JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Criminal Revision No. 34/2020

Ghulam Mustafa

Versus

The State, etc.

Criminal Revision No. 35/2020

Abdul Raheem

Versus

The State, etc.

Petitioners by: Hafiz Malik Mazhar Javed, Advocate.

Respondents by: Mr. M. Sohail Khursheed, State Counsel.
Mr. Mudassar Hussain Malik, Syed Zulfiqar Abbas Naqvi, Syed Hamid Ali Bukhari, Advocates.
Muhammad Rafiq, Inspector & Noor Elahi, ASI, P.S. Industrial Area, Islamabad.
Darya Khan, S.I. P.S. Aabpara, Islamabad.

Date of Hearing: 28.10.2020.

MOHSIN AKHTAR KAYANI, J. By way of this common judgment we intend to decide both the captioned criminal revisions having common questions of law and facts.

2. In criminal revision No.34/2020, petitioner Ghulam Mustafa has assailed the order dated 10.02.2020, passed by Special Judge, Anti-Terrorism Court-II, Islamabad, whereby application U/S 94/540 Cr.P.C. for summoning of court witnesses alongwith relevant record in case FIR No.296, dated 26.06.2015, U/S 324, 427, 34 PPC, 7 ATA, P.S. Aabpara, Islamabad was dismissed.

3. In criminal revision No.35/2020, the petitioner Abdul Raheem is aggrieved with the order dated 10.02.2020, passed by Special Judge, Anti-Terrorism Court-II, Islamabad, whereby application U/S 94/540 Cr.P.C. for summoning of court witnesses alongwith relevant record in case FIR No.03, dated 03.01.2014, U/S 302, 109, 34 PPC, 7 ATA, P.S. Industrial Area, Islamabad was dismissed.

4. Learned counsel for the petitioners in both these cases contends that respondents No.2 & 3 Syed Kumail Hussain Jaffari and Syed Mohsin Ali Naqvi are accused in the above mentioned two FIRs and facing trial before ATC Court, Islamabad for the charges of murder and attempt to commit murder, whereby weapons of offence in both these cases are same; that trial are almost at the last stage when petitioner filed two separate applications for summoning of court witnesses alongwith relevant record but trial Court vide impugned order dated 10.02.2020 dismissed the applications in violation of *Qanun-e-Shahadat* Order, 1984; that evidence of witnesses referred in the applications is necessary for the just decision of case, whereby trial Court is under legal obligation to summon any person, witness under the concept of material witness if the evidence appears to be essential for the just decision of the case; that in criminal case FIR No.296, dated 26.06.2015, U/S 324, 427, 34 PPC, 7 ATA, P.S. Aabpara, Islamabad, petitioner prayed for summoning of record of Machine Gun Factory, POF Wah Cannt alongwith record of pistol No.IT/1102-13-A.C.00169, which is weapon of offence used in both these cases but the trial Court dismissed the application on wrong reasons. Similarly, license of said weapon which has been registered at Muzaffarabad, AJK arms licensing authority was requested to be requisitioned and as such no justified reasons have been provided in the impugned order; that in criminal case FIR No.03, dated 03.01.2014, U/S 302, 109, 34 PPC, 7 ATA, P.S. Industrial Area, Islamabad petitioner requested to requisition ten (10) witnesses

including those two witnesses discussed above as accused in both these cases are same but learned trial Court has made a new analogy that attested copies of deposition recorded in connected matter can be produced/brought on record for the purpose of trial; that there is no concept under *Qanun-e-Shahadat* Order, 1984 to transpose or transmit the evidence of one criminal case into another criminal case for the purpose of conviction and as such witnesses who have not been called in the subsequent case are material witnesses as without their presence in the witness box their testimony could not be considered legally admissible under the law.

5. Conversely, learned counsel for the respondents raised different objections including maintainability of instant criminal revisions on the ground that evidence can be transmitted in criminal cases for the purpose of prosecution and all the documentary evidence exhibited in one criminal case can be used in second criminal trial against the same set of accused; that witnesses for the purpose of record i.e. machine gun factory, POF Wah and record keeper of license No.46345 of arms licensing authority AJK have already been examined in the trial Court in one case and there is no need to place those documents by summoning the witnesses in the second trial and once document exhibited, there is no need to call again which would cause further delay in the trial which is already fixed for final arguments.

6. Learned State Counsel contends that it is the discretion of Court to requisition the record if it is required for just decision of the case and without summoning of record trial Court is handicapped to adjudicate upon the matter; that trial Court is not permitted to transmit evidence of one criminal case into another criminal trial with the view to save precious time of Court.

7. Arguments heard, record perused.

8. Perusal of record reveals that respondents No.2 & 3 have been nominated as accused in two FIRs i.e. FIR No.03, dated 03.01.2014, U/S 302, 109, 34 PPC, 7 ATA, P.S. Industrial Area, Islamabad and FIR No.296, dated 26.06.2015, U/S 324, 427, 34 PPC, 7 ATA, P.S. Aabpara, Islamabad. Evidence of prosecution has already been concluded and matters are now pending for final arguments before the trial Court. Petitioners filed two different applications U/S 94/540 Cr.P.C. in both these cases for summoning of courts witnesses alongwith relevant record.

9. Learned counsel for the petitioners has mainly argued that weapon of offence i.e. 9MM pistol Ex.P-3 was used in both these cases alongwith other criminal cases by same set of accused who are accused in these cases. However, during the course of trial prosecution intends to connect the respondents/accused with particular piece of evidence i.e. the manufacturer of said weapon of offence which is machine gun factory, POF Wah, Rawalpindi as to whether the weapon of offence was purchased by Syed Kumail Hussain Jaffari/respondent and the same was registered with the licensing authority of AJK, therefore, these witnesses are necessary for the just decision of the case but in both these cases learned trial Court has not permitted the petitioners to call these witnesses in order to substantiate the prosecution case.

10. While considering the prayer as well as record of the petitioners, we have confronted learned counsel for the petitioners qua the weapon of offence, whether the same was manufactured by Machine Gun Factory, POF Wah and evidence to that extent has already been exhibited through Ex.PAF which verified these information. Learned counsel for the petitioners contends that Ex.PAF is a letter issued by Managing Director, Machine Gun Factory, POF Wah to Section officer Arms, Ministry of Interior, which was not taken into account by

the I.O from Managing Director, POF Wah, nor he has recorded the stance of any record keeper of Machine Gun Factory.

11. Similarly, learned counsel for respondents has drawn the attention of this Court towards another letter Ex.PAD, dated 07.11.2016, issued by office of District Magistrate, ICT, which is meant for verification of pistol 9MM.

12. Perusal of these two documents reveal that these documents have not been placed by the I.O in his testimony rather they have been placed on record by learned Special Prosecutor, even though the documents are not addressed to police authority or I.O in any manner and in such eventuality the confirmation of purchase of weapon of offence in the name of Syed Kumail Hussain Jaffari has to be substantiated from Machine Gun Factory, POF Wah by calling the record keeper as well as record keeper of the licensing authority from AJK, whether the weapon was registered in the name of accused/respondent in this case. The analogy provided in Section 540 Cr.P.C. confirms that such evidence if not brought on record, the prosecution might not be successful to connect the accused persons with weapon of offence, therefore, it is essential for the just decision of the case.

13. The objection raised by the respondents in terms of Section 540 Cr.P.C. which relates to report of chemical examiner, whereby petitioner in criminal revision No.35/2020 requested the trial Court for summoning of Ali Ahmed Khan and Iman Ali Shah of FSL alongwith reports though the same have already been exhibited through Ex.PAB in the said case by Special Prosecutor. The respondents in this regard contend that report once exhibited in one case could have been used in another case as expert witness could not be summoned and report be presented without calling him as witness in terms of Section 510 Cr.P.C.

14. The provision U/S 510 Cr.P.C. provides a protection to the chemical examiner, serologists, firearm expert etc. so that their expert reports be presented in the Courts and to avoid the delays, however in case where there was ambiguity in the case, the witness may be called at the discretion of the Court in terms of proviso of Section 510 Cr.P.C. i.e. *"the Court may [if it considers necessary in the interest of justice] summon and examine the person by whom such report has been made"*, however, in this case a unique proposition has been generated as to whether report exhibited in one case can be exhibited in another case prepared by FSL, such aspect if read in conjunction with Section 540 Cr.P.C., the principal provision fully attracts and such witness could not be called. The report is same in all the cases qua the weapon of offence, therefore, in such eventuality report of expert has to be treated as single report to be used in another case and bar so contained in Section 510 Cr.P.C. comes into play. List submitted for summoning of witnesses U/S 540 Cr.P.C. in criminal case FIR No.03, dated 03.01.2014, U/S 302, 109, 34 PPC, 7 ATA, P.S. Industrial Area, Islamabad contain ten (10) names, whereby persons referred at S.No.5 to 10 are police officials and eyewitnesses of criminal case FIR No.296/2015 whose evidence has been recorded therein, but have not been produced in case FIR No.03/2014 by the prosecution and the question as to whether their evidence is necessary or otherwise has been dealt by the trial Court in the following manner:-

