

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Justice Muhammad Ali Mazhar
Justice Ayesha A. Malik

Criminal Petition No.573 of 2025

Against the judgment dated 11.04.2025
passed by Islamabad High Court, Islamabad,
in Jail Appeal.No.240/2024

Waseem Hassan Khan ...Petitioner

Versus

The State and another ...Respondents

For the Petitioner: Syed Rifaqat Hussain Shah, AOR
Ms. Ayesha Khalid, AHC
(with permission of the Court)

For the State: Mrs. Chand Bibi, DPG
Mr. Ghulam Rasool, DSP

For the Complainant: Mr. Jan Khurshid Ahmed, ASC.

Date of Hearing: 10.07.2025

Judgment

Muhammad Ali Mazhar, J. This Criminal Petition is directed against the judgment dated 11.04.2025 passed by Islamabad High Court, in Jail Appeal No.240/2024.

2. According to the prosecution case, Esha Hassan sister of complainant (Muneeb Khan) was married to the petitioner (Waseem Hassan Khan). It was alleged by the complainant that he was informed by his sister several times that the petitioner maltreated her on numerous occasions and tortured her. On 06.03.2023, the complainant and his brother Usman tried to contact the petitioner on his cell phone due to their sister's failure to respond, but he disconnected the call. In the evening,

police informed them about the death of their sister. When the complainant along with his brother went to the Polyclinic Hospital to collect the body, they found marks of violence on her neck, hands, and feet, suggesting that she had been murdered by strangulation. The F.I.R No. 131 of 2023 was lodged on 06.03.2023 under Section 302 PPC at P.S Sihala, Islamabad. According to the post-mortem report, the cause of death was asphyxia and as per external post-mortem findings, a knot mark around the neck region, nail marks around the neck, rope marks, and bruises on both upper and lower limbs were also found. The report under Section 173 of Criminal Procedure Code, 1898 (Cr.P.C.) was submitted, thereafter the charge was framed and after completion of trial, the Additional District & Sessions Judge-IV (East), Islamabad, vide judgment dated 03.06.2024 convicted the petitioner and sentenced him for imprisonment for life with the directions to pay compensation of Rs. 10,00,000/- under Section 544-A Cr.P.C. to the legal heirs of the deceased. The petitioner filed Jail Appeal in the Islamabad High Court to challenge his conviction. After hearing, the learned judge of the Islamabad High Court being fortified with the guiding principle enunciated under Section 428 Cr.P.C., allowed the appeal by means of impugned judgment and while setting aside the conviction awarded to the petitioner by the trial Court, remanded the matter to the trial Court to record additional evidence of security guards of the tower, lady security guard, supervisor dealing with the recording of CCTV footage as well as the police official, namely Imam Ali, who responded at Fauji Foundation Hospital when the dead body of the deceased Esha was taken to the said hospital and also directed to the Investigation Officer to record additional statement in the evidence while explaining the CCTV footage to the trial Court.

3. The learned counsel for the petitioner argued that since the prosecution failed to prove its case, the conviction was rightly set aside by the High Court but at the same time, the matter was remanded to the trial Court to fill up the lacunas in the

prosecution case. She further argued that the Court cannot assume the role of prosecutor which was bound to prove the guilt of accused without reasonable doubt. It was further averred that under Section 428 of Cr.P.C. though the Appellate Court may call upon the Magistrate or Additional Sessions Judge to record the additional evidence but after receiving the additional evidence, if so recorded on the direction, the decision on appeal was to be rendered by the High Court itself on the Jail Appeal but the High Court remanded the matter for decision by the trial Court after recording additional evidence which is beyond the scope of Section 428 Cr.P.C.

4. The learned counsel representing the complainant as well as the learned Deputy Prosecutor General Islamabad both argued that no doubt under Section 428 Cr.P.C, if the appellate Court thinks that recording of additional evidence is necessary then obviously, it may record evidence by its own and when the appellate Court is a High Court then it may also ask the Court of Session to record evidence and certify such evidence to the Appellate Court to proceed and dispose of the appeal. It was further averred that instead of deciding the matter itself, the High Court wrongly remanded the matter to the trial Court which is against the provisions contained under Section 428 Cr.P.C for recording additional evidence.

