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JUDGMENT SHEET

IN THE LAHORE HIGH COURT,

BAHAWALPUR BENCH, BAHAWALPUR.

(JUDICIAL DEPARTMENT)

Criminal Revision No.200 of 2023.

Sabir Hussain versus The State, etc.

JUDGMENT

Date of hearing:	<u>13.12.2023</u>
Petitioner by:	Malik Saeed Ejaz, Advocate.
State by:	Mr. Shahid Fareed, Assistant District Public Prosecutor.
Respondent/complainant by:	Mr. Shabbir Masood Malik, Advocate.

MUHAMMAD AMJAD RAFIQ, J:- Through this criminal revision, order dated 08.11.2023 was assailed by the petitioner whereby the learned Additional Sessions Judge, Ahmadpur East has declined his request for providing him with copy of CDR comprising of 117 pages mentioned in the recovery memo dated 30.11.2020 though was not available on the record. The learned Judge directed that CDR was collected by one Dilawar Hussain SI/I.O. who has yet not been examined as witness in the case, therefore, on his appearance in the dock, the petitioner can well examine the data of CDR if produced in evidence.

2. Learned counsel for the petitioner contends that law permits for provision of relevant documents to the defence upon which the prosecution case is structured or is expected to be relied upon during trial, and in this respect, he developed an argument that it is not necessary that any document disclosure of which is regulated u/s 265-C of Cr.P.C. cannot be summoned before or after that stage. He has referred case reported as "*The STATE versus Chaudhry MUHAMMAD USMAN*" (2023 SCMR 1676) wherein while

referring section 94 of Cr.P.C., the Supreme Court of Pakistan has held that Court can summon any document at any stage of inquiry or trial for its supply to the accused if requested for and is essential for his defence on any fact in issue in the case. Learned counsel further submits that when disclosure stage under section 265-C of Cr.P.C., is passed and prosecution wants to use any witness who is not cited in the list, accused still had a chance to get copies of statement of a witness or related document as per mandate of section 162 of Cr.P.C.

3. Learned Assistant District Public Prosecutor on the other hand has conceded the legal position as referred in case reported as "The STATE versus Chaudhry MUHAMMAD USMAN" (2023 SCMR 1676). Though learned counsel for the respondent/complainant has opposed the petition but later conceded that by providing copy of CDR to the accused/petitioner, prosecution case would not be affected in any manner.

4. Heard. Record perused.

5. The Supreme Court of Pakistan while dilating upon section 94 of Cr.P.C. has categorically interpreted that the trial Court can summon any document which is essential for the purpose of an inquiry or trial and this can also be done on the application of any party. In this case, CDR of accused persons was collected by Dilawar Hussain SI/I.O. through recovery memo dated 30.11.2020 available in the police but such CDR and a recovery memo were not appended with the report under section 173 of Cr.P.C. It is expected that this evidence would be used against the accused if unfavourable to him; therefore, he cannot be embarrassed with surprise evidence without giving him time and opportunity to prepare his defence on this evidence. Due process as guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 requires that all the processes supplemented by the legal provisions must be followed by providing a fair opportunity to the accused.

6. It has further been noticed that once a party calls a document after giving notice to the other for its production which is in the

possession of other party and if such party refuses to produce the same, then document cannot be used as evidence later in the process except with the consent of party or the Court, and notice to other party of course can be a situation when an application before the Court is filed for summoning of such document. Article 159 & 160 of Qanun-e-Shahadat Order, 1984 are referred in this respect as under:

159. Giving, as evidence, of document called for and produced on notice: When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

160. Using, as evidence, of document production of which was refused on notice: When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

The Article 159 above connotes the benefits and fatalities of summoning of document for production in the evidence. In this case if CDR is unfavourable to the accused, then he cannot opt to skip its production before the Court, if prosecution demands. Whereas Article 160 above clearly speaks that if the prosecution shall not produce CDR before the Court on the notice of accused, then it cannot use such CDR as evidence during the trial except with the consent of accused or the Court. Thus, right of the accused for seeking the data of CDR should not be infringed otherwise this evidence could also not been used by the prosecution during the trial. Another situation can also be materialized in the circumstances that if on notice prosecution does not produce the CDR, then accused shall be at liberty to produce secondary evidence of such CDR as mandated through Article 76 & 77 of the Qanun-a-Shahadat Order, 1984 and in this respect he can seek the help of Court under section 265-F(7) of Cr.P.C. at later stage.

7. There is no cavil to the proposition that for taking a prosecutorial decision, police collect material pro and contra of the allegations; some material is used considering it in line with

prosecution story and rest is abandoned as irrelevant or in conflict of interest, such material is called unused material. In our law, disclosure of material to the accused under section 241-A or 265-C of Cr.P.C. is limited to one which is being used by the prosecution, but in foreign jurisdictions accused always had a chance to see or seek any unused material to build his defence or to contradict the prosecution case. Now Supreme Court of Pakistan in case cited supra has widened the scope of material to be provided to the accused if it is essential to adhere to fundamental right of due process and fair trial. The only exception to this material would be the ‘Diary of proceedings in investigation’ which is privileged under section 172 of Cr.P.C. as held by Supreme Court of Pakistan in case reported as “MUHAMMAD IDREES and another versus The STATE and others” (**2021 SCMR 612**).

8. For what has been discussed above, the accused/petitioner is entitled to have copy of requisite CDR and recovery memo well in time before the appearance of Dilawar Hussain SI/I.O. in the dock. Consequently, this revision petition is allowed in the above terms.

(MUHAMMAD AMJAD RAFIQ)
JUDGE

APPROVED FOR REPORTING:

JUDGE

This judgment was pronounced on 13.12.2023, however after dictation and preparation it was signed on 18.12.2023.

M. Azhar*