> *The complainant through application requests further that court may call some six witnesses pertaining to case registered through F.I.R No.296/15 of police station Aabpara so as to depose in this case, however, there is no need to call and examine the witnesses of another case and if there is anything material in their statement for reference, then attested copies of their depositions can be brought on record.*

15. The above mentioned observation of the trial Court reveals a unique proposition that witnesses are not required to be called as they have already

recorded their evidence in one criminal case FIR No.03/2014 and their deposition can be brought on record through attested copies. The principle applied by the trial Court in the above mentioned impugned order has to be considered in terms of *Qanun-e-Shahadat* Order, 1984, whereby testimony in shape of attested copies is to be considered as a document but the said document could not be considered as public document or private document in terms of Article 85 & 86 of *Qanun-e-Shahadat* Order, 1984 and even certified copies of a public documents are permissible to be produced in the court in terms of Article 87 of the *Qanun-e-Shahadat* Order, 1984, in such eventuality question arose as to whether certified copies of deposition of witnesses could be called as a public document to be considered in the second trial and in such process, testimony of witness is deemed to be recorded in the second trial, the answer is "***No***". Although, the presumption of truth is attached to certified copy and document produced on record in terms of Article 90 & 91 of *Qanun-e-Shahadat* Order, 1984 has duly been given in the *Qanun-e-Shahadat* Order, 1984. The admissibility of statement has to be considered in terms of Article 18 of *Qanun-e-Shahadat* Order, 1984, and its relevancy in terms of Article 19 of *Qanun-e-Shahadat* Order, 1984 is required to be proved by the prosecution. The onus to prove a case is upon prosecution in terms of Article 117(2) of *Qanun-e-Shahadat* Order, 1984 as in criminal jurisprudence the general principle is that, prosecution is to prove the case against accused beyond doubt and this burden does not shift from prosecution even if accused takes up any particular plea and fails in it.

16. Similarly, if there is any room for benefit of doubt in the case of prosecution, the same will go in favour of accused and not to prosecution while referring to this analogy of criminal jurisprudence one fact is evident that burden has to be discharged by the prosecution. The trial Court while passing the impugned order has not gone through the analogy of proof of facts which must

be given through oral evidence in terms of Article 70 of *Qanun-e-Shahadat* Order, 1984. The oral evidence must be direct in all cases by a person which could be seen, it must be the evidence of witness, who says he saw it. In other eventuality the witness who heard the fact has to say that he heard it or to perceive from any other sense. Article 71 of *Qanun-e-Shahadat* Order, 1984 also strengthen with 2nd proviso which says that "*if oral evidence refers to the existence or condition of any material thing other than document, the Court may, if it thinks fit, require the production of such material thing for its inspection*". Similarly, in 3rd proviso only exception to Article 71 of *Qanun-e-Shahadat* Order, 1984 is "*if a witness is dead or cannot be found or has become incapable of giving evidence, or his attendance could not be, procured without an amount of delay or expense which under the circumstances of the case the Court regards as unreasonable*", therefore, all these principles lead to irresistible conclusion that testimony should be direct from the witness to prove or disprove a particular fact, whereby the onus in a criminal case is upon the shoulders of prosecution. All these principles have not correctly been applied by the trial Court in these cases. Even otherwise, there is no concept available under the law to use the deposition of one set of witnesses of a criminal case in another criminal case without calling those witnesses nor there is any concept under the law that certified copies of statement of witnesses can be placed on record of any other case or if the evidence of one witness is adopted from one case into the file of other case without appearance of witness, without examination and cross examination of the witness, it amounts to serious defect and may cause prejudice to the case of defence, and it also amounts to illegality. In such circumstances, the trial stands vitiated and even no protection under Section 537 Cr.P.C. can be extended to a trial, where such methods were adopted by the learned Trial Courts, when accused is facing more than one trial. Reliance is placed upon ***1996 P.Cr.LJ 514 Karachi (Ghulam Hussain vs. The State)***. Similar principle has also been appreciated by the apex Court in case reported as ***PLD 1966 SC 708 (Noor***

Elahi vs. The State), whereby it was held by one of the Hon'ble Member namely B. Z. Kaikaus (as he then was), that:

