B/C

JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.R No. 15-M/2023
With Cr.M 136-M/2023

Sher Zada and 03 others.....(Petitioners)

vs

The State and one another.....(Respondents)

Present: Mr. Israr Ali, Advocate for the petitioners.

Ms. Mehnaz, Assistant A.G for the State.

Mr. Sarfaraz Khan Chakdarwal, Advocate for the respondent No.2.

Date of hearing: 03.04.2023

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. The instant revision petition u/s. 439-A, Cr.P.C, is directed against the order of Additional Sessions Judge/Izafi Zilla Qazi, Dir Lower at Chakdara, passed on 10.02.2023, by which, an application of the petitioners for summoning of Gul Rehman son of Khaista Rehman and Said Rahman son of Ali Rehman as defence witnesses, was dismissed.

2. Facts succinctly are that the petitioners are facing trial in the case FIR # 366 of 11.09.2020 u/ss. 302/324/337-F(vi)/34, PPC, registered at Police Station Chakdara, District Dir Lower, before the Court of Additional Sessions Judge/Izafi Zilla Qazi, Dir Lower, at Chakdara. At the last stage of the case, proceedings before the final arguments, the petitioners-accused submitted an application for summoning and recording statements of the aforementioned two persons as defence evidence, which application was dismissed vide impugned order.

3. The petitioners have now called into question the above-referred impugned order before this Court through the instant criminal revision petition.

4. Arguments of counsel for the petitioners, Asst: A.G, for the State and counsel for the respondent No.2/complainant, heard. Record gone through.

5. Admittedly, both the witnesses, namely, Gul Rahman s/o Khaista Khan and Said Rahman s/o Ali Rahman have been shown as the eye witnesses of the occurrence. They were shown as witnesses of the prosecution in the final report (challan). The prosecution has abandoned them on 22.08.2022 for the reason that they are strangers and they have been won over by the petitioner/accused. Although the petitioners/accused in their statements, recorded u/s.342, Cr.P.C on 25.10.2022 and on 09.01.2023, didn't prefer to avail the opportunity of producing evidence in defence. However, in the latter statements they availed the opportunity of recording statements on oath. The latter statement has been recorded after alteration in the charge against them on 12.12.2022. Perusal of the altered charge would show that when asked about the production of evidence in defence, they replied in the negative but added that they may do so if it is deemed necessary after the closing of the prosecution evidence. Learned Counsel for the petitioners stated that the statements of the petitioners on oath have not been recorded till date. The A.A.G and counsel for the private respondent/complainant didn't controvert the argument.

6. Counsel for the complainant party stated that the witnesses concerned have recorded their statements u/s.164, Cr.P.C during the investigation. He added that since they have been won over, therefore, the petitioners/accused intend to create a diverse impact on the evidence of the prosecution. This Court would restrain from making any comment in this regard, lest, it may prejudice either party. Two significance aspects of the matter in hand are that; firstly, both the witnesses have been shown in the FIR as the eye witnesses of the occurrence. This being so, perhaps the trial Court could have summoned them as CWs for the just decision of the case. Secondly, though the prosecution closed its case, the trial Court has yet to examine the petitioners/accused on Oath u/s.340(2), Cr.P.C. and to hear the arguments of the parties before announcing the judgment.

7. Section 540, Cr.P.C, which relates to the power of the Court to summon material witness or examine the person present before it. The provision has two parts. The first part vests in the Court the discretionary power to summon anyone as a witness or examine any person who is present though was not summoned as a witness. The second part which is mandatory in nature, makes it obligatory on the part of a Court to summon and examine or recall and reexamine any such person if his evidence appears to be essential for the just decision of the case.

8. As the witnesses concerned have been shown in the FIR as the eye witnesses of the occurrence, therefore, their evidence appears to be essential for the just decision of the case. It is a settled legal principle that a witness may be examined if his/her evidence is necessary for the just decision of the case. In ***Nawabzada Shah Zain Bugti and others v. The State***, **(PLD 2013 SC 160)**, the Supreme Court has observed that the law laid down in section 540, Cr.P.C., not only enables but in certain situations, makes it obligatory on Court to summon witnesses who couldn't otherwise be brought before the Court for evidence. The Court has relied on *AIR 2007 SC 3029*, in which, the object of section 311 of the Indian Criminal Procedure Code (an analogous provision) was discussed as under:

> **"9. 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 others 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 necessary for application of judicial mind." (underlining supplied)

9. Our Supreme Court has further observed in the above case that while trying a case, a court shall bear in mind that it has to discover the truth in a bid to pass a judgment to serve the purpose of justice. It has further

observed that in order to discern the truth, which relevant extract is as follows:

> **"10. [...] <u>the Court even without any formal application from prosecution or accused,</u> 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 and that of the trial Court restored which had allowed examination of additional evidence in terms of section 540, Cr.P.C. [...]"**

Reference may be made to the cases ***<u>Shair Ali Shah v. the State through Advocate General Muzaffarabad and 4 others</u>*** **[2018 YLR 1777 Shariat Court AJ&K)** and **(2001 SCMR 308) [Supreme Court of Pakistan]**.

<u>10.</u> The matter in law is also worth consideration from the perspective of Section 265(f) Cr.P.C., which provides that the Court shall summon the persons whom the prosecution or the complainant state to have been acquainted with the facts of the case and unable to give evidence. It further provides that the court may refuse to summon such person if it is vexatious, or tend to cause delay or defeat the ends of justice. It also provides that at the close of the prosecution evidence, if the accused wants to adduce evidence, the court shall allow him such opportunity to produce evidence in defence. For this purpose, the provision further adds that the court shall issue process for compelling the attendance of witnesses the accused wants to produce in defence. However, the court may refuse if it appears to be vexatious or aimed it causing delay in the decision of a case. It needs no emphasis that the matter in hand has a material bearing on the right to a fair trial of the petitioners/accused which is a constitutionally guaranteed fundamental rights under Art.10(A) of the Constitution. Reference may be made to ***<u>Muhammad Tanveer v. The State and others</u>*** **(2020 MLD 62) [Multan Bench]** in which section 265(f), Cr.P.C and Art. 10(A) of the Constitution have been discussed.

11. Learned counsel for the complainant/ respondent relied on 2004 YLR 213 (Lahore). A close reading of this judgment would show that it is not applicable in the facts and circumstances of the case. The reason is that the complainant sought to abandon certain witnesses which the court did not allow. The learned counsel also relied on 2003 YLR 2010 (Lahore). In this case, an application was moved by the complainant in a case for summoning of Naib Tehsildar as a court witness. The court observed that earlier an application for re-summoning of Patwari was moved which was dismissed. The plea of summoning of Naib Tehsildar as a court witness at a belated stage was thus seen as an effort to frustrate the defence version developed in cross examination. This ruling is also not applicable in the present circumstances. In the instant case, the examination of the two witnesses does not appear to be vexatious, this being already shown as eye witnesses of the occurrence. Moreover, such examination is not likely to cause delay in the conclusion of the trial.

12. As sequel to the above discussion, the instant criminal revision petition is allowed and the impugned order dated 10.02.2023 is set aside. The trial Court is directed to call the aforesaid witnesses, record their statements as CWs, afford full opportunity of cross examining them, both, by the prosecution as well as the defence counsel and conclude the trial as soon as possible.

Announced
Dt: 03.04.2023

JUDGE

office
17/04/23