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JUDGMENT SHEET
LAHORE HIGH COURT
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

Criminal Revision No. 187/2023

Rana Aamir Ijaz
Vs.
The State and others

JUDGMENT

Date of hearing	15.10.2024
For the Petitioner:	Mian Babar Saleem, Advocate, assisted by Sheikh Usman Ali, Advocate.
For the State:	Mr. Adnan Latif Sheikh, Deputy Prosecutor General.
For the Complainant (Respondent No.2):	Mr. Muhammad Shams-ul-Haq Dogar, Advocate.

Tariq Saleem Sheikh, J. – On 04.02.2022, the Special Judge, Anti-Corruption, Multan, indicted the Petitioner and nine others in case FIR No. 7/2021, dated 1.3.2021, registered at Police Station ACE Multan for offences under sections 420, 467, 468, 471, 109 PPC and section 5(2) of the Prevention of Corruption Act, 1947. After framing the charge, the Special Judge summoned prosecution evidence and recorded the testimonies of three witnesses, Mst. Azra Parveen (PW-1), Rana Iftikhar Ahmad Khan (PW-2), and Talha Abdul Rehman Khan (PW-3). While all the accused cross-examined the witnesses, the Petitioner sought repeated adjournments on various pretexts. On 7.1.2023, the Special Judge granted him a “last opportunity” to cross-examine the witnesses, subject to payment of Rs.10,000/- as diet money because they came from Islamabad for every hearing. The Petitioner did not pay the amount. On 18.3.2023, he again failed to produce his counsel for the cross-examination of the prosecution witnesses. Consequently, the Special Judge struck off his right to cross-examine them.

2. Through this petition under sections 435/439 of the Code of Criminal Procedure, 1898 (Cr.P.C.), the Petitioner has challenged the Special Judge's order dated 18.1.2023 (the "Impugned Order") before this Court.

3. This petition raises the following two questions of law:

- (i) Was the Special Judge's direction to the Petitioner to pay Rs.10,000/- to the prosecution witnesses lawful?
- (ii) Could the Special Judge lawfully strike off the Petitioner's right to cross-examine the prosecution witness, even if he was using dilatory tactics and refusing to proceed with the cross-examination?

I would address these questions *seriatim*.

Diet money

4. Witnesses play a vital role in the administration of justice. Order XVI of the Code of Civil Procedure 1908 contains detailed provisions for the summoning and attendance of witnesses in civil matters. It divides them into different categories and specifies separate provisions for payment of diet money and travel expenses.¹ Rule 2(3) of Order XVI CPC provides that where the court is subordinate to the High Court, in fixing the scale of expenses, regard shall be had to any rules made in that behalf. In *Ahmad and others v. Additional District Judge and others* (2008 SCMR 1330), the Supreme Court of Pakistan held that if a defendant fails to deposit the process fees and diet money for witnesses required to be summoned through the court, the judge is left with no choice but to close his evidence.

¹ Rule 1(1) of Order XVI CPC mandates that immediately after framing the issues, the court shall direct the parties to file a list of witnesses within a period not exceeding seven days (See amendments of the Lahore High Court). Rule 2(1) provides that the party applying for a summons must, before permission is granted, and within a period to be fixed, deposit an amount sufficient to cover the witness's travel and one day's attendance expenses. The government is exempt from depositing such money when requesting a summons for its own officers. Rule 2(2) allows the court to grant reasonable remuneration to expert witnesses for their time spent giving evidence and performing any expert work necessary for the case. Rule 3 mandates that the amount deposited must be tendered to the witness when the summons is served personally, except for government servants, where the sum is credited to the government (subject to certain exceptions). Rule 4 makes further stipulations to cater to the situations where the amount paid is insufficient to cover expenses or when the witness is detained for more than one day.

Order XVI Rule 7A CPC stipulates that, unless the court decides otherwise, the party applying for the summons is responsible for its service. Rules 16 and 18 of Order V apply to personal service under this rule, as if done by a serving officer.

Order XVI Rule 14 CPC gives the court the authority to summon any person, even if not called by the parties, if necessary, to give evidence or produce documents. Rule 14A provides that when a witness is summoned by the court of its own motion as aforesaid, his diet money shall be paid by such party or parties as the court may, in its discretion, direct. When diet money is not deposited, payment shall be made out of contingencies, and an order shall be passed for recovery from any property of the party concerned and executed under section 36 CPC.

