

**JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT**

Cr.R No. 07-P/2021.

Ahmad Ali Vs Ebrar Khan etc

Date of hearing 31.05.2021

Petitioner (by) Shabbir Hussain Giggani Advocate

Respondents (by) Mujahid Ali (clean addl: A S)

JUDGMENT

MUSARRAT HILALI, J.- This criminal revision petition

is directed against the order dated 03.10.2020 passed by

the learned Additional Sessions Judge-I, Swabi at Lahor,

whereby application moved from defence side for

transposition of the entire evidence earlier recorded in

previous trial of the acquitted co-accused was allowed.

Aggrieved therefrom, petitioner has filed the instant

criminal revision petition.

2. Learned counsel for the petitioner contended

that the impugned order dated 03.10.2020 is not

sustainable as the same was made on the application of

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accused-respondent and was allowed with the consent of the Public Prosecutor in absence of the petitioner and his counsel which has come as a surprise to the petitioner; that before making the impugned order, notices were not issued to the witnesses already examined in the earlier judicial proceedings, therefore, the order dated 03.10.2020 shall be set aside and the trial Court be directed to first summon the witnesses and then proceed with the trial.

3. As against that, learned counsel for accused-respondent contended that the evidence recorded at the earlier judicial proceedings is very much admissible in the subsequent proceedings; that on the arrest of absconding accused, the statement recorded under Section 512 Cr.P.C does not stand wipe off; that accused is a similarly circumstanced person, therefore, not transposing the evidence recorded in the earlier proceedings would amount to treating a person in a similar situation in a dissimilar manner. Learned counsel further contended that the impugned order does not suffer

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from any infirmity; hence, the instant criminal revision petition deserves to be dismissed.

Arguments heard and record perused.

4. Section 512 Cr.P.C is designed to meet a definite purpose and that is, to preserve the evidence against the absconding accused. The *ibid* Section reads as follows:-

512. Record of evidence in absence of accused. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him the Court competent to try or send for trial, to the Court of Session or High Court such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, of trial for the offence with which he is charged, if the dependant is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2)... ..

A plain reading of the above quoted provision shows that when a person has absconded and there is no immediate prospect of his arrest and the offence for which he is charged is punishable with death or imprisonment for life, the Court may examine the witness

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produced by the prosecution and record his deposition and when the accused is arrested, then at the stage of trial, if any of such witnesses are not available being dead or cannot be found or is incapable of giving evidence or his attendance cannot be obtained without an amount of delay, expenses or inconvenience, and when the matter is between the same party, then the statements recorded under Section 512 Cr.P.C may be accepted in the evidence.

5. In the instant case, three accused were charged for the murder of one Muhammad Ismail, the brother of the petitioner and also causing injuries to his father. An FIR to this effect was registered against Ibrar, Iftikhar and Nigar (sons of Mehr Dil) on 15.09.2017, under Section 302/324 PPC. Iftikhar and Nigar faced trial and were acquitted by the learned trial Court on 27.11.2019 and the accused-respondent was proceeded under Section 512 Cr.P.C. An appeal against the judgment dated 27.11.2019 has been admitted by this Court on 08.03.2021 for regular hearing.

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6. After remaining absconder, the accused-respondent was arrested after three years, whereafter his case was submitted before the learned trial Court for trial. On 03.10.2020, the accused-respondent submitted an application before the learned trial Court for transposition of the entire evidence recorded in the trial of co-accused which was allowed by the learned trial Court on the same date, not being objected by the Public Prosecutor. Neither the complainant, the most aggrieved person in the case nor his counsel was in attendance. Perusal of the order dated 03.10.2020 reveals that the same has been allowed without assigning any reason.

7. Article 47 of Qanoon-e-Shahadat Order, 1984 mandates how the statements of witnesses recorded in one judicial proceedings can be admissible in subsequent judicial proceedings. For ready reference, the said Article is reproduced as under:-

47. Relevancy of certain evidence for proving, in subsequent proceeding the truth of facts therein stated. *Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth*

of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

Provided that--

The proceeding was between the same parties or representatives-in-interest;

The adverse party in the first proceeding had the right opportunity to cross-examine;

The questions in issue were substantially the same in the first as in the second proceeding.

A plain reading of the aforementioned Article indicates that the evidence given by any witness in an earlier judicial proceedings would be relevant for the purpose of its proving in proceedings at a later stage provided *that*;

- i. the witness is dead*
- ii. Or cannot be found*
- iii. Or incapable of giving evidence*
- iv. Or is kept out of the way by the adverse party*
- v. Or if his presence cannot be obtained without any amount of delay or expenses*

8. While allowing the application dated 03.10.2020, none of conditions mentioned in the *ibid* Article were satisfied before transposition of the statements recorded under section 512 Cr.P.C. It appears

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that while allowing the application of the accused-responder, only the acquittal of co-accused was taken into consideration. If the decision was to be based on previous evidence without satisfying the conditions mentioned in Article 47 of the Qanoon-e-Shahadat Order, 1984, then accused should not have been arrested and should have been acquitted in absentia.

9. In a judgment passed by august Supreme Court in case titled '*State through Advocate General .Vs. Farman Hussain and others reported in PLD 1995 SC 1*', the Apex Court held that in the absence of any direct evidence, the mere declaration that "delay and unnecessary adjournment" would be involved in procuring the appearance of witness was not sufficient for satisfying the relevant condition of section 33 of the Evidence Act (Article 47 of the Qanun-e-Shahadat, 1984) which is to the effect that it should have been proved that the witness could not be found.

10. There is no indication in the impugned order dated 03.10.2020 as to how the learned trial Court satisfied itself about the ingredients of the law on the

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subject before allowing the impugned order. Not even a whisper. After the arrest of the absconding accused, if such witnesses are alive, available and capable of giving evidence then the statements recorded under Section 512 Cr.P.C cannot be utilized as substantive evidence.

11. In view of the above, the order dated 03.10.2020 is a queer and made in haste, therefore, the same is set aside. The learned trial Court is directed to proceed with the case strictly in accordance with law.



JUDGE

Announced
31.05.2021

(SB) Hon`ble Justice Musarrat Hilali

Noor Shah