

**IN THE PESHAWAR HIGH COURT,
BANNU BENCH
(Judicial Department)**

Cr.R No.60-B /2023.

**Umer Farooq
-Vs-
The State & another.**

JUDGEMENT/ORDER.

Date of hearing 26.10.2023

Petitioner(s) by: Mr. Qaid Ullah Khan Khattak,
Advocate.

For State: Mr. Habib Ullah Khan, AAG.

Respondent (s) by: Mr. Masood Iqbal Khattak,
Advocate.

FAZAL SUBHAN, J.--- The Instant revision petition under section 439 of the Criminal Procedure Cod read with 561-A Cr.P.C is filed by the petitioner against the order dated 19.9.2023, passed by the learned Additional Sessions Judge, Banda Daud Shah vide which application of the respondent was allowed and PW Saad Ullah Khan was re-summoned under section 540 Cr.P.C.

2. Relevant facts of the case are that case FIR No.114 dated 07.6.2022 under sections 302/324/449/34 PPC of police station Teri District Karak was registered by the respondent Zafar Ali Khan in respect of the murder of deceased Mst. Bibi Sakina, wife and Mst. Sadaf, daughter of Muhammad Yousaf, against Zeeshan and Farooq sons of Mumtaz Khan, residents of

Kot Banda. After necessary investigation in the case challan was submitted and after observing legal formalities trial in the case commenced. On 05.9.2023 statement of PW-11 Saad Ullah was recorded, who was identifier of the dead bodies of the 2 deceased. After recording his statement in respect of the identification of both the dead bodies before the police as well as before the doctor at THQ Hospital Banda Daud Shah, his cross-examination was conducted and the prosecution abandoned the other witness Muhammad Naeem and closed its evidence. On the same date the complainant filed an application for declaring PW Saad Ullah as hostile witness on the ground that he has deposed against the facts of the case during cross-examination and has extended concession to the respondent Umer Farooq, hence the said witness may be declared hostile and complainant be allowed to cross-examine him. The learned trial Court after hearing arguments through impugned order dated 19.9.2023, declared PW Saad Ullah as hostile witness and issued summon to him for cross-examination by the prosecution. Aggrieved from the said order the petitioner has challenged the same before this Court.

3. Arguments of learned counsel for petitioner and that of learned counsel for respondent assisted by leaned AAG for the State heard and record gone through.

4. From the record it is clear that PW Saad Ullah was only identifier of the dead bodies of the 2 deceased named above and his examination-in-chief reveals that he has supported the prosecution case and deposed the same facts of identification of the dead bodies in his examination-in-chief. After completion of the examination-in-chief the defence had all the rights to put any question to the witness and in that way the witness is bound to answer the question put to him. Article 150 of the Qanun-e-Shahadat Order, 1984 (Order) relates to the matter pertaining to the putting of question by a party to his own witness but the right to cross-examine a witness by the party who called the said witness for evidence would only apply when the witness deposed inconsistently in his statement/ examination-in-chief, however, when the witness has not stated against the prosecution version and his cross-examination is completed then the only right available to the prosecution was to re-examine the witness under Article 132(3) of the said order, however, in the instant case the prosecution seems to be satisfied with the statement as well as cross-examination and has not availed the opportunity of re-examining the witness and even closed its evidence by abandoning the last witness namely Muhammad Naeem. Though under section 540 Cr.P.C the Court has the ample powers to summon any person as a witness, examine any person in attendance though not

summoned as a witness or recall and re-examine any person already examined, if his evidence appears to be essential for just decision of the case, however, in the instant case PW Saad Ullah has not deposed against the interest of the prosecution in his statement and after recording his cross-examination and closing of evidence by the prosecution a valid and legal right has accrued to the petitioner which cannot be taken away on the mere assertion that the witness has given certain answers during cross-examination or extended concessions to the accused. PW-11 Saad Ullah is not a material witness of the case and has only identified the dead bodies of the deceased and, therefore, his statement has no direct bearing on the final result of the case. In fact the respondent has also not shown any cogent or convincing reason for recalling the witness on the ground of being hostile to his stance/version and hence in the absence of any solid reason prosecution cannot be allowed to impeach his credibility by declaring as hostile witness. In the case of Chairman, NAB-Vs-Muhammad Usman and others reported in PLD 2018 Supreme Court 28, the august Court has held that:-

“The discretion so vested in the Trial Court ordinarily cannot be questioned and that too in extraordinary constitutional jurisdiction unless it is shown and established that exercise of such powers by the Trial Court or by not exercising the same, has resulted into a grave miscarriage of justice, therefore, calling the witness of the other party as its own witness, even in criminal

trials, already examined, is not acknowledged by the law on the subject, therefore, it is neither desirable nor such a practice can be approved. In exceptional cases, where material witness has been dropped by the prosecution in the circumstances discussed above, the Court may exercise powers with due care and caution. However, in that case too, the prosecution witness/witnesses cannot be examined as defence witnesses but court witness/witnesses and for that, a written request is made to the Court showing cogent and convincing reasons for calling and examining any witness of the prosecution, not examined or has already been examined to be re-examined as court witness.”

Similarly, this Court in the case of *Faisal Khan-Vs-the State*, reported in 2022 YLR 1341 [Peshawar] in para 9 held that:-

“Therefore, the law is very clear and straightforward on the subject that a witness of prosecution can be declared hostile only when he in examination-in-chief does not support the prosecution case and record a statement contrary to his earlier statement recorded before the police under section 161, Cr.P.C. which is not a case in hand. In the present case, the statement of Muhammad Shareef was recorded on 02.10.2021 and the application to the Court was filed on 27.11.2021 after 33 days when he has left the dock as well as the Court. Thus, the request of the prosecution for declaring him a hostile witness was contrary to the established law on the subject which has been referred above. Hence, the Trial Court has erred by allowing the said request through the impugned order.”

Reliance in this respect can also be placed on the case law reported in 2021 P.Cr.L.J Lahroe 1026, 2022 P.Cr.L.J Peshawar 1472 and PLD 2023 Peshawar 133.

5. Thus in the light of the facts and circumstances of the present case and while relying on the aforesaid judgments, it is held that once a witness has recorded his examination-in-chief and no objection on the said statement is raised by the prosecution nor any request for declaring the witness as hostile to his interest was made and the defence thereafter completed its cross-examination on the witness and has succeeded in impeaching his credibility then the said witness cannot be declared hostile. In this view of the matter it is held that the impugned order is not legally correct, hence is not sustainable in the eyes of law. Resultantly this criminal revision is accepted and the impugned order dated 19.9.2023 is hereby set aside.

Announced.

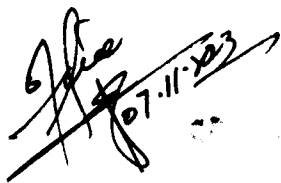
26.10.2023

Ihsan



JUDGE

Ihsan (S.B) Hon'ble Mr. Justice Fazal Subhan.



07 NOV 2023

