

SUPREME COURT OF PAKISTAN

(Appellate jurisdiction)

PRESENT:

Mr. Justice Dost Muhammad Khan
Mr. Justice Sardar Tariq Masood

CRIMINAL PETITION NO. 198 OF 2016

(On appeal against the order dated 09.02.2016 passed by Peshawar
High Court, Bannu Bench in Cr. M./Q.P. No. 58-B of 2015)

Asfandyar & another

Petitioners

Versus

Kamran & another

Respondents

For the petitioners: Mr. Liaqat Ali Shah, ASC
 Mr. Mehr Khan Malik, AOR (Absent)

Respondents: Not represented

Date of hearing: 29.08.2016

ORDER

SARDAR TARIQ MASOOD, J.

Crl. M.A. No. 540 of 2016

For the reason mentioned in this Crl. M.A., same is allowed and the additional documents are taken on record.

CRIMINAL PETITION NO. 198 OF 2016

Petitioner Asfandyar, through this petition, has sought leave to appeal against the judgment dated 09.02.2016 passed by a learned Judge in Chamber of the Peshawar High Court, Bannu Bench, through which Crl. M./Q.P. No. 58-B of 2015, filed by complainant Kamran was allowed and order of the learned Additional Sessions Judge, Takht-e-Nasrati, Karak dated 20.11.2015 was set aside.

2. Brief facts of the case are that the petitioner along with another was involved in case FIR No. 278 registered on 11.09.2014 at Police Station Yaqoob Khan Shaheed, District Karak in respect of offences under Sections 302/324/34 P.P.C. in respect of the murder of Abdul Razzaq and Wali Jan and attempt at the life of complainant and his uncle Muhammad Arif. Learned Additional Sessions Judge (trial Court) during the trial on the request of

petitioner/accused, vide order dated 20.11.2015 under Section 539-B Cr.P.C., appointed a Commission to visit the spot in order to ascertain the authenticity of the site plan in respect of a wall shown as close end. Vide the same order, the trial Court also allowed the accused person to place documents on record.

3. The learned counsel argued that actually the Commission was appointed when defence requested the trial Court to proceed against the investigating officer for committing perjury and the Commission was appointed in the said inquiry but conceded that no separate file for such inquiry was prepared in this regard. It was further argued that the documents obtained through modern devise are per se admissible hence Article 79 of the Qanun-e-Shahadat Order, 1984 (hereinafter referred to as "the Order, 1984") has no concern, for proving the said documents which were prepared from the C.C.T.V. Lastly, it was contended that the order of the learned Additional Sessions Judge was revisable hence petition under Section 561-A Cr.P.C. was not maintainable.

4. We have heard the learned counsel for the petitioners and also perused the record appended with the petition.

5. During cross-examination upon the investigating officer, in order to rebut the site plan, the learned trial Court on a request by the defence side, under Section 539-B Cr.P.C. appointed a Magistrate as a Commission to visit the place of occurrence in order to ascertain the authenticity of the site plan regarding the close end of the market. While doing so, the learned trial judge assumed the jurisdiction of an investigating officer and such order would amount to favour one party and prejudice the case of other party. Such power under Section 539-B Cr. P.C. cannot be a substitute for collection of evidence. Such inspection cannot be interchanged for investigation. Learned counsel for the petitioner although tried to satisfy us that the said Order was in respect of an inquiry regarding alleged perjury committed by the investigating officer but admittedly no separate file has been prepared to that extent nor, in the order dated 20.11.2015, the learned trial Court has mentioned that he had appointed a Commission in an inquiry whereas learned trial Court specifically

