

P L D 2012 Islamabad 35

Before Noor-ul-Haq N. Qureshi, J

NOOR JAHAN alias AHMED---Petitioner

versus

JUDGE SPECIAL COURT-2 and 2 others---Respondents

Criminal Revision No.32 of 2011, heard on 21st December, 2011.

(a) Criminal Procedure Code (V of 1898)---

---S. 540---Penal Code (XLV of 1860), Ss. 302, 324, 427 & 109---Explosive Substances Act (VI of 1908), Ss. 3 & 4---Anti-Terrorism Act (XXVII of 1997), S. 7---Power to summon material witness or examine persons present---Recalling of prosecution witnesses for their cross-examination---Deposition of two prosecution witnesses were recorded during trial in the absence of counsel of the petitioner---Petitioner moved an application for recalling said witnesses for the reason that their statements recorded under S.161, Cr.P.C during investigation to the extent of their improvements subsequently made in the deposition, had to be inquired into as it could affect the defence of the petitioner---Trial Court declined such application of the petitioner deeming that acceptance of the same would only delay the trial---Validity---Section 540, Cr.P.C provided procedure to summon witnesses for the purposes of cross-examining them, as right of the parties---Following principles of natural justice, accused could not be deprived of his right legitimated by procedural law, which would amount to denial of right of hearing---Improvements made by prosecution witnesses in their statements could ultimately affect the role of the accused, which could have been wrongly construed against the accused---Accused had the right to have an opportunity to cross-examine the prosecution witnesses to the extent of his defence---Revision petition was allowed and Trial Court was directed to summon the two prosecution witnesses for the purposes of cross-examination to the extent of confrontation of their statements under S.161 Cr.P.C.

Muhammad Younus v. The State 2004 PCr.LJ 699 and Zaheer Abbas v. The State 2008 YLR 1225 fol.

(b) Criminal Procedure Code (V of 1898)---

---S. 540 ---Power to summon material witness or examine persons present---Right of accused to cross-examine---Scope---Where accused could not cross-examine the witness for any reason beyond his control or any lapse was committed by the Trial Court in not allowing him to cross-examine, same had to be cured.

Zaheer Abbas v. The State 2008 YLR 1225 fol.

Basharat Ullah Khan for Petitioner.

Malik ;Ishtiaq Ahmad, Standing Counsel for Respondents.

Date of hearing: 21st December, 2011.

JUDGMENT

NOOR-UL-HAQ N. QURESHI, J.--The present criminal revision petition is directed against order dated 23-6-2011 passed by learned Judge Special Court-II, Anti Terrorism, Rawalpindi/Islamabad, whereby application moved under section 540, Cr.P.C. for recalling of P.Ws. Habib-ur-Rehman and Manzoor Ali for their cross- examination was declined.

2. That the petitioner was involved in case pertaining to Crime No.620/09, dated 2-12-2009, under Sections 302/324, 427/109, P.P.C., 7-ATA and 3/4 Explosive Act, registered at Police Station Margalla, Islamabad. During the trial, deposition of P.W.21 namely Habib-ur-Rehman and P.W.23 namely Manzoor Ali, Wireless Operator of Pakistan Navy were recorded on 11-4-2011 in the absence of learned counsel for the petitioner. The learned Counsel moved such an application for recalling the said witnesses for the reason that they are the important witnesses and their statements recorded under section 161, Cr.P.C. during investigation to the extent of their improvement

subsequently made in the deposition has to be confronted and enquired into, which ultimately gone un rebutted and affect the defence of the petitioner while cross-examining the other P.Ws.

3. We have heard both the sides and record perused.

4. Learned counsel for the petitioner reiterated the grounds urged in his criminal revision petition and prayed for allowing the same thereby the learned counsel for the petitioner may be permitted to cross-examine the P.Ws. Habib-ur-Rehman and Manzoor Ali, after recalling them for whom the learned Trial Court has declined his prayer made in the application.

5. Learned Standing Counsel on behalf of the State argued that it was duty casting upon the learned counsel to make himself available before the Court for the purposes of cross-examination, failure thereof disentitle him to seek such a relief and this matter before the Judge Special Court ATA therefore, needs to be concluded expeditiously.

6. From the perusal of record, it reveals that on 11-4-2011 when application was moved for recalling of P.Ws. but vide order dated 23-6-2011, said application was declined deeming that acceptance of the same will lead to linger on the trial but in the instant case while following the procedural law as envisaged by section 340, Cr.P.C., which provides the right of an accused to defended by a pleader, which cannot be denied to an accused person. Moreover, section 540, Cr.P.C. by itself provides a procedure to summon the witnesses for the purposes of cross-examining them as right of the parties. Otherwise, while following the principle of natural justice as defined by maxim audi alteram partem" (no body should be condemned unheard), one cannot be deprived of from his right legitimated by procedural law, which is equal to the denial of right of hearing.

7. That while forming an opinion in a reported case "2004 PCr.LJ 699", (Muhammad Younus v. The State), wherein it is settled that witnesses to be confronted the statement recorded under section 161, Cr.P.C. and in another reported case "2008 YLR 225," (Zaheer Abbas v. The State), the Hon'ble Court forms opinion that for any reason behind the control of parties any laps committed by the Trial Court in allowing to cross-examine has to be cured.

8. That in the instant case, though both the P.Ws. have not slightly indicated role of the accused not recognized them in the Court but their improvement to the extent of three persons present near the stop, ultimately affect the role of the accused, which may wrongly be construed against the petitioner, as such, it will be a right of the accused person facing trial before the Court of competent jurisdiction to have an opportunity to cross-examine the P.Ws. to the extent of his defence of his own choice. Therefore, while allowing this petition, we direct the learned Trial Court to summon

the P.W.21 and P.W.23 for the purposes of cross-examination to the extent of confrontation of their statements under section 161, Cr.P.C.

9. With these observations, the instant criminal revision is allowed.

M.W.A./23/IsI.

Revision allowed.