

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr.Misc.QP No.106-P/2021

Muhammad Ikram son of Shamsher Khan,
r/o Sarghodha Shah Masjid Kot.

Petitioner (s)

VERSUS

The State

Respondent (s)

For Petitioner (s) :-	<u>Ms. Shabina Noor, Advocate.</u>
For State :-	<u>Ms. Sophia Noreen, AAG.</u>
Date of hearing:	<u>24.01.2022.</u>

JUDGMENT

ROOH-UL-AMIN KHAN, J:-Through this common order, I propose to decide the instant Cr.Misc.QP No.106-P/2021 and connected Cr.Misc.QP No.103-P of 2021, and Cr.Misc.QP No.110-P of 2021, all filed by Muhammad Ikram, the petitioner, as all are arising out from one and the same order dated 20.10.2021 (*wrongly mentioned as 26.10.2021 in the heading of the petitions*), passed by learned ASJ/Judge Special Court, Peshawar, whereby, application of the petitioner for sending samples from parcel No.20 to the FSL, has been turned down, whereas, applications of the prosecution for summoning PW Bakhtiar No.715 and summoning of Moharrir Shahab and Constable Amjad No.469 and Inspector Hafeez ur Rehman, for re-examination have been allowed.

2. Facts in brief forming the background of the instant petitions are that Muhammad Ikram petitioner is an under trial

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accused in case FIR No.208 dated 30.01.2020, registered under section 9 (d) Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019. After denial of the charge by the petitioner, the prosecution evidence was invited. Some of the prosecution evidence was recorded. During cross-examination of Amjad No.469, on the request of learned counsel for the petitioner the case property was de-sealed and as per contention of learned counsel for the petitioner five packets of chars were resembling like opium, therefore, the petitioner filed an application for sending samples to the FSL from the said five packets for re-examination, but his application was turned down vide order dated 20.10.2021, whereas, through the same order, applications of the prosecution for examination of PW Bakhtiar No.715 and re-examination of PWs Shahab Moharrir/MASI, constable Amjad No.469 and Hafeez ur Rehman SHO (abandoned), were allowed, hence, these petitions.

3. Learned counsel for the petitioner heard and record perused.

4. It appears from record that samples sent to the FSL for chemical analysis by the prosecution have already examined and in this regard FSL report Exh.PZ is available on file. In this view of the matter, the request of learned counsel for the petitioner qua sending of samples from some five packets which according to his observation resembles with opium, is not tenable at this belated stage on the ground that on one hand, the learned counsel for the petitioner is not an Expert, while on the other hand, such

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exercise may prejudice the case of either side. In this view of the matter, the learned trial court has rightly turned down the request of the petitioner.

5. As regard grievance of the petitioner against the order of the trial Court whereby some PWs have been summoned for re-examination and an abandoned PW for examination, suffice it to say that under section 540 Cr.P.C., the learned trial court has ample power to 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 if his evidence appears to it essential to the just decision of the case. Conspicuous reading of section *ibid* shows that widest powers have been invested with the court, when it comes to the question of summoning a witness or to re-examine any witness. Need not to be interpreted rather it is essence of the section *ibid* that if evidence of any witness appears to the court to be essential to the just decision of the case, it is the duty of the court to summon and examine such witness, irrespective of the fact that name of such witness is included in the calendar of witnesses or not. Learned counsel for the petitioner led a lot of emphasis that examination of an abandoned witness or summoning of a witness whose statement has not recorded during investigation will not only cause prejudice to the defence but will also amount to filling in lacuna in prosecution's case. The argument of learned counsel for the petitioner is unpersuasive for the reasons that remedy provided by section 540 Cr.P.C. is not only meant for

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prosecution, but it can equally be agitated by defence also. As observed above that the object of section 265-F Cr.P.C. is to find the truth through obtaining proper proof of such facts which lead the court to arrive at a just and proper decision of the case, which exercise cannot be dubbed as filling in lacuna in the prosecution's case, unless the fact and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused.

6. The scheme of section 265-F Cr.P.C. at trial stage further provides a mechanism for examination of witnesses. At this juncture, I would also like to refer to S.265-F Cr.P.C, particularly, its subsection (2), which is very much relevant, which for the sake of convenience and ready reference is reproduced below:-

“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.....

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(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 and 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

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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. Similarly, under section 540 Cr.P.C. the Court can summon a material witness even if his name does not appear in the column of witnesses of the challan, provided his 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 of party, 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.

Conclusion

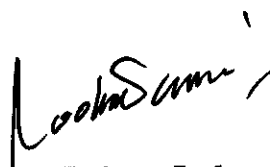
7. The prosecution has filed application for summoning PW Constable Bakhtiar on the ground that he had taken samples to the FSL from the Police Station. His statement has been recorded under section 161 Cr.P.C., but inadvertently, his name was not mentioned in the column of Challan. Similar is the case of PWs Moharrir Shahab ASI, and Inspector/SHO Hafeez ur Rehman, who have registered FIR and submitted challan but inadvertently, their names have not been mentioned in the Challan as witnesses. PW Amjd No.469 has been examined, but the prosecution is seeking his re-examination to the extent that he had taken Murasila to the Police Station and to this extent he has not been examined. The reasons furnished by the prosecution are plausible and convincing, therefore, the learned trial court was justified to allow the applications of the prosecution.

8. The impugned order being well reasoned and based on proper application of law on the subject are not open to any interference by this court. Accordingly, this and the connected Cr.Misc.QP No.103-P and Cr.Misc.QP No.110-P of 2011, are hereby dismissed.

Announced:

24.01.2022

M.Siraj Afridi PS


Senior Puisne Judge