ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Cr. Revision Application No.44 of 2017

Date	Order with signature of Judge

Present: Mr. Justice Salahuddin Panhwar
Mr. Justice Muhammad Saleem Jessar

1. For orders on MA No.5313/2017 (U/A)
2. For orders on MA No.3055/2017 (Ex/App)
3. For hearing of Main Case

23-05-2017

Mr. Muhammad Ishaq Memon, Special Prosecutor ANF
Mr. Shah Imroz Khan, Advocate for Respondent No.1

Salahuddin Panhwar, J:- Through instant Criminal Revision Application applicant (Deputy Director Law, RD ANF Sindh) has challenged the order dated 11.02.2017 whereby application under Section 540 Cr.P.C was declined which was moved by the Special Public Prosecutor for correction in the cross-examination of PW (Complainant Abid Raza Shah) and alternative prayer for re-examination of that witness to clarify the position that the statement, which is recorded as *"It is correct to suggest that he demanded huge amount from accused Naimatullah for release of accused Mianjee"*.

At the outset, counsel for the Applicant contends that such answer was not replied by the witness, in fact it was answered in negative, however, brought on record as correct to suggest. He relies upon 1994 CLC 1769 (Karachi).

In contra, learned counsel for Respondent No.1 has relied upon 2003 P Cr.LJ 624 (Federal Shariat Court).

At the outset, it is conducive to refer the impugned order:-

> *"...The plain reading of Section shows that the court has power to summon material witness, recall and re-examine any witness already examined, or examine any person present in the Court. This section did not authorize the Court to call the Witness to made correction in the replies given by the witness in cross examination to the question of Advocate for the accused.*
>
> *That there is no provision in the Criminal Procedure Code, or the Qanoon-e-Shahadat Order 1984, that a witness can be re-called for examination about a mistake made by him, while appearing at trial. Even if it was in-advertant. The authors of the law in their wisdom had not added such a provisions because that would have amounted to give the*

> *license to the prosecution to request for re-calling any witness for correcting any portion his statement detriment of the prosecution".*

There can be no denial to the legally established principle of law that Court is *always* competent to summon or *recall* a witness for purpose of *examination* or *re-examination* but such *powers* are not available to let a party get his *given* statement reversed or *contradicted* in name of clarification *even.* The *party* legally cannot be allowed to enjoy privilege to go through *evidence* and then to come forward for re-examination of his *own* witness even in the name of clarification. Worth to add that the Chapter-X of the Qanun-e-Shahadat Order requires *full* attention of the Court while conducting examination or re-examination of a *witness* even the Court has to examine *relevancy* of every single statement and *suggestion*. Thus, legally presumption of *correctness* is attached to what the court records because the Court is believed to be *attentive* enough to properly record the statement (conduct examination and re-examination) and such presumption cannot be *disturbed* unless strong circumstances are available to establish *otherwise.* The Court *however* has not been left *toothless* from exercising such *powers* at any stage if same is necessary for *just decision* which *powers* even can well be exercised without an application. Reference may be made to the case of *Shah Zain Bugti v. State* PLD 2013 SC 160.

No doubt, Qanun-e-Shahdat Order, 1984 is applicable in criminal or civil administration of justice, however, facts can be varied in circumstances and it is settled principle of law that civil cases are to be decided on the rule of probability, whereas in criminal cases benefit of doubt is a golden principle. Here, it is necessary to add that **'clarification'** means ***"to make (something) easier to understand"*** hence if evidence or a *part* thereof is *ambiguous* the Court can exercise such powers because conduct of *examination* is meant to **reach to the truth**. The Article 161 of

the Order vests *absolute* powers and jurisdiction in the Court to get things *explained* or to get the doubt *removed* but this will not include allowing a party to make his *own* statement contradicted. Here reference to relevant portion of the case of *Anwar Ahmed v. Nafis Bano* 2005 SCMR 152, being relevant, is made hereunder:

> "38. …. It is but a known and consistent principle of law , not so far deviated from , that a Court has unfettered and absolute power to call or recall a witness at any stage **in order to get the things explained or get the doubt removed.**

We *however* would not hesitate in saying that any part of deposition cannot be read in isolation and evidence as whole shall be taken into consideration. It is the trial Court to decide the fate of the case and while doing so, can competently examine a *particular* statement with reference to evidence as a *whole* and can competently form an *opinion* with regard to that *particular* statement, as was observed in case, relied by learned counsel for petitioner wherein *too* evidence as a *whole* was considered without recalling or re-examining the witness. The observation in this case ended with:

> **"This can be the only logical interpretation of the last sentence in the above-quoted portion of the cross-examination; otherwise this last sentence would make no sense and would not properly co-relate with the earlier portion of above-quoted cross-examination."**

Thus, reference to such case was also not of any help for the petitioner for *two* reasons *firstly* it was observation in *Civil Administration* and *secondly* the opinion with regard to *inadvertent* mistake was result of considering evidence as a whole and not by allowing re-examination. Things shall stand *rather* easy with reference to relevant portion of the case of *Anwar Ahmed v. Nafis Bano* supra which is:

> "27. Adverting to the genuineness and due execution of receipt Ex.6/4, dated 7.6.1971, I find nothing wrong on the part of the learned Single Judge, who noticed traces of writing with ink on the original document having been removed by chemical action

> and typing out the substance on the receipt leaving the signature of the respondent intact. After noticing such discrepancy, learned Judge had called upon the appellant to appear before him when he was confronted with the document. Admittedly, he was unable to explain the traces of writing with ink on the document, except saying that it was given to him by the vendor and he had produced the same in the rent proceedings against him. Serious exception was taken by the learned Senior Advocate Supreme Court that the appellant was called for confrontation with this document in the absence of his counsel but, strictly speaking, a Court is always competent to examine and re-examine a witness in terms of Article 161 of Qanun-e-Shahadat, 1984 to satisfy its conscience to find out the truth or otherwise of a statement or a document. **Even without calling the appellant to explain the discrepancy, I think, the Court was competent to look into the document and to comment upon its true nature or otherwise, as , such power is inherent in every Court, much less the High Court..**

We would add that such power to form an *opinion* about any particular statement or portion of the evidence can well be exercised in *both* criminal and civil administrations which *however* would require existence of an **ambiguity** requiring an *explanation* either to find the truth or to reach a proper decision but shall not be available to get excluded or inserted the word **'not'** in a given statement particularly in Criminal Administration of Justice which *permits* acquittal of **'Ten guilty'** even while avoiding possibility of chances of **an innocent** being convicted if a *single* circumstance (material dent) leaves a room in satisfying phrase **beyond reasonable doubt** . In short, the provision of Section 540 of the Code would not be available for *prosecution* to get the word **not** inserted or excluded from a statement of a witness hence impugned order does not appear to be suffering from any *illegality* or *jurisdictional* defect.

In this case two brothers have been implicated with regard to recovery of 2 k.g *Chars;* one is behind the bars and the second is on bail and the case is yet to be adjudicated, pending since two years. It is not a *proper* stage to make any comment upon such *portion* of evidence that whether this was an **admission** or not of the complainant or an *inadvertent* mistake of the Court? Because the Criminal Court has to sift the grain

from chuff. Thus, trial Court at the time of judgment shall examine the evidence as a whole and sift the grain from chuff, as well decide the fate of evidence brought on record including contradiction.

In terms of above, instant Revision Application is disposed of.

JUDGE

JUDGE

Barkat Ali/PA