5. In criminal cases, the issue of diet money is governed by sections 244(3) and 544 Cr.P.C., and Rule 26.30 of the Police Rules, 1934. Section 244 Cr.P.C., found in Chapter XX of the Cr.P.C., pertains to the trial of summons cases by Magistrates. It outlines the procedure when the accused pleads not guilty or the magistrate decides not to convict him despite his admission and proceeds with the trial. Section 244(2) Cr.P.C. provides that the magistrate may, if he thinks fit, on the application of the complainant or the accused, issue a summons to any witness directing him to attend or to produce any document or thing. Section 244(3) states that the magistrate may, before summoning any witness on such an application, require that the witness's reasonable expenses incurred in attending the trial be deposited in court. However, the accused is not required to deposit such expenses if he is charged with an offence punishable with imprisonment exceeding six months.

6. Section 544 Cr.P.C. provides that, subject to any rules made by the Provincial Government, any criminal court may, if it deems appropriate, order the government to pay the reasonable expenses of any complainant or witness attending an inquiry, trial, or other proceeding before the court under the Code of 1898.

7. Rule 26.30 of the Police Rules, 1934, stipulates that the instructions regarding the advance of diet money and travel expenses to witnesses, as outlined in Rule 26.27, shall be strictly followed in all police stations.²

8. Given the above, a magistrate may only direct an accused to deposit expenses for summoning a witness in summons cases where he is charged with an offence punishable with imprisonment up to six months. Additionally, under section 544 Cr.P.C., subject to any rules framed by the Provincial Government, the court has the discretion to order the government to pay the reasonable expenses of a complainant or witness attending any inquiry, trial, or other proceeding.

9. Diet money and travel expenses can be considered a subset of the broader category of costs incurred during criminal proceedings. The question is whether an accused can be directed to pay the prosecution witness's diet money and travel expenses under section 344(1) Cr.P.C.,

² Rule 26.27 prescribes the diet of accused persons.

which empowers the court to adjourn the proceedings of any inquiry or trial, if necessary, by order in writing, stating the reasons therefor, from time to time, on such terms as it thinks fit.³ Some authorities hold that courts have inherent power to impose adjournment costs for the safe administration of justice,⁴ while others maintain that the phrase “on such terms” in section 344(1) Cr.P.C. is significant and can be legitimately construed as empowering the court to impose costs when granting an adjournment.⁵ Nonetheless, this power must be exercised judiciously and should not create barriers preventing the accused from effectively defending themselves.⁶

10. The Code of Criminal Procedure 1898 is the cornerstone of the criminal justice system in Pakistan. Its primary objective is to provide a detailed and comprehensive procedural framework for the administration of criminal justice, covering all aspects from the investigation of crimes to the prosecution and adjudication of criminal cases. The Code applies to all criminal matters unless there is a special law conferring special jurisdiction or power or prescribes a special form of procedure. Special laws sometimes contain specific provisions for imposing adjournment costs. In this regard, reference may be made to sections 19(8) of the Anti-Terrorism Act, 1997, and 16(2) of the Anti-Rape (Investigation and Trial) Act, 2021.

11. Criminal courts generally do not impose costs on the accused during the trial, as the primary focus is to ensure justice through a fair process without burdening the accused with procedural expenses while the case is being adjudicated. I respectfully agree that a court may impose penalties if the accused engages in conduct that delays the trial or obstructs the judicial process. While these penalties are sometimes referred to as costs, they are more accurately sanctions for misconduct or

³ For ease of reference, section 344(1) Cr.P.C. is reproduced below:

344. Power to postpone or adjourn proceedings. – (1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable and may by a warrant remand the accused if in custody:

Remand. Provided, no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

⁴ *Muhammad Shahid Yousaf v. The State and others* (2022 MLD 1331). [*Azad Khan v. The State and another* (2018 PCr.LJ 879) takes a contrary view].

⁵ *Muhammad Shahid Yousaf v. The State and others* (2022 MLD 1331).

⁶ *Dr. Manzoor Hussain and others v. The State* (1969 PCr.LJ 336).

procedural non-compliance rather than traditional trial costs. The phrase “on such terms” cannot be stretched to undermine the specific provisions of the Criminal Procedure Code and the Police Rules discussed above.

