

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

(Judicial Department)

Cr.R No.24-B of 2015.

JUDGMENT

Date of hearing 09.12.2015.

Appellant-Petitioner: Wasi Ullah By Mr.
Farooq Khan Sokari,
Advocate.

Respondent: By Sultan Mehmood
Khan, Avocate, State By
Saif ur Rehman, Addl:
A.G.

IKRAMULLAH KHAN, J--- Through the instant Criminal Revision Petition, the petitioner Wasiullah has called in question the impugned order dated 25.06.2015, rendered by the learned Additional Sessions Judge-III, Bannu, whereby prosecution was allowed for recording statement of Junaid Khan/respondent No.2 while objection raised by counsel for defence with regard to non-recording of said statement was turned down.

2. Learned counsel for petitioner contended that the impugned judgment is against law, as the statement of the proposed witness had not been recorded, by the investigation officer, under section 161 Cr.P.C and as such, when copies of statement of a witness is not provided to an accused, in view of the provision contained in section 265 (C) Cr.P.C, no such person would be examined as witness during course of trial, but the learned trial court below has not properly appreciated the law in this respect and had exercised a jurisdiction not vested in him by allowing the proposed witness to record his statement, thereby fell in error of law, which has occasioned not only patent illegality but also gross miscarriage of justice.

3. On the other hand, learned counsel for the respondent and learned AAG, on behalf of the state, while vehemently refuted the grounds raised by learned counsel for petitioner, argued that the impugned judgment is based on correct appreciation of law, as the witness namely Junaid Khan, who was an

injured PW, could not recorded his statement, during course of investigation, being unable to talk and was under treatment in the hospital. Next argued that not only the provision contained in section 265(F)(2) Cr.P.C under section 540 Cr.P.C, conferred ample power and jurisdiction upon the trial court to call and summon any person remained acquainted with the facts of the case and is able to give evidence for the prosecution but also the High Court rules, empower the trial court to summon any person as a witness, remained acquainted with facts of the case, in strive of dispensation of criminal justice.

4. I have heard learned counsel for the parties in light of law and facts on record.

5. It is mandatory provision of law envisaged there-under 265(C) Cr.P.C, **that apart from (a), (b) and (d)**, the statements of all witnesses recorded under section 161 and 164 Cr.P.C in view of clause (c) of section 265(C) Cr.P.C, shall be supplied

to the accused, free of cost not later than seven days before the commencement of the trial.

6. In case in hand, which is admitted fact, as the petitioner had raised no objection in this regard that copies of all the documents as mentioned in section 265(C) Cr.P.C were not supplied to the petitioner free of cost, however, copy of statement of the injured PW was not supplied. It is also admitted fact that no statement of the injured PW was recorded during course of investigation under section 161 Cr.P.C, therefore, it could not be presumed that the learned trial court had not fulfilled the requirements of law as envisaged thereunder section 265 (C) Cr.P.C which reads as:

“265 (C) 265C. Supply of statements and documents to accused. (1) In all cases instituted upon police report, copies of the following documents shall be supplied free of cost to the accused not later than seven days before the commencement of the trial, namely:

(a) the first information report;

- (b) *the police report;*
- (c) *the statements of all witnesses recorded under sections 161 and 164, and*
- (d) *the inspection note recorded by an investigating officer on his first visit to the place of occurrence and the note recorded by him on recoveries made, if any:*

Provided that, if any part of a statement recorded under section 161 or section 164 is such that its disclosure to the accused would be inexpedient in the public interest, such part of the statement shall be excluded from the copy of the statement furnished to the accused.

(2) -----

7. As the statement of the injured PW was not recorded , therefore, the contention of the learned counsel for petitioner that the injured PW could not be examined as a witness on the only ground that he had not recorded his statement in view of section 161 Cr.P.C is not conceivable and liable to be dismissed. The non-availability of statement of a witness who had not recorded its statement could not be considered to

be a violation of the provision of section 265(C) Cr.P.C and likewise the law does not place any embargo on examination of a person during course of trial, either in favour of prosecution or accused, who had not recorded his statement under section 161Cr.P.C.

