudice to the complainant and, therefore, the complainant being aggrieved party by such conduct of the prosecution was competent to file the said application.

8. In view of the above discussion this Criminal Revision Application is allowed. The impugned order of trial Court is set aside and the application under **Section 540** of the Cr.P.C filed by the applicant is allowed. The R&Ps may be returned forthwith and the trial Court is directed to complete re-examination of the prosecution witnesses and decide Special Case No.55/2005 within three months from today and submit report of compliance of this order to this Court through MIT-II for perusal in chamber.

JUDGE

Karachi, Dated: 31.07.2019

Ayaz Gul