



former is absolute prerogative of the parties i.e prosecution and defence and their discretion to examine; with-hold or give-up any witness or document cannot be questioned but the Court can competently consider the consequences thereof. However, the *later* is an exception. In a case of Malik Naseer vs. Wishno Mal and another (2014 P.Cr.L.J. 1496) (authored by me) it was observed as:-

***“It is noteworthy to further elaborate that provision of section 265-F of the Code provides a mechanism for the prosecution and defence (accused) to get witness(s) or document(s) exhibited at their own while by provision of section 540 Cr.P.C. is not limited for the benefit of any of either sides but it is aimed for just decision.”***

However, *normally* the exception to call a witness as a **court-witness** would be available in certain situations where witness cannot be *otherwise* brought before the Court else the prerogative, provided by Section 265-F of the Code shall stand prejudiced. Guidance is taken from the case, reported as PLD 2013 SC 160. The operative part whereof reads as under:-

***“8. .... It enables the Court rather in certain situations imposes a duty on it to summon witnesses who could not otherwise be brought before the Court. (under lining is mine).***

I would further add that to ensure **‘just decision’** is not only responsibility of trial Court but of **‘appellate Court’** too. Therefore, parties may seek production of **additional evidence** but the jurisdiction, available with trial court, to suo-moto call / summon a witness, is not available with appellant Court.

4. Reverting to merits of the case, the perusal of impugned judgment, passed by appellate court, reflects that case was remanded back with direction to examine *particular* witnesses. This has been

done without any application from prosecution. Needless to add that in case any witness was required to be examined, specific provision is available with all parties to move such application but that remedy was not availed therefore it was not within domain of the learned appellate court to order for summoning / examination of particular witnesses which, *otherwise*, party (prosecution) itself avoided nor the defence so intended. Thus, the learned appellate court *prima facie* traveled beyond its jurisdiction which the procedural law never vested in it hence impugned judgment cannot *legally* sustain. Accordingly impugned judgment is set aside. Appellate court shall pass judgment after hearing the parties. Learned District and Sessions Judge shall withdraw that appeal from 9<sup>th</sup> Additional District Judge Karachi West and transfer to any other Additional Sessions Judge, for hearing. Needless to mention that since applicant was granted bail by the appellate court, hence that order would remain intact, till decision of appeal.

**J U D G E**

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