IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Criminal Revision Application No.D-23 of 2021

Present:
Mr. Justice Mehmood A. Khan
Mr. Justice Khadim Hussain Tunio

Applicant(s):	Hadi Bux through Mian Taj Muhammad Keerio, Advocate.
The State:	Through Mr. Shahnawaz Brohi, Special Prosecutor A.N.F.
Date of hearing:	14.9.2021
Date of decision:	14.9.2021
Date of reasons:	15.9.2021

O R D E R

KHADIM HUSSAIN TUNIO, J.- Through instant criminal revision application, the applicant has challenged the order dated 28.07.2021, passed by the learned 1st Additional Sessions Judge/MCTC-I, Hyderabad whereby application of the applicant in Special Case No. 216/2020 for calling CDR report concerning cell phones of the prosecution witnesses was dismissed.

2. Precisely, facts of the present case are that applicant was booked in Crime No. 12 of 2020, registered with Police Station Anti-Narcotics Force, Hyderabad for the offence punishable u/s 9(c) of the CNS Act. During trial, the applicant first filed an application through his advocate for the production of CCTV Footage of MCB Bank Sinjhoro where the applicant was arrested. Such application was allowed, however after some time, the applicant filed another application for the production of Call Data Record reports concerning the prosecution witnesses namely Inspector Naeem, Mohsin Ali and Asim Saleem as noted *supra*. This application was dismissed. Instant revision application challenges the validity of the same.

3. Mian Taj Muhammad Keerio, counsel for the applicant primarily argued that the Court, for safe administration of justice, was bound to allow the application for the production of CDR reports to establish the presence of the witnesses as they had dodged the same questions during cross-examination and that the learned trial Judge erred by holding that since the applicant had not taken the said ground in his 342 Cr.P.C statement, the same could not be used by him at a belated stage. In support of his contentions, counsel cited the case law titled ***Abdul Hamid Mian v. Muhammad Nawaz Kasuri (2002 SCMR 468), Ansar Mehmood v. Abdul Khaliq and another (2011 SCMR 713), Sikandar***

Zulqarnain v. Messrs Habib Bank Limited and 9 others (PLD 2016 Sindh 139), Sultan Ubaid-ur-Rehman v. The State and another (2017 PCrLJ 469), Ishtiaq Ahmed Mirza and 2 others v. Federation of Pakistan and others (PLD 2019 SC 675), Ali Raza alias Peter and others v. The State and others (2019 SCMR 1982) and ***Shafqat Masih and others v. The State and others (2021 MLD 1415)***.

4. Conversely, Mr. Shahnawaz Brohi, learned Special Prosecutor ANF supported the impugned order while arguing that the application was being filed by the applicant in order to cause delay in the conclusion of trial.

5. Having heard the counsel for parties and perused the material available on record.

6. Unlike the present case, if the Court believes that it is ***essential*** for some document to be produced, it may exercise its ***discretion***. However, when the element of discretion comes into play, it is not mandatory for a Court to always allow such applications merely because a document was not produced and could establish something. If the defence or prosecution has already been given ample opportunity to present their case to the level best, such an application may be refused as it can safely be assumed that it is being made to delay the process of justice. Merely pleading at a belated stage that the presence of prosecution witnesses needs to be affirmed would not be sufficient for allowing this application especially when no such plea was even taken as a defence at the time of the recording of 342 Cr.P.C statement of the accused/applicant. The ground of fair and impartial inquiry or trial has been placed atop of the grounds which otherwise is a guaranteed fundamental right within meaning of Article 10-A of the Constitution as well whole edifice of **Administration of Justice** depends upon assurance of fair trial. However, fair trial does not mean that a Court is to allow excessive opportunities to an accused to fill in the lacunas that he otherwise had ample opportunity to do at an earlier stage. By doing so, the Court no longer remains *impartial* and provides undue benefit to one party while making the other suffer detriment. The legislature(s) have kept *equity* for both *prosecution* and *defence*, without any discrimination as the *fair trial* is not limited to defence alone. The Hon'ble Apex Court, in the case of ***Muhammad Naeem and another v. The State and others (PLD 2019 Supreme Court 669)*** has made stringent observations that:-

> "In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. **The judge should not enter the arena so as to appear that he is taking sides.** The court cannot allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence

> tendered by them. Any such step would tarnish the objectivity and impartiality of the court which is its hallmark. Such favoured intervention, no matter how well-meaning strikes at the very foundations of fair trial, which is now recognized as a fundamental right under Article 10-A of our Constitution."

7. Usually, prosecution and defence both are supposed, rather *believed*, to assist the court in reaching to a **just** decision which duty shall always require a fair attitude without an intention to necessarily prove charge or defence which intention some time may include omission to produce/examine material witnesses of incident. However, since the law makers always knew that the just decision cannot be left at whims and wishes of parties, therefore, to enable the Courts to do complete justice i.e **'just decision'** the legislatures have provided exceptions. However, a general request to call for CDR report without detailing the necessity thereof in reaching a **just decision** is always sufficient for declining such a request. As far as the calling of CDR report itself is concerned, it is pertinent to mention that the application failed to point out exact transcripts of the calls needing determination or the part that would be taken in as evidence. In this regard, the Hon'ble Apex Court has been pleased to observe in the case titled ***Mian Khalid Perviz v. The State through Special Prosecutor ANF and another (2021 SCMR 522)*** that:-

> "A perusal of these documents would reveal that these were general in nature. Neither relevant entries were pointed out in the data nor the voice record transcripts were produced which, if available, could have made a point. There is nothing on the record in this regard to help out the Appellant in support of his allegations made in defence. Mere production of CDR DATA without transcripts of the calls or end to end audio recording cannot be considered/used as evidence worth reliance. **Besides the call transcripts, it should also be established on the record that callers on both the ends were the same persons whose calls data is being used in evidence.**"

8. Pursuant to the above discussion and circumstances, instant criminal revision application was dismissed by our short order dated 14.09.2021. These are the reasons for the same.

JUDGE

JUDGE