> *"The law is that every criminal proceeding (and in fact in every civil proceedings) is to be decided on the material on record of that proceedings and neither the record of another case nor any findings recorded therein should affect the decision. If the court takes into consideration evidence recorded in another case of a finding recorded therein the judgment is vitiated."*

17. The principle discussed above is also highlighted in ***2010 P.Cr.LJ 1778 Karachi (Ch. Muhammad Aslam vs. The State)***, whereby it was held that:-

> *"no protection under section 537, Cr. P. C. can be extended to a trial wherein such methods are adopted. He concluded his arguments by submitting that the trial Court in each case has to separately assess the evidence of each witness. There are two separate charge-sheets and different charges were framed in each case against the accused, as such the statement of a witness in independent/separate proceeding if brought on record of other proceeding, it would amount to patent illegality and utter violation of Article 47 of the Qanun-e-Shahadat Order, 1984."*

18. Learned counsel for the respondents contends that the petitioners have not objected to the submission of evidence recorded in one case in the other cases against the accused person and as such they are not permitted to object at this stage. As such the consent, if given by the parties in any case in this manner is also illegal and is alien to the procedure provided under the law. Hence, the statement of one case could not be used in another case without calling a witness in the Court and same could not be given protection on the ground that it is against the principles of natural justice. Reliance is placed upon ***PLD 1976 Lahore 1446 (Malik Aman v. Haji Muhammad Tufail)***. It is also settled that the cases have to be conducted by prescribed criminal or civil procedure, the principle of natural justice also demands that evidence should have been recorded separately and thereafter the Court has to apply its mind independently in context of evidence brought on record in each and every case and same should be disposed of. Reliance is placed upon ***PLD 1953 Lahore 321 (Muhammad Younas vs. The Crown)*** and ***PLD 1971 Peshawar 119 (The State vs. Qalandar Khan)***.

19. While considering the above background, this Court truly believes that application U/S 540 Cr.P.C. for summoning of material witnesses is required to be allowed, otherwise prosecution may suffer irreparable loss and they shall be deprived of opportunity to prove their case. The principle of summoning of material witnesses is only meant for just decision of the case and not to fill the lacuna. Reliance is placed upon ***2011 SCMR 474 (Muhammad Saleem Vs. Muhammad Azan)*** and as such courts are bound to exercise their powers judiciously. The principles have also been highlighted in ***PLD 2016 Lahore 533 (Muhammad Awais Vs. The State and others), 2006 YLR 584 (Mst. Bibi Khatoon Vs. Gul Dad Khan), 2001 SCMR 308 (The State Vs. Muhammad Yaqoob and others)***.

20. Even otherwise, the witness may also be called where defective investigation was reflected from record and those witnesses who are not arrayed in the calendar of witnesses who are essential for the just decision of case could be summoned as material witnesses. Reliance is placed upon ***PLD 2013 SC 160 (Nawabzada Shah Zain Bugti and others Vs. The State)***.

21. We have also gone through the relevant provision of Section 265-F Cr.P.C. whereby the Court shall take all such evidence as may be produced in support of the prosecution. Even those persons may also be allowed to give evidence, who are acquainted with the facts of the case, however, the Court may refuse to summon any witness, if it is of the opinion that such witness is being called for the purpose of vexation or delay or defeating the ends of justice, but in the present case all the witnesses who have been referred by the petitioners in their applications are likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution. In this backdrop, the provision of Section 265-F Cr.P.C though provisional in nature, but it manifests a positive intent in advancing the cause of justice, especially when the said material evidence was left out by negligence of I.O or of the prosecutor. Reliance is placed upon ***1989***

P.Cr.L.J 2050 (Mahboob Vs. The State and 3 others). It is trite law that complainant should not suffer for the fault of prosecution who is negligent in discharging its duties and functions. Reliance is placed upon ***2011 SCMR 713 (Ansar Mehmood Vs. Abdul Khaliq and another)***.

22. Keeping in view the above position and laws discussed above, both the orders dated 10.02.2020, passed by ATC, Islamabad are contrary to settled principles of law, therefore, same are hereby ***set aside*** and both these criminal revisions are ***allowed*** in the interest of justice. Learned trial court is directed to summon all the witnesses separately in each case and conclude the trial by all means within a period of four (04) months as this court is mindful of the fact that earlier direction has already been expired. However, eventuality discussed above gives rise to a new situation which could only be catered by extension of time.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open court on 05.11.2020.

JUDGE **JUDGE**

APPROVED FOR REPORTING

Zahid