

Form No: HCJD/C-121
ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Writ Petition No. 2280 of 2021

Muhammad Maroof

Versus

The State and 04 others.

| S.No. of order/ proceeding | Date of order/ proceeding | Order with signature of Judge and that of parties or counsel where necessary. |
|-----------------------------------|----------------------------------|---|
| (04) | 20.10.2021 | Ch. Naeem Ali Gujjar, Advocate for the petitioner. Mr. Ali Hussain Bhatti, Advocate for respondents No.4 and 5. Syed Shahbaz Shah, learned State Counsel. Muhammad Riaz, ASI |

Through the instant writ petition, the petitioner has impugned order dated 07.06.2021, passed by learned Sessions Judge (West), Islamabad and order dated 27.01.2021, passed by learned Judicial Magistrate, Police Station Kohsar, Islamabad, whereby application filed by the petitioner u/s 540 Cr.PC for summoning witnesses was dismissed.

02. Brief facts of the case are that the petitioner is complainant in case FIR No. 253, dated 02.07.2019, U/s 506-II, 427/34,

452/379 P.P.C, registered at Police Station Kohsar, Islamabad.

03. That report U/s 173 Cr.P.C was submitted before the learned trial Court; evidence of the prosecution witnesses was recorded; statements u/s 342 Cr.P.C of the accused persons were also recorded; the petitioner filed application for summoning of witnesses whose names were mentioned in the FIR as eye-witnesses.

04. That application filed by the petitioner u/s 540 Cr.P.C was dismissed by the Court of learned Judicial Magistrate, P.S Kohsar, Islamabad vide order dated 27.01.2021; the petitioner filed a criminal revision petition which was also dismissed vide order dated 07.06.2021, passed by learned Sessions Judge (West), Islamabad.

05. Being aggrieved from the orders passed by learned lower Courts, the petitioner has filed the instant writ petition for setting aside of the impugned orders.

06. Learned counsel for the petitioner, *inter alia*, contends that the impugned orders passed by the learned Courts below are against the law and facts of the case and the same are illegal, unlawful and against the rights of the petitioner, erroneous, factually incorrect and has resulted into miscarriage of justice, hence, the same are liable to be set aside. Learned counsel has relied upon the cases reported as **2019 MLD 2048 Balochistan** and **2021 PCr.LJ 417 Islamabad.**

07. Learned State Counsel assisted by learned counsel for the respondent No.4 & 5 has controverted the arguments advanced by learned counsel for the petitioner and stated that both the impugned orders have rightly been passed strictly in accordance with law; the petitioner has filed the application u/s 540 Cr.PC at belated stage, just in order to delay and linger on the proceedings, hence both the impugned orders were rightly passed and has prayed for dismissal of instant writ petition. Learned counsel have relied upon the cases

reported as **2018 YLR 2490** and **2020 MLD 942.**

08. Arguments advanced by both the parties and learned State Counsel have been heard and record has been perused with their able assistance.

09. Application u/s 540 Cr.PC filed by the petitioner has been refused by the learned Courts below on the ground that it was filed at belated stage. Names of the witnesses were not mentioned in the Challan / report and just in order to fill up the lacunas, the application was moved.

10. Petitioner submitted application for registration of FIR regarding the occurrence; local police did not register FIR and the petitioner moved an application U/s 22-A Cr.PC, which was allowed vide order dated 14.06.2019, passed by learned Additional Sessions Judge, (West) Islamabad, whereby police was directed to lodge FIR under the relevant sections of law, as cognizable offence was made out as per contents of application moved by the petitioner before the learned

Justice of Peace. It was further mentioned in the said order that after conducting investigation, if the allegations are proved to be false/wrong, then the police was directed to initiate proceedings u/s 182 Cr.PC against the petitioner / complainant.

11. In compliance of order passed by learned Justice of Peace, police registered FIR No. 253/19, u/s 148, 149, 506(ii); the petitioner moved application for adding the proper sections in the FIR, whereupon DSP (Legal) gave his legal opinion that Sections 452, 379 and 427 were attracted in the instant case, hence the same were added by the investigating officer in the FIR.

12. In the FIR, names of the persons mentioned in application u/s 540 Cr.PC are categorically mentioned as eye-witnesses of the occurrence but the police did not record their statements u/s 161 Cr.PC, rather submitted challan in the Court wherein only names of two witnesses were mentioned, one is Muhammad Maroof / complainant of the case and the other is Asim Ghaffar / I.O.

13. It is quite surprising that police has not recorded statements of eye-witnesses whose names were mentioned in the FIR.

14. The petitioner also filed a complaint against the Investigating Officer before the Inspector General of Police, Islamabad, whereby detailed inquiry was conducted and it was recommended that the I.O has deliberately not recorded the statements of eye-witnesses and also not conducted investigation independently, rather supported the accused party; the I.O was found guilty of misconduct by not mentioning the important evidence in challan/report u/s 173 Cr.PC and departmental proceedings were recommended to be initiated against the I.O.