5. Heard the arguments. To begin with, we would like to reproduce paragraph 6 and 7 of the impugned judgment which deduced the reasons of recording additional evidence as under: -

"6. Perusal of the record reflects that Ghulam Rasool, Inspector and Investigating Officer (L.O.), PW-08, while conducting the investigation qua death of Esha, who was allegedly murdered by the appellant, Waseem Hassan Khan, her husband, in her own apartment on 06.03.2023 in Flat No. 416, 4th Floor, Lignum Tower, DHA-II, Islamabad. The dead body was removed from the scene of the crime by the appellant himself with the help of a security guard from the same tower. This aspect has been demonstrated through the CCTV footage collected by the 1.0. in USB Exh.PT, which was played in Court and visibly observed in the presence of the Investigation Officer, learned State Counsel, and the

counsel for the appellant. However, 1.0. did not provide any justification for this aspect, nor did he refer any other charge in the investigation regarding it. Furthermore, the witnesses, including the security guards, lady security guard, and supervisor, who recorded the video evidence, were not recorded by the I.O. during the investigation. Additionally, USB has not been confirmed through a forensic report, which is a minimum requirement in such cases.

7. In this backdrop, this Court has been guided with the principle in terms of Section 428 Cr.P.C., where appellate Court may take such evidence itself or direct the same to be taken by Trial Court. Such powers and the provisions are not to be utilized at the appellate stage to cure the inherent infirmities or fill up a lacuna in the prosecution case as held in PLD 2001 SC 384 (Dildar Vs. The State through Pakistan Narcotics Control Board, Quetta). It is settled principle of law that if evidence that was available at the time of trial was not produced before the Court of first instance due to the negligence of the prosecutor or the investigating officer, its later production may seriously prejudice the proceedings. In this regard, this Court took guidance from the case law reported as PLD 2019 SC 675 (Ishtiaq Ahmed Mirza and 2 others Vs. Federation of Pakistan and others), where it was held that necessity of taking additional evidence at the appellate stage must be felt by the appellate court itself and the same was not dependent upon what a party to the appeal thought of such necessity. However, the Court must record the reasons in terms of Section 428 Cr.P.C. This Court also took guidance from case law reported as 1992 PCr.LJ 116 (Latif and others Vs. The State), where it was held that in terms of Section 428 read with Section 375 (2), High Court has plenary powers for rectifying procedural defects or allowing further enquiry or additional evidence which has bearing on the guilt or innocence of accused to avoid injustice to either party. It is also settled that apparently the discretion vested in a Court appears to be unrestricted nevertheless such power being in the nature of the public trust can only be exercised if such evidence appears to be essential to the just decision of the case and not merely to fill in the lacuna in a case owing to gross negligence, inefficiency, carelessness and recklessness of a party as held in PLD 2001 SC 384 (Dildar Vs. The State through Pakistan Narcotics Control Board, Quetta).

In view of the above, the instant appeal is ALLOWED, and the judgment dated 06.03.2024, passed by the learned Additional Sessions Judge-IV, is hereby SET-ASIDE. The matter is remanded to the learned Trial Court to record the evidence of the security guards of the tower, the lady security guard, the supervisor dealing with the recording of CCTV footage, as well as the police official, namely Imam Ali, who responded at Fauji Foundation Hospital when the dead body of the deceased Esha was taken to the said hospital. In addition to the above, Investigation Officer (PW-08) shall record an additional statement in evidence while explaining the CCTV footage to the trial Court. Thereafter, the learned trial Court shall decide the matter, keeping in view the evidence under the law, within a period of the next six (06)

months, after duly confronting the additional evidence to the accused/appellant under Section 342 Cr.P.C".

6. Following the allowance of appeal, the learned judge of the High Court remanded the matter to the trial Court to first record the additional evidence and decide the matter within a period of six months, after confronting the additional evidence to the accused/appellant under Section 342 Cr.P.C. The whole controversy is roaming around the niceties and interpretation of Section 428 Cr.P.C, which is for the ease of reference, reproduced as under: -

"Section 428 CR.PC.

Appellate Court may take further evidence or direct it to be taken. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry".

7. We feel it is imperative to draw a distinction between Section 423 and 428 Cr.P.C. The powers couched under Section 423, Cr.P.C explicates the powers of Appellate Court in disposing of appeal. In case of appeal against the acquittal, the appellate Court may reverse such orders and direct that further inquiry be made or that the accused be tried or sent for trial to the Court of Session or High Court as the case may be or find him guilty and pass sentence on him according to law. While in an appeal against conviction, the appellate Court may reverse the finding and sentence and acquit or discharge the accused or order him to be tried by a Court of competent jurisdiction subordinate to

such Appellate Court of or sent for trial or alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence or with or without such reduction and with or without altering the finding after the nature of the sentence. Whereas in an appeal from any other order may alter or reverse such order; make any amendment or any consequential or incidental order that may be just or proper. Whereas Section 428 provides power of Appellate Court to record additional evidence separately and thereafter decide the appeal which cannot be mixed up or intertwined with the exactitudes of Section 423, which deals with the general powers of the appellate Court including the power of remand. The provision of Section 428 can be used as a tool to ensure justice but before exercising this jurisdiction, the Court should be convinced and satisfied that the recording of additional evidence is necessary for a just decision and not to fill up the gaps and lacunas of the prosecution case or the defect of prosecution or investigation. The overarching aim is to reach the truth and avoid miscarriage of justice. This jurisdiction vested in this section of law applies in rare cases where the appellate court's conscience is satisfied that without the fresh evidence, there would be a failure of justice. In the present case, if the learned judge of the High Court felt that the recording of additional evidence was inevitable then in such exigency, the High Court in the Jail Appeal, ought to record the additional evidence by itself or could have directed to record the additional evidence by a Court of Session or a Magistrate and after receiving the record of additional evidence with certification, the High Court was duty-bound under the rigors of law to decide appeal rather than remanding the matter to trial Court to decide the matter on the basis of additional evidence. The appellate court's power under Section 428 Cr.P.C is exclusive and exhaustive but it must be exercised with caution and only to serve the ends of justice and not to redo or restart the trial, rather the recording of evidence in this Section shall be subject to the provisions of Chapter XXV (of the Mode of Taking and Recording Evidence in Inquiries and

Trials - Sections 353 to 361 and 363 to 365 of Cr.P.C.) as if it were an inquiry.

8. This Court has interpreted this provision in several cases and laid down the scope and safeguards for admitting additional evidence at the appellate stage. In the case Shahadat Khan v. Home Secretary, West Pakistan (PLD 1969 SC 158), this Court emphasized that the provision is not meant to give the prosecution a chance to produce evidence which could easily have been produced at the first trial, i.e. it should not be used to fill gaps left in the prosecution. The key principles laid down in this dictum is that the additional evidence should be admitted only if necessary for a just decision, for instance, to prevent a miscarriage of justice caused by an omission at trial and not merely to allow a retrial of issues due to prosecutorial lapse. The Court noted that a guilty person should not escape through carelessness or ignorance of the trial court, nor should an innocent person be wrongly convicted due to an omission to record essential evidence. In case of Nadir Shah v. The State (1980 SCMR 402), this Court allowed additional evidence to clarify a technical point (the chain of custody of crime-scene items) which had been overlooked at trial. The Court reasoned that since the truth of the matter was at stake, the appellate court could admit further evidence rather than let the case turn on a technical omission. In fact, this decision reinforced that the appellate court has wide jurisdiction under Section 428, Cr.P.C. to direct additional evidence so as to avoid any injustice. However, this power is subject to two conditions: (1) the evidence must appear necessary to the court for reaching a just conclusion, and (2) it must not prejudice the accused's right to a fair trial. In the case of Dildar Vs. The State through Pakistan Narcotics Control Board, Quetta (PLD 2001 SC 384), it was held that if evidence that was available at the time of trial was not produced before the Court of first instance due to the negligence of the prosecutor or the investigating officer, its later production may seriously prejudice the proceedings. Whereas this Court held

in the case of Ishtiaq Ahmed Mirza and others Vs. Federation of Pakistan and others, (PLD 2019 SC 675) that necessity of taking additional evidence at the appellate stage must be felt by the appellate court itself and the same was not dependent upon what a party to the appeal thought of such necessity. However, the Court must record the reasons in terms of Section 428 Cr.P.C.

