IN THE HIGH COURT OF SINDH, AT KARACHI

Cr. Revision Application No. 29 of 2021

Present:
Ahmed Ali M. Shaikh, CJ
and Yousuf Ali Sayeed, J

Applicant	:	Ms. Rubina Mir, through, Khwaja Shamul Islam, Advocate
Respondent	:	The State, through Firdous Faridi, Special Prosecutor, ANF.
Date of Hearing	:	01.06.2021

ORDER

Yousuf Ali Sayeed, J - The instant Revision impugns the Order made on 10.11.2020 by the Special Court-I, (CNS), Karachi (the "**Trial Court**") in Special Case No.258/2012 (the "**Underlying Case**"), whereby the Application filed by the SPP for Pakistan Customs under S. 540 Cr. P.C. (the "**Subject Application**") was allowed and two prosecution witnesses, namely PW-2, Azhar Mehdi, the Investigating Officer, and PW-5, Shamim Akhtar, the Seizing Officer (collectively the "**Witnesses**"), were recalled for recording their further evidence and production of documents, with the relevant portion of the impugned Order reflecting the reasons of the Trial Court reading as follows:

> "7. It is to be noted that on 09.10.2010 Seizing Officer on suspicion hold the container No. AMFU-3082330 shipping line-C CMS-CGM, Allama Iqbal, Lahore and during checking he recovered 226 kilograms cocaine thereby the FIR of present case was registered.
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> 8. The perusal of record shows that the evidence of PW-5 was recorded in absence of SPP for Pakistan Custom though the deposition indicates her representative but case diary dated 02.01.2012 reveals absence of SPP for Pakistan Customs. The application for adjournment is also available on record which show the demise of father of learned SPP Pakistan Customs though diary dated 28.12.2012 indicates that the evidence of PW-2 was recorded in presence of SPP for Pakistan Custom, however the contents of Criminal Transfer Application No.03/2012 indicates the same version of prosecuting agency as have been agitated in instant application.

9. It is to be advantageous to reproduce the provision of section 540 Cr.P.C.

> 540. Power to summon material witness or examine persons present. Any court may, at any stage of any inquiry, trial or other proceeding under this Code. Summons 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.

10. It is to be noted that section 540 Cr.P.C confer wide powers upon the court in order to ascertain the truth and arrive at a just decision of the case and the court at any stage of the case can summon, examine or recall and re-examine any person already examine, therefore in such a situation, the documents which intend to be produced by above witnesses are essential for a just decision. I am very much respects of the case laws relied upon by the learned defence counsel but same quite distinguishable from the facts and circumstances of the present case, therefore in the interest of justice application in hand is allowed with direction to bring both PWs on the next date of hearing, without fail for recording their further evidence and production of the documents, subject to final chance.

11. In view of what has been discussed above, the application under Section 540 Cr.P.C is allowed, order accordingly."

2. Learned counsel for the accused/Applicant submitted that the impugned Order was bad in law as the Trial Court had thereby enabled the prosecution to fill in the evidentiary gaps in its case against the accused, that too after considerable passage of time. He submitted that the Witnesses had appeared as far back as the year 2012, when they had been examined and crossed, and argued that the documents which the prosecution now desired to produce had been available at the relevant time and were either withheld by design or not put into evidence due to ineptitude, but, in either case, to allow the Witnesses to be recalled at this stage for further examination and production of such documents was unwarranted. He stated that the Subject Application had been pending since 2012 without being properly pursued/pressed, which

according to him demonstrated that the prosecution desired to prolong the case so as victimise the Accused by keeping them under a cloud of uncertainty. He emphasised that such a course would further impede the trial, which had been lingering over a protracted period, to the detriment of the Applicant and other accused persons.

3. Conversely, the learned Special Prosecutor argued that the impugned Order had been correctly made as incriminating documentary evidence in the hands of the prosecution had been wrongly shut out at the time that the Witnesses had earlier taken the stand, as the then Presiding Officer of the Court had been hostile to the prosecution and refused to accept such documents notwithstanding that they were material for the just and correct decision of the case. It was pointed out that in view of the attitude of the then Presiding Officer, Criminal Transfer Application No.03/2012 had been filed before this Court on the same grounds, which had been allowed vide an Order dated 08.02.2012, with the Underlying Case then being transferred to the court of Special Judge CNS-II, Karachi, before being transferred back to the Trial Court in the year 2014. On the point of delay, it was emphasised that the Subject Application had been filed on 16.10.2012, but the then Presiding Officer has passed an order thereon that the same would be heard after disposal of Criminal Miscellaneous Application No.76/ 2012 which had been filed by the Accused before this Court under section 561-A Cr.P.C, seeking quashment, which came to be decided on 28.09.2018, with notice of the Subject Application then being issued on 23.10.2018

4. We have heard and considered the arguments advanced, with it being apparent that the Subject Application proceeds on the basis that material documents vital for proper adjudication of the Underlying Case were shut out by the then Presiding Officer at the time that the Witnesses had first appeared.