8. A person though well cited a witness in the FIR and the report under section 173 Cr.P.C but his statement was not recorded there under section 161 Cr.P.C could not be equated with a person who was neither cited as a witness nor his statement was recorded during course of investigation.

9. Witnesses whose names appear in the list of witnesses, annexed with the report under section 173 Cr.P.C submitted before the trial court and once the prosecution is allowed to lead its evidence, no special permission is required, for producing each and every witness, thereafter, from the trial court. However, if the prosecution or the court in view of section 265 (F)(2) Cr.P.C, desires to produce a person,

not already cited as a witness, in calendar of witnesses, then the permission, in this regard from the trial court become necessary.

10. The provision contained in section 265 (F)(2) and 540 Cr.P.C, is not applicable to the attending facts and circumstances of the case. The provision contained in section 26(F) (2) Cr.P.C is in addition to section 265 (C)(1) Cr.P.C which reads as:

“265 (F)(1) If the accuses does not plead guilty or the court in its discretion does not convict him on his plea, the Court shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution.”

11. Subsection (1) of section 265-(F) Cr.P.C, as mentioned hereinabove, has made it mandatory upon the court to take all such evidence as may be produced in support of the prosecution and as such, there is no any restriction on the prosecution to produce evidence of its choice or to apply for

permission of the court while sub-section (2) of section 265(F) Cr.P.C would be invoked if a person remained acquainted with the facts of the case is desired to be summoned through Courts, who was not produced in the first instance, by the prosecution, under sub-section (1) of section 265 (F) Cr.P.C, which shall be subject to grant of permission by the Court. In view of subsection (3) of section 265(F) Cr.P.C, the witness mentioned in sub-section (2) *ibid* may be refused by the court to summon any such witness, if it is of opinion that such witness is being called for purpose of vexation of delay or defeating the ends of justice. But the court has given no choice to refuse to examine any witness produced by prosecution, in view of sub-section 1 of section 265(F) Cr.P.C.

12. The provision contained in section 540 Cr.P.C is more exhaustive and conferred vast jurisdiction upon the court, even to examine a witness not summoned as a witness in the case or examine any person in attendance if his evidence appears to the

court, essential to the just decision of the case, which reads as:

540.- 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”

13. In strive of and to arrive at just and fair decision, the trial court has conferred with ample power to examine any person as a witness in the case, irrespective of the fact whether, his statement under section 161 Cr.P.C was recorded during course of investigation or not.

14. In “*Nekam Deen V. The State through Advocate General and 15 others*” (PLD 2006 Supreme Court (AJ &K) 43) in para 24 it is held as:

“24.The procedure visualized by Chapter XX or XXII-A of Cr.P.C. as the case may be, ensures a fair trial not only for the accused but also to the prosecution as well as for the complainant. The provisions in the chapters have dispelled the age old impression that the accused is the special child of the law. The Court is given a discretion under subsection (2) of section 265-F to summon any person who appears to the Court to be acquainted with the fact of the case and able to give evidence for the prosecution. Thus, the above regulatory provisions are not for the accused only, but for the prosecution and complainant as well. These ensure that justice should be done between all the parties before the Court i.e. the

complainant who moved the machinery of law, the investigating agency who conducted the investigation and collected the evidence, the prosecution who conducts the prosecution on the basis of evidence collected by the investigating agency and the accused who is the ultimate sufferer or winner, as the case may be. The right of all the parties for fair trial is ensured”.

15. The judgment cited by learned counsel for petitioner “*Shahbaz Masih Vs. The State*” (2007 SCMR 1631) with utmost respect could not be applied to the facts and circumstances of the case in hand, as not only the name of injured PW Junaid was well mentioned in calendar of witnesses by the prosecution but he was also cited as an injured person in the FIR.

16. Keeping in view, the aforementioned reasons, no other exception, could be taken, but the one, held by learned trial court below, therefore, this revision petition is dismissed accordingly.

Announced
09.12.2015

J U D G E

A/Awan*

J U D G E