9. Under the Indian Code of Criminal Procedure 1973, Section 391 corresponds to the power to take additional evidence in appellate proceedings (akin to old Section 428 of the 1898 Code). While dealing with any appeal, the Appellate Court, if it thinks additional evidence is necessary, then after recording reasons may either take such evidence itself, or direct it to be taken by a Magistrate or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate but after certification of such evidence, the Appellate Court has to dispose of the appeal and not be trial Court. The Supreme Court of India has also dilated upon Section 391 of Cr.P.C in the case of Rajeswar Prasad Misra v. State of West Bengal (AIR 1965 SC 1887 = 1966 SCR (1) 178), and held that Section 391/428 Cr.P.C is an exceptional power in which a wide discretion is conferred on the appellate court, but it must be exercised sparingly and only in suitable cases, when there would be failure of justice without such additional evidence. The purpose is to empower the appellate court to avoid miscarriages of justice either by ordering a retrial or by taking additional evidence depending on what the exigencies of the case demand but the power should not be used as a disguise for a retrial or to change the nature of the case against the accused. Any new evidence must not take the defense by surprise or otherwise undermine a fair trial. Similarly, in the case of State of Gujarat v. Mohanlal Jitamalji Porwal (1987 (2) SCC 364, AIR 1987 SC 1321), it was held that mere lapse of time is no ground to sacrifice justice, a formal defect in proof could be cured in appeal to promote the ends of justice. If crucial evidence was left out due to oversight, an appellate court should not hesitate to bring it on record, so

long as the accused gets an opportunity to meet that evidence. Whereas Rambhau v. State of Maharashtra (2001) 4 SCC 759, the Court held that section 391 is an exception to the normal rule that appeals are decided on the trial record, and thus the power shall always have to be exercised with great care and caution. The Court stressed that additional evidence is not for filling up lacunae in the prosecution or defense case. The doctrine of finality of trials is not disturbed by Section 391 because it avoids the necessity of a de novo trial, but it must not be abused. The Court held that an application under Section 391 should not be allowed for the mere asking the applicant but must show exceptional circumstances why the evidence was not produced earlier. If a party had every opportunity at trial to lead a piece of evidence but failed to do so, they ordinarily cannot be allowed to fill up the lacuna under the guise of additional evidence.

10. The comparative study of Section 428 Cr.P.C and Order 41 Rule 27, Civil Procedure Code 1908, (CPC) demonstrates that even in the civil cases the appellate Court is invested with the powers to record additional evidence whether oral or documentary, in case the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause and when the additional evidence is allowed to be produced by an Appellate Court the Court shall record the reason for its admission. Under Rule 28 of CPC, the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court and according to Rule 29 of CPC, where the additional evidence is allowed to be taken, the Appellate Court has to specify the points to which the evidence is to be confined and record on its proceedings. In C.P.C, also, after sending the record of additional

evidence so recorded by the Court from whose decree the appeal is preferred, or any other subordinate Court, the appellate court has to decide the appeal by its own instead of remanding the case to the trial Court. So far as the question of remand is concerned, the provision is set down under Order 41 Rule 23 CPC, where if the Appellate Court thinks fit to remand the case, it may further direct what issue or issues shall be tried in the case so remanded with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit but no power of remand is provided under Order 41 Rule 27, C.P.C.

11. It is a matter of record that neither any application for recording additional evidence under Section 428 Cr.P.C was filed by the complainant nor the prosecution or the petitioner. No doubt if the Appellate Court in its own wisdom feels recording of additional evidence indispensable then it does not depend upon what a party thinks of such necessity but in this case the Court while passing order on its own motion, did not provide any opportunity of hearing to the parties to address whether there was any need to record additional evidence or not. The right of appeal, embraces and enfolds the right to invoke all the powers of the appellate court to advance the cause of justice but no miscarriage of justice, however, the predominant principle laid down in the catena of judgments is that the additional evidence should be permitted only if the party was genuinely prevented from producing it at trial stage irrespective of exercising due diligence but cannot be invoked in a routine and casual manner to revitalize or invigorate a lackadaisical prosecution at the appellate stage. Here the requirement of due diligence accentuates that only new or previously unavailable evidence that was overlooked despite best efforts but if the oversight was due to a party's own negligence or strategy, the appellate court may refuse the recording of additional evidence. The philosophy of recording additional evidence is not that an innocent person be wrongfully punished due to an omission or slip-up nor should

a guilty person escape for want of a formal proof. In our considered opinion, even if additional evidence was ordered to be recorded without any application from any party, the matter could not be remanded but it should have been recorded by the Appellate Court itself and if this task was assigned to the Sessions Judge/Additional Sessions Judge/Trial Court, then after recording and receiving evidence, the Appellate Court should have decided the appeal to fulfill the requirements of Section 428 Cr.P.C. which is lacking in this case.

12. In the wake of above discussion, this Criminal Petition is converted into an appeal and allowed. As a consequence, the impugned judgment is set aside and the matter is remanded to the High Court to decide the Jail appeal of the petitioner afresh in accordance with law after providing ample opportunity of hearing to the parties preferably within three months.

Judge

Judge

ISLAMABAD
10th July, 2025
Mudassar
Approved for reporting