5. As it transpires, this was also the main thrust of the argument advanced for the purpose of Criminal Transfer Application No.03 of 2012 decided by this Court, with transfer similarly being sought on the basis that the then Presiding Officer of the trial Court had been inimical to the prosecution and not admitted certain documents on which the prosecution sought to rely and also directed the Witnesses into the witness box for purpose of recording their evidence albeit that the Special Prosecutor had not been in attendance on the relevant date, having applied for adjournment due to a bereavement in the family. Such plea was accepted for that purpose by this Court, which was pleased to allow the Transfer Application vide an Order 08.02.2012.

6. Turning to the argument that the Trial Court had erred in allowing the Subject Application as it facilitated the prosecution in filling in the gaps in the case against the accused to their detriment, it merits consideration that the criminal justice system is inquisitorial rather than adversarial, hence it is the duty of the Court to reach at the just decision of the case and any piece of evidence that is considered essential for that purpose has to be brought on record, subject of course to any challenge as to its veracity by way of cross-examination. The Judgment of the Lahore High Court in the case reported as Abdul Latif Aasi v. The State 1999 MLD 1069 (authored by Asif Saeed Khan Khosa, J, as he then was, later the Honourable CJP) squarely addresses this aspect, with it having been held as follows:

> 7. The main plank of the petitioners arguments before me has been that in our adversarial system of justice there was no scope for an inquisitorial approach adopted by learned Trial Court through the impugned order passed by it. However, the learned counsel for the petitioner have failed to point out any statutory sanction for observing that our system of justice is adversarial and not inquisitorial. If one looks at the history of our judicial system one may notice that this concept has gradually developed therein

> as a rule of prudence and practice mainly as regards civil litigation wherein the parties to a lis are required to lay their respective claims before the trial Court and then substantiate, the same through evidence to be led by them. There are indications available in the Code of Civil Procedure which support the perception that civil litigation in our system is, by and large, adversarial in nature. But even there the inherent and general powers of the court, and even some specific powers, sometimes cut across that concept. A general acceptance of that concept in the civil litigation is, even otherwise, understandable. In a civil lis, more often than not, it is the parties to the lis alone who are interested in its outcome and effect. This cannot be said to be true for a criminal case wherein an offence committed by an individual is considered to be an offence not only against his victim but also against the whole society and the State. Thus, in a criminal case an intentional or an un-intentional lapse on the part of the complainant, the Investigating Officer or the prosecuting counsel is not to be allowed to stand in the way of a Trial Court to rectify that lapse by calling in evidence on its own if such evidence can have a bearing on the determination of guilt or innocence of the accused person. Such a power has to be conceded to a Criminal Court in the larger interest of the community at large. Looked at in this context the stage of a trial appears to be irrelevant to an exercise of such a power of the Court and the only factor relevant to the exercise of such a power cannot be other than the relevance of the evidence called."

7. In considering the argument raised that the impugned Order had facilitated the prosecution in allowing it to fill in the gaps in its evidence, reference may also be made to the judgment of the Shariat Bench of the Honourable Supreme Court in the case reported as Muhammad Azam v. Muhammad Iqbal and others PLD 1984 Supreme Court 95, where it was inter alia held that:

> "It needs to be observed that for purpose of acting under section 540, Cr.P.C. (whether the first or second part), it is permissible to look into the material not formally admitted in evidence, whether it is available in the records of the judicial file or in the police file or elsewhere. The perusal of both these records would show that if evidence, in connection with the items already noticed, would have been properly entertained the reasoning and decision of the learned two Courts might have been different.

> Sometimes apprehension is expressed that any action by the trial Court under section 540, Criminal Procedure Code would amount to filing the gaps and omissions in the version or evidence of one or the other party. It may straightaway be observed that in so far as the second part of section 540 goes, it does not admit any such qualification. Instead, even if the action thereunder is of the type mentioned, the Court shall act in accordance with the dictates of the law. In fact the Court has no discretion in this behalf. It is obligatory on it to admit evidence thereunder if it is essential for the just decision of the case."

8. In that very judgment, the learned Shariat Bench went on to observe as follows:

> "In yet another case Rashid Ahmad v. The State (1), this Court made it more clear that a criminal Court is fully within its rights in receiving fresh evidence even after both the sides have closed their evidence and the case, is adjourned for judgment, for, till then the case is still pending. The only question therefore, is as to whether in the interest of fairness further opportunity should have been given to the accused; and, it was held that there is no bar to the taking of additional evidence in the interest of justice, at any stage of inquiry or trial as provided by the provisions of section 540, Cr.P.C. In these cases if the question regarding so-called filling of the gaps would have been raised more squarely, the answer in view of what has been noticed above would have been the same as already rendered; namely, that if it is essential for the just decision of the case, then the same is the command of the law under the second part of section 540, Cr.P.C. It would not be possible to canvass that when the action under the said provision amounted to so-called filling of a gap, the Court would for this reason, avoid its duty to admit the additional evidence."

9. Under the given circumstances, in view of the aforementioned precedents, no interference is warranted and the Revision, being devoid of merit, stands dismissed accordingly.

10. However, in order to alleviate the anxiety of the Applicant as to delay of the trial of the Underlying Case, the Trial Court is directed to proceed expeditiously therewith so as to conclude the exercise without further delay, preferably within a period of three (3) months from the date of announcement of this Order.

JUDGE

CHIEF JUSTICE

Karachi.
Dated: