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Judgment Sheet

IN THE LAHORE HIGH COURT

MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

Criminal Misc. No.1885-M of 2025
(Muhammad Rizwan and another v. The State and others)

JUDGMENT

Date of hearing:	24.03.2025
Petitioners by:	Rana Shakeel Ahmad, Advocate.
State by:	Mr. Waheed Rafique, Deputy District Public Prosecutor with Safdar, ASI.
Respondents No. 2 to 5 by:	Rao Muhammad Arif, Advocate.
Amicus curiae:	Mehroze Aziz Khan Niazi, Advocate.

Through this petition, filed under Section 561-A of the Code of Criminal Procedure 1898 (“**Code**” or “**Cr.P.C**”), the petitioner has assailed the *vires* of order dated 20.02.2025 passed by learned Additional Sessions Judge, Khanewal (“**Court of Sessions**”), whereby the learned Additional Sessions Judge set aside order dated 09.12.2024 passed by learned Senior Civil Judge (Criminal Division), Khanewal (“Senior Civil Judge (Criminal Division), Khanewal” is hereinafter referred to as the (“**Trial Court**”); while “order dated 20.02.2025” is referred to as the (“**impugned order**”)).

2. The synoptical facts and circumstances, relevant, yet shorn of unnecessary details, as are necessary for deciding this *lis* are that complainant Muhammad Imran (“**petitioner No.2**”) got registered crime report bearing FIR No. 150 of 2023 dated 04.05.2023, for offences under Sections 506, 341, 148 and 149 of the Pakistan Penal Code 1860 (“**PPC**”), registered with Police Station Makhdoom Pur (“**crime report**” or “**FIR**”). Succinct allegations, as delineated in the crime report, are that on 16.04.2023 at 03:57 p.m., petitioner No. 2, while carrying wheat on a cart, was heading home while respondent No. 2 to No. 5, armed with “*Sota*” excluding Saeed Ahmad who was armed with “hatchet”, encircled him and threatened that they would not let

him/petitioner No. 2 pass through. As a result thereof, Muhammad Rizwan (“**petitioner No. 1**”) called on police helpline No. 15 from his cell phone bearing No. 0345-5973276 on 16.04.2023 at 03:57 p.m.

3. Investigating officer, after completion of all codal formalities, submitted *challan*/police report under Section 173 of the Code before the learned Trial Court; however, failed to cite the name of petitioner No. 1 in the calendar of witnesses in column No. 6 of the *challan*. Formal charge was framed on 07.11.2023, and thereafter, trial commenced. Examination-in-chief of petitioner No. 2/complainant and Saeed Ahmad (“**PWs**”) was recorded by the learned Trial Court on 24.04.2024, and the case was adjourned on the request of learned defence counsel. On the next date of hearing, both PWs were present but adjournment was sought by the defence. Subsequently, the presiding officer of the learned Trial Court was on leave and on his return, an application for dispensation of personal attendance of accused Saeed was filed before the learned Trial Court, which was accepted. Pertinently, on the same date, i.e., 26.06.2024, an application under Section 540 of the Code was filed by petitioner No. 1, stating therein that he is a material witness of the prosecution case as his name finds mentioned in the crime report, however, due to inadvertence of the investigating agency, his name was not mentioned in the calendar of witnesses in the *challan*.

4. After hearing arguments of the parties, the learned Trial Court accepted the application *vide* order dated 09.12.2024, and permission was granted to petitioner No. 1 to appear as a witness in the case. Aforementioned order of the learned Trial Court was challenged by respondents No. 2 to 5 in criminal revision, filed under Section 435 and 439-A of the Code, before the learned Court of Sessions. The revision petition was accepted *vide* impugned order, hence this petition.

5. Arguments heard; Record perused.

6. In a magisterial trial, after taking cognizance of an offence on receipt of *challan*, the magistrate supplies copies of all the relevant statements and documents to the accused under Section 241-A of the Code. Once copies are supplied, formal charge is framed under Section 242 of the Code, to

which the accused either pleads guilty and can be straightaway convicted¹ or pleads his/her innocence, after which prosecution evidence is called.² Section 244 of the Code stipulates in subsection (1) thereof that:

*‘If the Magistrate does not convict the accused under the preceding section or if the accused does not make such admission, the **Magistrate shall proceed** to hear the complainant (if any), **and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence**’ (emphasis supplied).*

It is evident from perusal of the aforementioned provision that the legislature, while explicitly using the term “shall”, has made it compulsory for all the magisterial courts to take in all evidence of the prosecution and defence. The term “shall”, as per the law laid down in “*The Collector of Sales Tax, Gujranwala v. Super Asia Mohammad Din and Sons*”,³ normally connotes that the legislature wants to brand any provision as mandatory. In “*Province of Punjab v. Murree Brewery Company Limited (MBCL)*”,⁴ the Honourable Supreme Court of Pakistan has articulated that the criterion for distinguishing whether a legislative provision is mandatory or directory lies in the ascertainment of the legislative intent underlying its enactment. Legislative intent can be determined in a few ways. Firstly, the legislature has, in Section 241 of the Code, also used the term “shall” in the following words:

*‘The following procedure **shall** be observed by Magistrate in the trial of cases’ (emphasis supplied).*

This is self-explanatory and does not need further explanation. Secondly, the legislature has, besides the provision of Section 244 of the Code, also inserted Sections 94 and 540 in the Code. Powers under Section 94 of the Code can be exercised at any stage of “any proceedings”⁵ where the Court conducting the proceedings, inquiry or trial, as the case may be, considers the production of a document or other thing, i.e., an object,⁶ necessary. However, while exercising such powers, the learned Court can only summon such a person to

¹ See Section 243 of the Code.

² See Section 244 of the Code.

³ 2017 SCMR 1427.

⁴ 2021 SCMR 305.

⁵ See “*Sultan alias Panun v. The State*” (2025 LHC 825).

⁶ See “*Sultan alias Panun v. The State*” (2025 LHC 825).

produce the document or other thing in whose possession or power such a document or other thing is believed to be. Likewise, Section 540 of the Code enables the learned Trial Court to, at any stage of an inquiry, trial, or other proceedings under the Code: (a) summon any person as a witness; (b) examine any person in attendance, though not summoned as a witness; or, (c) recall and re-examine any person already examined as a witness. Although this part of Section 540 of the Code is discretionary, the second part of the provision is mandatory and casts a duty upon the learned Trial Court to exercise the powers where it appears that the evidence of the person in question is essential for a fair and just decision. This power, akin to the power under Section 94 of the Code, can be exercised at any stage, even before the production of defence evidence. In addition to the above, the legislature has also incorporated Article 161 in the Qanun-e-Shahadat Order 1984 (“QSO”), which provides that:

‘The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant, and may order the production of any document or things and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question’.

Similarly, Rule 2 of Chapter 1-E, Volume III of the Rules and Orders of the Lahore High Court pertains to the “Duty of Court to elucidate facts” and reads as follows:

*‘a Judge in a Criminal trial is not merely a disinterested auditor of the contest between the prosecution and the defence, but it is his duty to elucidate points left in obscurity by either side, intentionally or unintentionally, to come to a clear understanding of the actual events that occurred and to remove obscurities as far as possible. The wide powers given to the court by [Article 161 of the Qanun-e-Shahadat, 1984] ***[...] should be judiciously utilized for this purpose when necessary’.*

The legislative intent, as observed in “*Sajid Mehmood v. The State*”,⁷ behind enacting these provisions is to ensure fair trial and equal opportunity are given to both the prosecution and the accused. It ought not to be out of place to observe here that the insertion of provisions like Sections 94, 244, 265-F

⁷ 2022 SCMR 1882.

and 540 in the Code or Article 161 of QSO, or Rule 2 of Chapter 1-E, Volume III of the Rules and Orders of the Lahore High Court for that matter, is because the criminal justice system, particularly in relation to criminal trials, is inquisitorial in nature as opposed to adversarial⁸. The purpose of holding a criminal trial is to ensure that innocent people are acquitted, while only the guilty are incarcerated.⁹ Therefore, in addition to prosecution evidence and defence evidence, the legislature has granted power to the learned Trial Court to summon such a person as a witness, irrespective of whether any statement under Section 161 of the Code of such a person is recorded or otherwise.¹⁰ Regarding belated invocation of Section 540 of the Code, it needs no reiteration that the Honourable Supreme Court of Pakistan in “*Muhammad Azam v. Muhammad Iqbal*”¹¹ held that it is mandatory for the learned Trial Court to summon evidence if it is essential for a fair and just decision and in “*Abdul Latif Aassi v. The State*”¹² it was held that any delay in this regard is immaterial if evidence is necessary for securing the ends of justice. Further, it is trite that no application needs to be filed by either side for invoking jurisdiction under Section 540 of the Code because:

*‘calling of additional evidence is not always conditioned on the defence or prosecution making application for this purpose but it is the duty of the Court to do complete justice between the parties and the carelessness or ignorance of one party or the other or the delay that may result in the conclusion of the case should not be a hindrance in achieving that object’.*¹³

In “*Chairman, NAB v. Muhammad Usman*”;¹⁴ “*Nawabzada Shah Zain Bugti v. The State*”;¹⁵ “*Ghulam Rasool Shah v. The State*”;¹⁶ the Honourable Supreme Court of Pakistan held that the role of the Court while exercising powers under Section 540 of the Code is inquisitorial where it endeavoured to discover the truth which was suppressed by either party. Resultantly, it is

⁸ See “*Khuda Bux v. The State*” (2024 PCr.LJ 2014 Sindh); “*Zaheer Ahmed v. Judge, Special Court*” (PLD 2023 Lahore 528); and, “*Ch. Muhammad Anwar v. Judge Accountability Court No. 4, Lahore*” (2021 MLD 648 Lahore).

⁹ See “*Sultan alias Panun v. The State*” (2025 LHC 825).

¹⁰ See “*Sajid Mehmood v. The State*” (2022 SCMR 1882).

¹¹ PLD 1984 Supreme Court 95.

¹² 1999 MLD 1069 Lahore.

¹³ See “*The State v. Muhammad Yaqoob*” (2001 SCMR 308).

¹⁴ PLD 2018 Supreme Court 28.

¹⁵ PLD 2013 Supreme Court 160.

¹⁶ 2011 SCMR 735.

concluded that the provision of Section 244 of the Code is mandatory and the learned Trial Court is under a bounden duty to take all such evidence in support of the prosecution, as well as the defence;¹⁷ furthermore, the learned Trial Court should accept evidence, in addition to that presented by the prosecution with the *challan* in the shape of witnesses and documents it intends to reply upon, where the same is essential for a fair and just conclusion, for securing the ends of justice, irrespective of delay. The only condition precedent being that the copy of statement under Section 161 of the Code of such a witness, if the same is recorded by the investigating agency, should be supplied to the accused, so that he can exercise his right to cross-examination.

7. The material available on record was examined in light of the jurisprudence expounded above and it was observed that the name of petitioner No. 1 finds mention in the crime report as an eyewitness to the occurrence and his specific role is making a call on the police helpline No. 15. As a consequence thereof, the testimony of petitioner No. 1 is of paramount importance for securing the ends of justice for the obvious reason that he, being an eyewitness, can shed light on the material particulars pertaining to the occurrence and assist the learned Trial Court in ascertaining all the relevant facts surrounding call made to police helpline No. 15.

8. The upshot of the deliberation made hereinabove is that the impugned order is fraught with serious infirmities and flaws as the learned Additional Sessions Judge while passing the impugned order, instead of proceeding in accordance with safe principles of administration of justice, has acted with impulse, so the same is based on misinterpretation and misapplication of law. Consequently, this petition is **accepted**; the impugned order passed by the learned Additional Sessions Judge is **set aside**; and, order dated 09.12.2024 passed by the learned Trial Court, whereby the application filed by petitioner No. 1 under Section 540 of the Code was allowed, is **restored**.

¹⁷ It was held in “*Hakam Deen v. The State*” (PLD 2006 Supreme Court (AJ&K) 43) that the provisions of Chapter XX (Sections 241 to 250-A) of the Code are mandatory.

9. Before parting ways with this order, it is clarified that the observations enumerated hereinabove were made only to the extent of this petition and shall have no bearing on the trial, which **shall** be concluded by the learned Trial Court purely on merit. It is also noticed by this Court that formal charge was framed on 07.11.2023, however, the trial has not been concluded despite a lapse of over one year and four months. Given the situation, the learned Trial Court is directed to conclude the trial of the case within **two months**, positively, after receiving the certified copy of this order under intimation to the Deputy Registrar (Judicial) of this Court.

(MUHAMMAD JAWAD ZAFAR)
JUDGE

*Gulfam/**

Approved for Reporting

JUDGE