

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

**Cr.R. No.83-P/2015**

Date of hearing: \_\_\_\_\_

Petitioner (s) : \_\_\_\_\_

Respondent (s) : \_\_\_\_\_

**JUDGMENT**

**ASSADULLAH KHAN CHAMMKANI, J.-** Through the instant revision petition, petitioner/accused Zeeshan has questioned the legality and propriety of judgment/order dated 03.06.2015, rendered by learned Trial Court/ Additional Sessions Judge-II, Charsadda, whereby he while allowing the application of the respondent/complainant under section 540 Cr.P.C., summoned Mst. Reema as a witness.

2. The petitioner is under trial accused before the learned Additional Sessions Judge-II, Charsadda, in case FIR No.246 dated 19.10.2013, registered under sections 324/34 PPC, in Police Station Khanmai Charsadda, wherein he alongwith co-accused Jan Zada and Wakil, is charged for attempting at the life of complainant

Manzoor Rehman, by firing at him on 19.10.2013 at 09.00 hours, on a metalled road of village Ganjiano Kala. A dispute over women folk has been alleged as motive behind the incident.

3. The main thrust of the arguments of learned counsel for the petitioner was that neither Mst. Reema figure as an eyewitness in the FIR nor has she been cited as a witness in the calendar of the witnesses, therefore, the learned Trial Court landed in the field of error by calling her as a witness on the application of the respondent/complainant, as her examination is for no other purpose but just to fill up the lacuna in the prosecution case.

4. Learned counsel for the respondent and learned AAG while supporting the impugned order contended that it is the discretion of the Trial Court to summon any person as a witness whose evidence is essential for just decision of the case, which discretion has been exercised by the learned Trial Court judiciously, to which no exception can be taken. They sought dismissal of the revision petition.

5. Arguments heard and record perused.

6. Before dilating upon the discretion of the Trial Court under section 540 Cr.P.C., I would like to refer

first to S.365-F Cr.P.C, particularly, its subsection (2), which is very much relevant keeping in view the nature of the controversy with which this Court is confronted.

**“S.265-F Evidence for prosecution:- (1) If the accused 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.**

Provided that the Court shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

**(2) The Court shall ascertain from the public prosecutor or as the case may be, from the complainant, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon such persons to give evidence before it.**

**(3).....**

**(4) to 6.....**

(7) If the accused or any one or several accused, after entering on his defence, applies to the Court to issue any process for compelling the attendance of any witness for examination or the production of any document or other thing, the Court shall issue such process unless it considers that the application is made for the purpose of vexation or delay or defeating the ends of justice such ground shall be recorded by the Court in writing”.

S.265-F Cr.P.C. referred to above is quite comprehensive. This section has been added in the Code notwithstanding the already existing S.540 Cr.P.C. in order to ensure the concept of a fair trial and in order to achieve this purpose, equal opportunity has been provided to both, the accused as well as the prosecution for summoning the evidence. Subsection (7) of S.265-F Cr.P.C. grants even a right to accused to apply for summoning any witness and production of documents; therefore, balance has to be struck between the parties. Section 265-F Cr.P.C. caters for such situation where the Court may ascertain from the complainant the name of any person likely to be acquainted with the facts of the case and to be able to give

evidence for prosecution. This section does not provide specifically that only those witnesses can be examined whose statements have been recorded under section 161 Cr.P.C. or their names have been mentioned in the challan in column of witnesses. The intent of the legislature is very much clear from the language of the entire section that the Court can examine any person who is acquainted with the facts of the case, therefore, the Court is not bound to record the statements of only those witnesses who are listed in the calendar of witnesses only, but in order to arrive at a just conclusion, the Court can call any person likely to be acquainted with the facts of the case after ascertaining it from the public prosecutor or the complainant subject to the general provisions that summoning of any such witness does not cause delay or defeat the ends of justice. It would be the second option of the Court as to what extent it consider or rely on the statement of such witness.

7. Similarly, under section 540 Cr.P.C. the Court can summon a material witness even if his/her name does not appear in the column of witnesses of the challan, provided his/her evidence is deemed essential by the Trial Court for the right decision of the case. Powers under section 540 Cr.P.C. to be exercised by the Court, are

divided into two parts. The first part is discretionary in nature, whereas the second is mandatory. According to the first part, it is discretionary with the Court to summon any person as a witness suo motu or on an application, whereas according to the second part, powers to summon, examine, recall or re-examine any person as a witness, are to be exercised with due care and great caution. There should be some convincing evidence/ material available on record from which it is to be inferred that the examination of a particular person as a witness is essential for the just decision of the case. Power under section 540 Cr.P.C. can be exercised if the Trial Court feels that the evidence of such a person is essential for the just decision of the case.

8. Taking the case in hand at the touch stone of the provisions of S.265-F and 540 Cr.P.C. discussed above, a dispute over women folk has been alleged as motive behind the incident. Mst. Reema who has been summoned as a witness on the application of the complainant is the wife of the complainant and sister of accused/petitioner Zeeshan. No doubt, her name does not figure in column of witnesses in the challan, but keeping in view the peculiar facts and circumstances particularly the motive part of the incident, she seems to be a material witness, therefore, the learned lower Court was quite

justified to summon her as a witness on the application of the complainant. Her examination would not prejudice the defence as equal opportunity of cross-examination would be provided to the defence. The impugned judgment/ order being well reasoned and based on law on the subject is not open to any interference by this Court in its revisional jurisdiction.

9. Resultantly, this petition being meritless stands dismissed. Office is directed to send the record to the learned Trial Court within two days, without fail.

**Announced**  
**16.02.2016**

**J U D G E**