12. It is pertinent to point out that the Code allows the court to impose fines or order compensation to the victim while convicting an accused. Section 544-A(1) Cr.P.C. mandates that when a person is convicted of an offence that results in death, harm, injury, mental anguish, or psychological damage to another person or causes damage, loss, or destruction of property, the court must, at the time of conviction, order the convict to pay compensation to the victim or their heirs, unless it gives reasons in writing for not doing so. The amount is determined based on the circumstances of the case. Section 544-A(3) Cr.P.C. further states that this compensation is in addition to any sentence imposed for the offence. Section 545(1) Cr.P.C. provides that whenever a criminal court imposes or confirms a fine, it may direct that the recovered fine be used for (a) covering the proper expenses of prosecution, (b) compensating any person for loss, injury, mental anguish, or psychological damage caused by the offence, if such compensation could be recoverable in a civil court, or (c) compensating a *bona fide* purchaser of stolen property when the offender is convicted of theft, misappropriation, breach of trust, cheating, or receiving stolen property, and the property is returned to its rightful owner. Section 546-A Cr.P.C. states that when a complaint regarding a non-cognizable offence is brought before a court, and the court convicts the accused, it may, in addition to any penalty imposed, direct the accused to pay the complainant: (a) any fees paid for filing the complaint or for the complainant’s examination, and (b) fees paid for serving notices to witnesses or the accused. If the accused fails to pay, the court may impose simple imprisonment for up to 30 days. Furthermore, while exercising its revisional powers, an Appellate Court or the High Court may also issue such an order.

13. Sections 544-A, 545, and 546-A Cr.P.C. enable courts to impose financial penalties on convicted individuals. They are financial consequences of the conviction and intended as part of the punishment or restitution.

14. To conclude, in civil cases, a party may lose the right to have witnesses summoned through the court’s process, or the court may close its evidence if it fails to deposit the required diet money and travel expenses within the specified time. When the court summons a witness on its own motion, the court, at its discretion, may direct the payment of diet money by the concerned party or parties. If the deposit is not made, payment will be arranged from contingency funds, and an order will be issued for recovery from the party’s property, enforceable under section 36 CPC. However, the Code of Criminal Procedure does not contain any provision that allows the court to close an accused’s right to cross-examine a prosecution witness if the accused fails to pay the witness’s diet money or travel expenses. Reference in this regard may also be usefully made to *Ghulam Nabi and others v. Shaukat Ali and another* (PLD 2007 Lahore 368). The statutory framework governing diet money in criminal trials ensures that financial burdens do not obstruct an accused’s right to a fair defence.

Striking off the right of cross-examination

15. The concept of a fair trial is central to the administration of justice, and the right to cross-examine witnesses is a component of the right to a fair trial. Cross-examination is “the greatest legal engine ever invented for the discovery of truth.”⁷ In an adversarial legal system, it is a “primary evidentiary safeguard”,⁸ an acid test of the truthfulness of a statement made by a witness on oath in examination-in-chief.⁹ Taylor elaborates:

“Cross-examination is justly regarded as one of the most efficacious tests by means of which the law has devised for the discovery of truth and by means of which the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used the means, his power of discernment, memory and description are fully investigated and ascertained ...”¹⁰

⁷ *Lilly v. Virginia*, 527 U.S.116 (1999), *California v. Green*, 399 U.S. 149 (1970).

⁸ Ellison, ‘The Protection of Vulnerable Witnesses in Court’ (Reproduced in Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: an impossible triangulation, an article by Phoebe Bowden, Terese Henning And David Plater).

⁹ *Kartar Singh v. State of Punjab* [(1994) 3 SCC 569].

¹⁰ Extract from *Taylor on Evidence*, 5th Edn., p. 1238 (reproduced in *Aiyar & Aiyar’s The Principles and Precedents of the Art of Cross-Examination*, 10th Edn., Butterworths India at p.2).

