

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT**

**Criminal Revision No.80/2019**

Ajmal Hussain  
Vs.  
Yasir Mehmood and another

Petitioner By:	Mr. Jan Muhammad Khan, Advocate.
Respondent No.1 By:	Rana Abid Farooq, Advocate.
State By:	Hafiz Mazhar Iqbal, State Counsel and Mr. Zohaib Hassan Gondal, State Counsel along with M. Ali Shah, Assistant Sub-Inspector.
Date of Hearing:	31.01.2020.

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**GHULAM AZAM QAMBRANJI**: The instant Criminal Revision Petition has been filed by the petitioner (Ajmal Hussain) against the impugned orders, dated 20.07.2019 and 23.07.2019, passed by the learned Additional Sessions Judge (East) Islamabad.

2. Briefly stated, the petitioner along with four others is facing trial in case F.I.R No.59 registered on 14.04.2017 for the commission of murder of deceased Zarakat. On 10.07.2019 the prosecution produced two private witnesses, whose statements had been recorded as PW-1 and PW-2, thereafter, the petitioner moved an application under Order 540 Cr.P.C. for summoning 21 witnesses as Court Witnesses, whose names are mentioned in the list of witnesses annexed with the report under Section 173 Cr.P.C. which was allowed by the learned Trial Court. It was assertion of the petitioner that examination of Court Witnesses namely Malik Ayaz Ahmed, Muhammad Yousaf, Abdul

Shakoor and Abdul Munir was necessary for the just decision of the case but the learned Trial Court recorded the statements of three witnesses and gave up the important witness namely Abdul Munir vide order dated 23.07.2019, stating that his statement is not necessary, whereas the statement of said witness is very much important. Hence the instant Criminal Revision Petition.

3. The learned counsel for the petitioner has contended that; after framing of charge against the accused, prosecution examined two witnesses i.e. PW-1 & 2; the complainant of the case was not satisfied with the investigation and, therefore, filed a private complaint against the petitioner and four others on 07.11.2018, titled as "*Yasir Mehmood vs. Raja Ajmal and others*" and the same is pending before the learned trial Court i.e. Additional Sessions Judge (East) Islamabad; the petitioner filed an application under Section 540 Cr.P.C for summoning of twenty-one witnesses as court witnesses, who have been mentioned in the list of witnesses annexed with the report u/s 173 Cr.P.C.; on 20.07.2019, the learned counsel for the respondent refused to cross examine first on CW-7, namely Sikandar Ali and it was requested to the learned trial Court that first the complainant counsel will start the cross-examination on the witnesses and after that the defense will cross-examine, on which the learned trial Court did not accord the permission to the counsel for the petitioner for cross-examining the witnesses and after recording the statement of CW-7, and at the end of it mentioned that "*Opportunity given, NIL*", which is against the norms of justice, the learned counsel for the petitioners was not afforded an

opportunity to cross examine the witnesses, which is against the law; the learned trial Court did not accord permission to get record statement of Abdul Munir as court witness being unnecessary; lastly, it is contended that while recording the statements of court witnesses, opportunity to first cross examine the witnesses should have to be given to the prosecution side and, thereafter, to the defense. Hence, the instant revision petition.

4. The learned State Counsel assisted by the learned counsel for the complainant vehemently opposed the arguments advanced by the learned counsel for petitioner. They have supported the orders passed by the learned trial Court and prayed for dismissal of the instant revision petition.

5. I have heard arguments of the learned counsels for the parties and perused the available record with their able assistance.

6. The petitioner along with other co-accused persons is facing trial in the case F.I.R No.59/2017 with the allegation of committing the murder of one Zarakat. The record further shows that a Criminal Private Complaint has also been instituted against the accused persons, wherein a list of three witnesses has been annexed. The learned trial Court after fulfilling the codal formalities framed charge against the petitioner/accused. On denial of the charge by the accused persons, the learned trial Court proceeded with the matter, recorded statements of some of the witnesses. The prosecution side after examining the statements of PWs-1&2, did not file any application to the Court for

recording the statements of other PWs. The petitioner/accused filed an application under Section 540 Cr.P.C for summoning/examination of the statements of the witnesses mentioned in the report filed under Section 173 of Cr.P.C.

7. After hearing the application under Section 540 Cr.P.C, the learned trial Court passed the following order on 20.07.2019.-

*"5. Perusal of record reveals that initially challan in State case was sent up in this Court for Trial. Subsequently the complainant has filed the complaint u/s 200 Cr.P.C. The charge in complaint was framed and the three witnesses enlisted in the list of witnesses, evidence was recorded. Subsequently, the complainant has not filed any application u/s 540 Cr.P.C to summon the witnesses of the F.I.R as a Court witness. The Court while exercising its jurisdiction u/s 540 Cr.P.C, itself summoned the witnesses of the F.I.R as a Court witness, meanwhile the defense had also filed an application u/s 540 Cr.P.C to summon the witnesses of State case, which was placed on the record and the witnesses were summoned to appear as a Court witness. The learned counsel for the complainant filed the instant petition wherein he referred Article 133 of Qanoon-e-shahadat, which is not relevant when the witnesses were called as a Court witness. The procedure which is enumerated in Order 133 of Qanoon-e-Shahadat that the party shall first record its examination in chief and then the adverse party so desired cross examine the witness, then if the party calling him so desires re-examine him.*

*6. The Court witnesses as stipulated in Section 540 Cr.P.C can be called by the Court at any stage, if it appears to the Court it is essential to the just decision of the case. Since the witnesses which were called as Court witnesses were not already examined by the either parties, therefore, it cannot be said that they are witness of either of the party. The evidence recorded by the Court witness is only an assistance to the Court to dig out the facts and both the parties would have ample opportunities to cross examine the Court witnesses and no harm would be caused to the case of either party. Reliance is placed on 2011 P.Cr.L.J. 1248.*

*7. Furthermore, the learned counsel for the complainant has not brought on record any law or judgment of apex courts to substantiate his point that the defense had to first cross examine the Court witness and then the prosecution would cross examine him. It is not out of the place to mention here that the complainant had*

*brought the case before the Court and the burden lies on the prosecution to prove it beyond shadow of doubt. Let the evidence of CWs be recorded. This order be made part of the main file. "*

8. That the learned trial Court on 23.07.2019 passed the following order.-

**"11:00 a.m.**

**Present:** Accused Ajmal Hussain, Kamran Khan, Adnan Khan, Asnan Khan and Wajid Hussain on bail along with learned counsel Jan Muhammad Khan Advocate. Complainant in person along with Associate of senior counsel.

**ORDER**

*The associate of senior counsel appeared and contended that the counsel is busy in funeral and he intends to withdraw his Wakalatnama, therefore, let the case to come up till 02:00 p.m.*

**2:00 p.m.**

**Present:** Accused Ajmal Hussain, Kamran Khan, Adnan Khan, Asnan Khan and Wajid Hussain on bail along with learned counsel Jan Muhammad Khan Advocate. Advocate Haroon-ur-Rasheed for the complainant.

**ORDER**

*Advocate Haroon-ur-Rasheed, learned counsel for the complainant appeared before the Court and requested the Court that he may be allowed to withdraw his power of attorney. The request is allowed and his power of attorney is withdrawn. Signatures of learned counsel for the complainant to this effect have been obtained upon the margin of order sheet. Whereas, the complainant of case as well as his another counsel Rana Abid Farooq Advocate did not appear before the Court. Examination in chiefs of CWs Malik Ayaz Ahmed Awan, Muhammad Yousaf and Abdul Shakoor have recorded, whereas statements of CWs Nasir Abbas and Abdul Munir have not been recorded as the fact has already been brought on record by other witnesses of set, so their evidence is not necessary. File to come for cross examination upon CWs Malik Ayaz Ahmed Awan, Muhammad Yousaf and Abdul Shakoor on 25.07.2019 and it is made clear upon the parties that they make sure to cross examine the CWs in case of failure of either of the parties, penal provision shall be invoked."*

The petitioner being aggrieved and dissatisfied from the above said orders assailed the same before this Court through the instant petition.

9. The learned trial Court failed to comprehend the dictum laid down in *Nur Elahi's* case [PLD 1966 SC 708] in its true prospective wherein it has been clearly laid down in the said principle that all the PWs in the State case, who were not witnesses on behalf of the complainant as PWs in the Private Complaint, should be examined as CWs, so that the just decision could be arrived at after proper consideration of the entire material, relied upon by the parties. Although, it is discretion of the Court to summon any of the witness but in the instant case, as the petitioner has filed an application to summon certain set of witnesses, therefore, the said application be allowed to reach at a just decision.

10. The statement of the witness, namely Abdul Munir was not recorded by the learned trial Court who's statement, as per petitioner, is necessary to have been recorded for just and righteous decision of the case, but the learned trial Court vide order, dated 23.07.2019 has refused to record the statement of the said witness, holding that the statement of another witness of same set has already been recorded and, therefore, the statement of remaining witnesses including Abdul Munir, would not be helpful to the Court.

11. Both the parties have relied upon the judgment titled as "*Nur Elahi versus The State and others*" [PLD 1966 SC 708], wherein the august Supreme Court allowed the revision petition. The relevant portion of the judgment is reproduced as below.-

*"After considering all aspects of the matter, we hold that a fair procedure would be for the learned trial Judge to take up the complaint case first for trial.*

*During that case the learned trial Judge may call the witnesses mentioned in the Police challan, if they were not already examined on behalf of the complainant, as Court witnesses under section 540-A of the Criminal Procedure Code, so that they can be cross-examined by both the parties. This will enable the Court to have the whole relevant evidence included in one trial and a decision could be arrived at after a proper consideration of the entire material relied on by the parties."*

12. Keeping in view the dictum laid down by the Hon'ble Supreme Court of Pakistan, in the above case, it appears that all the PWs cited in the State case/challan case and not cited/mentioned as PWs on behalf of the complainant, have to be examined by the learned trial Court while conducting trial in a Private Complaint. The wisdom and the logic in so doing has also been enunciated by the apex Court in the aforementioned judgment of *Nur Elahi* case supra, in the following words:-

*"This will enable the Court to have the whole relevant evidence included in one trial and a decision could be arrived at after a proper consideration of the entire material relied on by the parties. The accused persons would in addition obviously have the right to adduce defence evidence if they so choose. If that trial results in a conviction, it will be for the Public Prosecutor to consider whether or not he should withdraw from the prosecution, with the permission of the court, under section 494 of the Code of Criminal Procedure, in the Police challan case. It would be easy for him to take such a decision after the whole evidence has been thrashed out in the first trial. If the first case ends in an acquittal, he might still have to consider whether the police version has not been so seriously damaged by what has been brought out in the first trial, as to justify withdrawal of the prosecution. Otherwise the second trial would be allowed to proceed to its normal conclusion and the parties would have the advantage of utilizing the material placed on the record of the earlier trial, by way of cross-examination of the relevant witnesses as permitted by law."*

13. Perusal of the impugned order, dated 20.07.2019 shows that nowhere it has been mentioned that the learned counsel for petitioner

did not want to cross-examine CW-7. The right of cross-examination cannot be denied to any of the parties. In such circumstances, the learned trial Court is directed to afford an opportunity of cross-examination to the petitioners on CW-7. The impugned order dated 23.07.2019 passed by learned trial Court is set-aside only to the extent of refusal for recording of statement of CW, namely Abdul Munir and the learned trial Court is also directed to allow recording statement of said witness and opportunity for cross-examination be given first to the complainant/prosecution and then to the defence. The reason behind is that whatever may be the result, ultimately, it is the accused, who will face the consequences.

14. For what has been discussed above, this petition is **accepted**. Parties are directed to appear before the learned trial Court on **16.03.2020** for further proceedings.

~~MAJ. JUDGE~~  
(GHULAM AZAM QAMBRANI)  
JUDGE

Announced in open Court, on 3<sup>rd</sup> of March, 2020.

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~~JUDGE~~  
JUDGE<sub>2</sub>

"Rana.M.Ift"