mentioned that the Magistrate as a Commission was appointed under Section 539-B Cr. P.C.. Section 539-B Cr.P.C. gives power to a Judge or a Magistrate to visit and inspect the place of occurrence or any other place after due notice to the parties, if necessary in the opinion of the trial Court, for properly appreciating the evidence given during the trial. He was also required to record a memorandum without unnecessary delay regarding his observation at such inspection but this power cannot be delegated by the trial judge to any other subordinate or even a subordinate judicial officer. Under Section 539-B Cr.P.C, the trial Judge had no power to appoint another person to visit the place of occurrence as a Commission because the report submitted by a local Commission cannot be equated with the memorandum mentioned in sub-section-I of Section 539-B Cr.P.C.. The trial Judge can inspect the place of occurrence but alone and he cannot delegate his powers under Section 539-B Cr.P.C. and it is exclusive domain of trial Court under said section. Judicial power has its own sanctity and the same cannot be entrusted to anyone. The act of the trial Court is not curable under Section 537 Cr.P.C. as it is not an irregularity rather was an illegality. It is quite astonishing that the learned trial Judge, while appointing a Commission under Section 539-B Cr.P.C, did not go through the said provision and acted mechanically upon the request of defence. The High Court has rightly observed that such an act of the trial Court was not only prejudicial to the other party but also detrimental to the fairness of the procedure provided under the Code, apart from being without jurisdiction.

The record reveals that during investigation the petitioner tried to produce the footage of some C.C.T.V. which were produced by the petitioner/accused before the investigating officer. No doubt the trial Court, under Section 164 of the Order, 1984, may allow to produce the said footage of C.C.T.V. but it is incumbent upon the defence to prove the same in accordance with the provisions of the Order, 1984. The defence had ample opportunity to produce in his defence, the concerned person who had prepared the said footage from the C.C.T.V. system in order to prove the same. In that eventuality, the adverse party would be given an opportunity to cross-

examine the said witness regarding the genuineness or otherwise of the said document. Any document brought on record could not be treated as proved until the same is proved strictly in accordance with the provisions contained in the Order, 1984. While discussing these aspects of the case, the High Court restricted the admissibility only to the extent of Article 79 of the Order, 1984 whereas there are certain other provisions/articles in the Order, 1984 for proving the documents which are procured through the modern devices and techniques. Mere producing any footage of C.C.T.V. as a piece of evidence in the Court is not sufficient to be relied upon unless and until the same is proved to be genuine. In order to prove the genuineness of such footage it is incumbent upon the defence or prosecution to examine the person who prepared such footage from the C.C.T.V. system. So we modify the impugned judgment to the extent that the accused is at liberty to produce evidence and prove the same strictly in accordance with the provisions of the Order, 1984 and it will not confine only to the Article 79 of the Order, 1984.

Admittedly, the order of the learned Additional Sessions Judge was revisable and the learned Judge in Chamber of the Peshawar High Court, Bannu Bench was required to decide the same under his revisional powers. The remedy under Section 561-A Cr. P.C. is not an alternate or substitute for an express remedy as provided under the law in terms of Sections 435 to 439 Cr.P.C.. Jurisdiction under Section 561-A Cr.P.C. is neither alternative nor additional in its nature and is to be rarely invoked only to secure the end of justice so as to seek redress of grievance for which no other procedure is available. Although learned Judge in Chamber did not mention any reason as to why he made a departure from the normal course prescribed by law but this omission on the part of learned judge in Chamber is not fatal at this stage because the judgment passed by the High Court is well reasoned and was passed after going through the record of the lower Court. The High Court might have overlooked this aspect of the case, hence, we, in the peculiar circumstances of the case, hold that the impugned judgment, passed by the High Court, be deemed to have been passed in revisional jurisdiction. The trial in this case is pending in the trial Court and almost prosecution evidence has

already been recorded, hence instead of remanding the case to the High Court, we observe that the impugned judgment is well reasoned and there is no perversity or infirmity warranting interference of this Court. Consequently, this petition is dismissed and leave to appeal is declined.

Judge

Judge

Islamabad, the
29thAugust, 2016
Atif* /
APPROVED FOR REPORTING