16. International human rights law recognizes the right to cross-examination as a fundamental aspect of the right to a fair trial, which is enshrined in various international legal instruments. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) explicitly guarantees the right of individuals to be informed of the charges against them, to have adequate time and facilities to prepare a defence, and to examine, or have examined, the witnesses against them. The European Convention on Human Rights (ECHR) also reflects this principle. Article 6 of the ECHR emphasizes the right to a fair trial, which includes the right to question witnesses. The Court of Human Rights has reaffirmed that the right to cross-examine witnesses is essential to ensuring equality of arms between the prosecution and the defence. In *Lüdi v. Switzerland* (1992),¹¹ the Court emphasized the importance of cross-examination in ensuring a fair trial. The applicant, Lüdi, had been convicted based on evidence from an undercover police officer. Lüdi was denied the opportunity to cross-examine the officer. The Court ruled that this violated his rights under Article 6 of the ECHR. It found that the fairness of the proceedings had been compromised by the inability to cross-examine a key witness.

17. The right to cross-examination is also a crucial element of due process in many national legal systems. In the United States, this right is explicitly protected under the Sixth Amendment of the Constitution, which guarantees that a person accused of a crime has the right “to be confronted with the witnesses against him.” In *Crawford v. Washington*, 541 US 36 (2004), the U.S. Supreme Court ruled that testimonial statements made out of court cannot be admitted as evidence unless the witness is unavailable and the accused has had a prior opportunity to cross-examine them. This landmark decision reaffirmed that the right to confrontation is not just a procedural formality but a substantive right essential to a fair trial. The Court’s decision emphasized that denying the accused the chance to cross-examine a witness deprives them of a key tool for defending themselves, violating their constitutional rights.

18. Cross-examination in the U.K. operates within the framework of the common law tradition, which relies on the adversarial system of justice. In addition to common law, the Criminal Procedure

¹¹ *Lüdi v Switzerland* (App no 12433/86) ECHR 15 June 1992.
https://www.hr-dp.org/files/2013/09/11/CASE_OF_LUDI_v._SWITZERLAND_.pdf

Rules and other statutory measures provide guidelines on how cross-examination is conducted in the U.K. For instance, the Youth Justice and Criminal Evidence Act 1999 includes provisions to protect vulnerable witnesses while still allowing the defence to challenge their evidence. Special measures, such as screens or video links, can be used in cases involving vulnerable or intimidated witnesses, such as children or victims of sexual offences. However, even with these protective measures, the fundamental right to cross-examine remains intact, ensuring that the defence can still test the evidence while maintaining the witness's dignity and well-being.

19. The U.K. courts have also been careful to balance the rights of the accused with the protection of witnesses. In cases like *R v. Davis* [2008] UKHL 36, the House of Lords ruled that using anonymous witnesses to prevent effective cross-examination violated the defendant's right to a fair trial. The Court held that while protecting witnesses was important, it should not come at the expense of the accused's ability to challenge the evidence. This decision reaffirmed the principle that cross-examination is crucial for ensuring that untested or unreliable testimony does not compromise justice.

20. In *Browne v. Dunn, Lord Halsbury* [(1893) 6 R. 67], the House of Lords held that "nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given." In *Abel v. The Queen* [(1955), 115 C.C.C. 119 (Que. Q.B.)], the Court held that "there can be no question of the importance of cross-examination ... It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make a full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence." Similarly, in *Mechanical & General Inventions Co. Ltd. v. Austin and the Austin Motor Co. Ltd.* [(1935) AC 346], the Court described cross-examination as the "powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story." This observation was reiterated in *Wakeley v. The Queen* [(1990) 93 ALR 79, 86].

21. However, there are certain exceptions where the right to cross-examination may be limited. For instance, under the Domestic Violence, Crime and Victims Act 2004, a defendant in cases of sexual offences or domestic violence may be prohibited from cross-examining the victim personally. In such cases, a court-appointed lawyer conducts the cross-examination to preserve the accused's right to a fair trial while protecting the victim from further trauma.

22. In *Michael Garfield Lyttle v. Her Majesty The Queen* (2004 SCC 5), the Supreme Court of Canada ruled that "the right of an accused to cross-examine prosecution witnesses without significant and unwarranted constraint is an essential component of the right to make a full answer and defence. The right of cross-examination, which is protected by ss.7 and 11(d) of the Canadian Charter of Rights and Freedoms, must be jealously protected and broadly construed."

