

Form No: HCJD/C.

**JUDGEMENT SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

**Case No: Writ Petition No.270 of 2021**

**Faisal Rafique**  
**Vs.**  
**Saeed Mumtaz Durrani etc.**

**Petitioner by: Mr. Adil Aziz Qazi, Advocate.**

**Respondents by: Raja Rizwan Abbasi, Advocate.**  
**Majid Rashid, State Counsel.**  
**M. Riasat, A.S.I.**

***Date of Decision: 28.01.2021.***

**AAMER FAROOQ, J.-** Respondent No.1 namely Saeed Mumtaz Durrani is facing trial in case FIR No.326 dated 09.09.2018 under Sections 324, 452, 337-F(D) PPC, Police Station, Aabpara, Islamabad.

2. During the course of trial the prosecution produced witnesses which include the complainant/petitioner. The prosecution witnesses were duly examined by the State and cross-examination was conducted by the learned counsel on behalf of respondent No.1. In this behalf, cross-examination of prosecution witnesses was conducted on 18.05.2019. An application was filed by respondent No.1 under Section 540 Cr.P.C. for recalling PW-2 Abdul Ahad Faisal and PW-3 Uzma Faisal for further cross-examination. The said application was dismissed by the learned Trial Court vide order dated 13.03.2020. Criminal Revision was preferred by

respondent No.1 against the said order which was allowed vide order dated 21.09.2020 and the application filed by respondent No.1 was accepted. The instant writ petition assails order dated 21.09.2020 passed by the learned Revisional Court.

3. Learned counsel for the petitioner, *inter alia*, contended that under Section 540 Cr.P.C. the defence cannot fill in the lacunae and loophole. It was contended that the prosecution witnesses were duly cross-examined by learned counsel for respondent No.1 way back in 2019 whereas the application was filed much later in time on 02.03.2020 almost after about 10 months just to fill in the lacunae and loophole. It was further contended that the only difference being since earlier cross-examination was that a new counsel was engaged by respondent No.1. Reliance was placed on the case titled **Muhammad Safdar alias Bhooma v. The State and another** (2020 P Cr. L J 1113), **Muhammad Munir v. The State through Advocate-General AJ&K Muzaffarabad** (2015 P Cr. L J 1464), **Najam ul Hassan v. The State** (2002 MLD 477), **Ghulam Sarwar v. The State** (2010 MLD 1775), **Abdul Razzaq Abid v. Special Judge (Central) FIA Lahore and another** (2002 YLR 3), **Zaheer Abbas v. The State** (2008 YLR 1225).

4. Learned counsel for respondent No.1, *inter alia*, contended that in the interest of justice and fair trial

respondent No.1 is entitled to further cross-examination. It was further contended that earlier respondent No.1 was represented but not defended properly; that the material questions were not asked which go to the root of the matter. Reliance was placed on the case titled **Riaz and others v. The State (1991 P Cr. L J 877)**, **Muhammad Azam v. The State (1988 P Cr. L J 1464)**.

5. Learned State Counsel endorsed the arguments addressed by learned counsel for respondent No.1.

6. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

7. The background of the controversy in hand has been mentioned hereinabove therefore, need not be reproduced. Under Section 540 Cr.P.C. the Trial Court has jurisdiction to summon any witness or recall and reexamine any person already examined if his evidence appears to be essential for just decision of the case. For the ease of convenience the Section is reproduced below:

*“540. Power to summon material witness or examine person present: Any Court may, at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine any person already examined; and the Court shall summon and examine or re-call and re-examine*

*any such person if his evidence appears to it essential to the just decision of the case.”*

8. The bare perusal of the Section shows that the same is split into two parts; one, the Court may summon any witness whose evidence is essential to just decision of the matter or recall and reexamine any person already examined if his evidence appears to be essential to the just decision of the case. In the instant case it is the latter part of Section 540 Cr.P.C. which may be applicable. As noted above, the prosecution witnesses PW-2 and PW-3 were duly cross-examined by learned counsel for respondent No.1. The stance on behalf of respondent No.1 that the accused was represented but not defended properly, is not correct in the facts and circumstances of the case inasmuch as it is not the case of the accused that he was not afforded an opportunity of cross-examination of prosecution witnesses. The Hon’ble Lahore High Court in case reported as **Muhammad Safdar alias Bhooma v. The State and another** (2020 P Cr. L J 1113) observed as follows:

*“Learned trial Court has certainly been vested with adequate powers under section 540 Cr.P.C. to summon and examine or re-summon and re-examine any witness in the trial before pronouncing the final verdict, but said provisions of the Code did not ingrain any such interpretation where it should be allowed to be used by a party to fill-in the lacunae of its case or to unnecessarily*

*protract proceedings of the trial to defeat the ends of justice.”*

9. Similarly, in **Abdul Razzaq Abid v. Special Judge (Central) FIA Lahore and another** (2002 YLR 3) the Hon’ble Lahore High Court observed that since the prosecution witnesses have been cross-examined the law did not provide for further cross-examination of a witness. In **Zaheer Abbas v. The State** (2008 YLR 1225) the Division Bench of the Hon’ble Lahore High Court observed that the petitioner must establish some ground for further cross-examination. It was also observed as follows:

*“Of course cross-examination is a very valuable right particularly of accused. However, recognition of this right as such is not to be misused. To invoke revisional jurisdiction of this Court, the petitioner must have established some legal ground. A look through application moved by petitioner under section 540, Cr.P.C. would show that he was hovering under the impression that perhaps it was his choice to exercise the right of cross-examination as and when he wanted and he was not required even to explain as to why he did not cross-examine when he was required to do so. This was a misconception. The petitioner must have come up with cogent reason as to why he could not cross-examine the witness at relevant time. Copy of the order sheet of the learned trial Court or proceedings of recording of evidence have not been placed on record by the petitioner. It is not case of the petitioner that he was not*

*allowed opportunity to cross-examine the witnesses. Uncertified copy of the application moved by the petitioner does not disclose any reason as to why P.W.3 was not cross-examined by the petitioner or his counsel. It was incumbent upon the petitioner to make out a case that he could not cross-examine the witness for any reason beyond his control or any lapse was committed by the learned trial Court in not allowing him to cross-examine. Without mentioning any reason he moved the application on the sole ground that cross-examination was the most valuable right of the accused.”*

10. There is some case law which does provide for recalling of a witness for further cross-examination but that only was done to further cause of justice where either the accused was not represented or even was represented but the right of opportunity was not properly availed. Reliance is placed on the case titled **Ghulam Sarwar v. The State (2010 MLD 1775), Muhammad Azam v. The State (1988 P Cr. L J 1464) & Riaz and others v. The State (1991 P Cr. L J 877).**

In the facts and circumstances the referred case law is not applicable inasmuch as no cogent ground is mentioned in the application for recalling of a witness for cross-examination. Moreover, the application was moved almost after about 10 months which seems to be an afterthought.

11. Though under Section 540 Cr.P.C. a witness can be recalled and reexamined but the literal interpretation of the

same does not indicate that he can be cross-examined again. The purpose of Section 540 Cr.P.C. is to provide jurisdiction to the Court to summon a witness or recall a witness for reexamination only for just adjudication of the matter; the recalling of a witness for further cross-examination is not provided in Section 540 Cr.P.C. on the plain reading of the said provision. Likewise, Articles 132 and 133 of the Qanoon-e-Shahadat Order, 1984 also provide for examination, cross-examination and reexamination of a witness. Calling a witness again for cross-examination is not permissible under the referred law.

12. In view of the foregoing, the order impugned in the instant petition is not tenable as the discretion exercised by the Revisional Court is not within the purport of the law.

13. For what has been stated above, the instant petition is allowed and the impugned order dated 21.09.2020 by respondent No.3 is set aside; consequently, the application filed by respondent No.1 stands dismissed.

**(AAMER FAROOQ)**  
**JUDGE**

Approved for reporting

\*M.Naveed\*