15. Section 540 Cr.PC is reproduced here for ready reference:

"540 Cr.P.C. Power to summon material witness or examine persons 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 recall and re-examine any person already

examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

16. A close reading of afore-mentioned provision indicates that it gives rather wide powers to the Court to examine any person as a court witness at any stage of the case. It enables the Court rather in certain situations imposes a duty on it to summon witnesses who could not otherwise be brought before the Court. The section consists of two parts: one giving discretionary power to the Court and the other imposing an obligation on it. In **Jamatraj Kewalfi Govani v. State of Maharashtra** (AIR 1968 SC 178), the Court was seized of a similar issue when it held as follows:--

"(10) Section 540 is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the court

may act in one of the three ways: (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are, however, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly."

17. The Court cannot summarily dismiss an application for additional evidence in terms of section 540 Cr.P.C. by merely holding that either the said witness was not mentioned in the challan or that it was belated application or that it may fill up lacunas in prosecution case, unless the totality of material placed

before it is considered to find out whether examination of the said witness is essential for a just decision of the case. While dilating on the purpose of an analogous provision in Indian Criminal Procedure Code (Section 311), the Supreme Court of India in **Iddar and orders v. Aabida and another** (AIR 2007 SC 3029) observed as follows:--

"The object underlying section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trial under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It

is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

18. The Court has also to keep in mind that in trying a case it has to find out the truth to render a judgment in accord with canons of justice. If it finds that the investigation is defective, it cannot just sit idle as a timorous soul and has to exercise all the enabling provisions under the law including section 540, Cr.P.C. to discern the truth. For the purpose of this provision, the Court even without any formal application from prosecution or accused, can summon any person as witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined. **In Ansar Mehmood v. Abdul Khaliq** (2011 SCMR 713), the judgment of the High Court was reversed by the Hon'ble Supreme Court of Pakistan and that of the trial Court was restored which had allowed examination of additional evidence in

terms of section 540, Cr.P.C. While doing so, the Court commented on the ambit of this provision in terms as follows:--

"5. Bare reading of section 540, Cr.P.C. transpires that where an evidence is essential for just decision of the case, it is obligatory upon the Court to allow its production and examination. Examining the law on the subject, reference can be had to Muhammad Murad Abro v. The State through A.G. Balochistan (2004 SCMR 966), wherein it was held that provision of section 540, Cr.P.C., is to enable the Court to go at the truth of the matter, so as to come to a proper conclusion. In the case under trial, it is obligatory to summon a person whose evidence is essential for just decision of the case. Similar view was taken in Painda Gul and another v. The State and another (1987 SCMR 886), with addition that the Court has widest powers under section 540, Cr.P. C. and can summon a witness for examination at any stage of the case. However, while exercising discretion it must guard itself against the exploitation of this power by a litigant party and keep in view the guiding principle, what the ends of justice demand. Cases titled as Dildar v. State through Pakistan Narcotics Board, Quetta (PLD 2001 Supreme Court 384) and the State v. Muhammad Yaqoob (2001 SCMR 308), lay down guide. Observations made in 2001 SCMR 308, are quoted:--

"It is thus manifest that calling of additional evidence is not always conditioned on the defence or prosecution making application for this purpose but it is the duty of the Court to do complete justice between the parties and the carelessness or ignorance of one party or the other or the delay that may result in the conclusion of the case should not be a hindrance in achieving that object. It is salutary principle of judicial proceedings in criminal cases to find out the truth and to arrive at a correct conclusion and to see that an innocent person is not punished merely because of certain technical omission on his part or on the part of the Court. It is correct that every criminal case has its own facts and, therefore, no hard and fast rule criteria for general application can be laid down in this respect but if on the facts of a particular case it appears essential to the Court that additional evidence is necessary for just decision of the case then under second part of the section 540, Cr.P.C., it is obligatory on the Court to examine such a witness ignoring technical/formal objection in this respect as to do justice and to avoid miscarriage of justice."

19. In **Shahbaz Masih v. The State** (2007 SCMR 1631), similar view was reiterated by the Hon'ble Supreme Court of Pakistan and it was held as under:--

7.Court enjoys full, powers to summon and, examine any person as a witness at any stage of trial; rather it is imperative for the Court within terms of section 540, Cr.P.C. to summon and examine a person when evidence of such person appears to the Court essential to do the just decision of the case. Also, the Court can examine any person in attendance though not called as a witness. The underlying object, always, is to reach truth"

20. As the names of persons mentioned in the application u/s 540 Cr.PC already mentioned in FIR as eye-witnesses, if their statements are recorded by the learned trial Court, no prejudice will be caused but if their statements are not allowed to be recorded, the petitioner/complainant may suffer from said act and may not get proper justice from the Court of law / learned trial Court.

21. In view of above, both the orders passed by learned lower Courts are set aside, the instant writ petition is **allowed**. Learned trial Court is directed to provide one and single opportunity to the petitioner for producing the witnesses mentioned in the application u/s 540 Cr.PC and if any witness is

failed to appear for recording of evidence on the date fixed by the learned trial Court, the right of recording of evidence be closed and the case be decided on its merits. Learned trial Court is further directed to conclude the trial in all respects within a period of two (02) months positively and submit compliance report before the Additional Registrar (Judicial) of this Court.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Ahmed Sheikh

Approved for reporting