23. In *Muhammad Hussain alias Julfikar Ali v. State (Govt. of NCT of Delhi)* (AIR 2012 SC 750 : 2012 SCMR 1610), the Supreme Court of India observed that "the fate of the criminal trial depends upon the truthfulness or otherwise of the witness and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged, and for that purpose, cross-examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of witness is fit to be rejected."

24. Courts in Pakistan also acknowledge that the accused's right to cross-examine witnesses is one of the most fundamental rights. In *Ghulam Rasool Shah and another v. The State* (2011 SCMR 735), the Supreme Court observed, "Undoubtedly, cross-examination is the most effective tool to test the credibility of witnesses. A statement recorded without undergoing this scrutiny will inevitably lead to injustice for the accused."

25. In Pakistan, cross-examination is a statutory right recognized and provided under Article 133 of the Qanun-e-Shahadat 1984 (QSO). It is also a part of the right to a fair trial guaranteed under Article 10A of the Constitution of the Islamic Republic of Pakistan, 1973, because, as discussed above, no fair trial is possible unless an accused is allowed to

confront his accuser. In *Muhammad Bashir v. Rukhsar and others* (PLD 2020 SC 334), the accused, Rukhsar, was denied the opportunity to cross-examine the petitioner, who had testified against him. Seeking to rectify this, he filed an application under section 540 Cr.P.C., requesting the court to summon the petitioner and allow cross-examination. The Additional Sessions Judge granted the request, and the High Court upheld the decision. The Supreme Court ruled that depriving Rukhsar of his right to cross-examine the petitioner violated his fundamental right. Thus, summoning and cross-examining him was entirely in accordance with the law. The Supreme Court highlighted that Chapter X of the QSO outlines the procedures for examining witnesses. Witness examination begins with “examination-in-chief” by the party calling the witness, followed by “cross-examination” by the opposing party, and may conclude with “re-examination”. The right to cross-examine belongs to the opposing party; it may be waived but cannot be unjustly denied.

26. However, an accused cannot be permitted to abuse the legal process or obstruct court proceedings. If they deliberately fail to bring their lawyer, the court must appoint a defence counsel at state expense and proceed with the trial. In *Abdul Ghaffoor v. The State* (2011 SCMR 23), a murder case, the prosecution examined 13 witnesses, including two eyewitnesses. The accused-appellant failed to produce his counsel for their cross-examination despite repeated opportunities. In the circumstances, the trial court required him to cross-examine the witnesses himself and then proceeded to decide the case. The Supreme Court held that it is the primary duty of a trial court to ensure the discovery of truth and the fair administration of justice. If the accused’s counsel repeatedly sought adjournments and failed to appear, the court should have either appointed a defence counsel at State expense or provided the accused a final opportunity to arrange legal representation, failing which the trial could proceed. Since the trial court failed to follow these steps and unexpectedly required the accused to cross-examine witnesses despite his lack of legal expertise, the Supreme Court ruled that this approach led to a miscarriage of justice and allowed the accused another opportunity for cross-examination.

27. A similar view was taken in *Ghulam Rasool Shah's* case, where the Supreme Court reiterated that if an accused fails to engage counsel, the trial court must appoint a defence lawyer from the State's panel and proceed with the trial, ensuring that the accused's right to a fair trial remains protected.

The case at hand

28. The Special Judge's order requiring the Petitioner to deposit Rs.10,000/- as diet money was legally flawed as it contravened section 244(3) Cr.P.C., which explicitly exempts an accused from bearing witness expenses if charged with an offence punishable by imprisonment exceeding six months. By imposing this unlawful condition, the trial court misapplied the law and created a procedural hurdle that unjustly restricted the Petitioner's right to cross-examine prosecution witnesses.

29. Furthermore, striking off the Petitioner's right to cross-examine was a grave procedural flaw. As discussed, if an accused fails to produce counsel, the court must either grant a final opportunity to engage private representation or appoint a state defence counsel. The Special Judge failed to follow either course of action, depriving the Petitioner of a fundamental procedural safeguard and causing a grave miscarriage of justice.

30. In view of the above, this petition is **accepted**, and the Impugned Order is set aside. The learned Special Judge is directed to provide the Petitioner one opportunity to engage counsel and cross-examine the prosecution witnesses. If the Petitioner fails to do so within the prescribed time, he shall appoint a defence counsel and proceed with the trial in accordance with the law.

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge