B/R

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(Judicial Department)

Cr.Rev.No.19-D/2023 with
Cr.Misc.No.311-D/2023

Muhammad Ibrahim and 05 others

Versus.

The State and another

JUDGMENT

For petitioner: Mr. Saif-ur-Rahman Khan, Advocate.

For respondents: Nemo (motion case).

Date of hearing: **05.9.2023.**

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Dr. Khurshid Iqbal, J.-

1. The subject and the connected Cr.Rev.No.20-D/2023 are directed against a common order dated 17.6.2023 of the learned trial Court. These are being disposed of by this single opinion. In the background of the subject petitions lies an incident of harassment and criminal intimidation Dr Tayyaba Alam has alleged against the petitioners in her report on which a criminal case has been registered against them and they are currently on trial. Dr Tayyaba Alam is a medical doctor. She is serving in the District Headquarter Hospital in Dera Ismail Khan. The harassment she has alleged is in the form of *Ghag* (Pashto: literally, a voice; a pronouncement, a declaration; a warning)—an abhorrent social practice which is a public declaration by a young male (usually unmarried) of a preferential claim to get the hand of a young unmarried woman in marriage. In other

words, it is a warning both to the targeted woman and her family as well as to the public at large to hold back from getting her married to anybody else. In the year 2013, *Ghag* was criminalized by our Provincial Assembly through the Khyber Pakhtunkhwa Ghag Act. Its section 2 defines Ghag in the following words:

> (b) "Ghag" means a custom, usage, tradition or practice whereby a person forcibly demands or claims the hand of a woman, without her own or her parents' or wali's will and free consent, by making an open declaration either by words spoken or written or by visible representation or by an imputation, innuendo, or insinuation, directly or indirectly, in a locality or before public in general that the woman shall stand engaged to him or any other particular man and that no other man shall make a marriage proposal to her or marry her, threatening her parents and other relatives to refrain from giving her hand in marriage to any other person, and shall also include obstructing the marriage of such woman in any other manner pursuant to such declaration; and
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> **Explanation.**-For the purpose of this definition, ghag shall also include "awaz", "noom" or any word or phrase, denoting such declaration.

2. The specific facts of the case are that the complainant and her sister Engr. Faiqa Mahboob submitted a written application to the District Police Officer for registration of a criminal case against the petitioners. A copy of the complaint available on the record reflects that the parties are close relatives. A dispute has arisen between them over the divorce their brother has given to his wife who was their

maternal first cousin. Two other women from amongst their paternal cousins are also stated to have married in the family. In this background, the complaint further shows, the petitioners allegedly claim that father of the complainant had promised to give his daughters' hands in marriage to them. They allegedly run after the complainant and her sister with a claim of marriage (Ghag). The matter was referred to a dispute resolution forum. The proposed witnesses were present in the dispute resolution process.

3. Arguments of learned counsel for the petitioner heard. Record perused.

4. So far, 03 witnesses have been examined. Another witness Qari Amanullah has been partially examined. Others including the complainant are yet to be examined. The complainant submitted an application under section 540 Cr.PC to the trial court to summon three other persons Hafeez-ur-Rahman, Noman Ullah Khan Gandapur and Maulana Waheed Kundi as her witnesses. The reason she showed, as noted above, was that the aforesaid persons were present in certain mediation proceedings on 29/05/2022 to resolve the dispute. The proposed witnesses were not examined under section 161 Cr.PC during the investigation of the case. The trial court has allowed the application. Simultaneously, the petitioners sought their acquittal under section 265-K, Cr.PC, contending that the charge is groundless and there is no likelihood of their conviction even if the remaining evidence is recorded. The trial court has allowed the complainant's application and dismissed the petitioners' application. So, the issue here is that

whether the trial court has correctly applied the letter and spirit of sections 540 and 265-K, Cr.PC. Obviously, both the applications are substantially interdependent.

5. The principle argument of Advocate Saif-ur-Rehman Khan, appearing for the petitioners, was that the proposed witnesses were not associated in the investigation and they were not examined under section 161, Cr,PC. He maintained that the defence couldn't be taken by surprise right in the middle of the trial to come to know about certain evidence of which it has had no notice at the commencement of the trial. He next argued that there is no charge against the petitioners even on the strength of whatever evidence has been brought on the record, which warrants their acquittal at this stage.

6. The text of section 540 Cr.PC reads as under:

> (1) 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 re-call and re-examine any person already examined and (2) the Court shall summon and examine or re-call and re-examine any such person if his evidence appears to it essential to the just decision of the case (numbers supplied).

7. The jurisprudence on the subject provision developed by our higher courts is expansive. The first part is discretionary, the second, obligatory. The court may in its discretion (a) summon any person as a witness, (b) examine any

person present before it, and (c) recall and re-examine any person already examined. The court has vast power under the subject provision. However, if the just decision of a case demands, it is obligatory on the court to summon and examine or re-examine or recall and re-examine any person as a witness. In the leading case of *Muhammad Azam*[1] (1984), the Supreme Court has comprehensively discussed the subject provision. The case pertained to the trial on the charge of the offence of Zina or zina-bil-jabr liable to tazir punishable under section (10)3) of the Offence of Zina (Enforcement of Haudood) Ordinance (VII of 1979). The Court ruled that given the fact that the victim of the offence was a minor, certain evidence of her age was essential and that the trial Court was under a duty to re-summon and re-examine her under the second part of section 540, Cr.PC in order to discover truth about the validity of the marriage of the victim. Two other aspects the Court discussed in details are: firstly, the rule of "avoidance to fill gaps" and secondly, the meaning of the words "appears to it" used in second/obligatory part of section 540 Cr.PC. As regards the first one, the Court observed that the second part of the provision:

> "does not admit of any such qualification. Instead, even if the action thereunder is of the type mentioned, the Court shall act in accordance with the dictates of law. In fact, the Court has no jurisdiction in this behalf. It is obligatory on it to admit evidence thereunder *if it is for the just decision of the case*." [p. 121]

Adverting to the second aspect, the Court offered the following interpretation:

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[1] *Muhammad Azam v. Muhammad Iqbal*, PLD 1984 SC 95.

> "The use of the expression *"appears to it"* in the second part of section 540 gives ample indication that even when it is not possible to give a conclusive verdict with regard to the item of evidence being essential or otherwise, yet it must in any case at least *"appear"* to the Court that it is essential, before taking action under the said part of section 540. And for that matter as observed earlier, it would not be necessary for the trial Court to hold a separate inquiry so as to reach a conclusion whether an item of evidence is essential for the just decision of the case. It would be enough *if it appears so* to the Court from any material or inference from the material including that which is already available to the Court in any form—admitted evidence or material otherwise lying on the judicial and other files before it." [p.123]

8. Another aspect that may be called the third one the Court discussed was that the language of the second part of the provision is also supported by the language of section 165 of the Evidence Act (Article 161 of the Qanun-e-Shahadat Order, 1984). For quick reading, the Article is reproduced as under:

> ***Judge's power to put questions or order production:*** The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he places, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

> Provided that the Judgment must be based upon facts declared by this Order to be relevant, and duly proved.
>
> Provided also that this Article shall not authorise any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Articles 4 to 14, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Article 143 or 144; nor shall be dispensed with primary evidence of any document, except in the cases hereinbefore excepted.

The Court reasoning is as follows:

> If the power under section 165 is so wide as sometimes even to go beyond what is conferred by section 540 then it would not be proper to assume any artificial limitations on the exercise of one or the other power and they have to be treated as supplementary to each other.[2] [p.124]

9. The above discussed case has been widely cited and relied upon, for example, in *Muhammad Aslam alias Accha*[3] (1984); *Mehrzad Khan*[4] (1991); *Syed Saeed Muhammad Shah*[5] (1993); and *Pervaiz Ahmad*[6] (1998). It may be helpful to study more recent cases.

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[2] The Court referred to the Indian cases of *Jamatraj Kewalji Govani v. State of Maharashtra*, AIR 1968 SC 178; and *Ragunandan v. State of U.P.*, AIR 1974SC 463.

[3] *Muhammad Aslam alias Accha and others v. The State*, 1984 SCMR 353.

[4] *Mehrzad Khan v. The State*, PLD 1991 SC 430.

[5] *Syed Saeed Muhammad Shah and another v. The State*, 1993 SCMR 550.

[6] *Pervaiz Ahmed v. Munir Ahmed and another* (1998 SCMR 326)

10. The reason that the court has full power is—as was held in *Mujahid alias Ghulam Shabir*[7] (2018) —,

> "[T]o find out the truth to render a judgment in accordance with canons of justice. It cannot just sit idle as a timorous soul, but has to exercise all the enabling provisions under the law including section 540, Cr.PC, to discover the truth."

11. Ordinarily, two objections are raised to an application under section 540 Cr.PC: firstly, submission of application at a belated stage; and secondly, an effort to fill lacunae ("avoidance to fill the gaps" rules discussed above). These aspects were considered by the Supreme Court in *Muhammad Yaqoob*[8] (2001). The Court held that:

> "Calling of additional evidence under section 540 Cr.PC is not always conditional on defence or prosecution making an application for this purpose. It is duty of the court to do complete justice between the parties, carelessness and ignorance of one party or other or delay that may result in conclusion of the case should not be a hindrance in achieving object of doing complete justice by allowing additional evidence."

12. The case law also reveals that no formal application is necessary. In *Nawabzada Shah Zain Bugti*[9] (2013), it was held:

> For the purposes of section 540 Cr.PC the Court even without any formal application from the prosecution or accused, could summon any person as witness or examine any person in attendance as

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[7] *Mujahid alias Ghulam Shabir v.The State*, 2019 P Cr.LJ 1701 [Sindh (Larkana Bench)].
[8] *The State v. Muhammad Yaqoob and others*, 2001 SCMR 308.
[9] *Nawabzada Shah Zain Bugti and others v. The State*, PLD 2013 S.C 160.

a witness or recall and re-examine any person already examined.

13. The provision aims at serving justice at all costs. To this end, it empowers the court to record evidence of any witness whether already in the list of a party or not and even to re-record evidence of any witness already recorded. The power neither in terms of judicial conscience is fettered, nor is limited to any stage or kind of proceedings, which the court may invoke without looking for an application by a party. If at all, a party may move an application at any stage, it is sufficient if it appears to the Court that the proposed evidence is necessary for the just decision of the case. To this sole end, the usual argument of opposite party that the proposed evidence is sought to fill lacuna shall not be seen as a hindrance. The only condition, however, is that the court should consider it necessary for the just decision of the case so as to find out the truth, which of course, it shall exercise in good faith.

14. In the prime interest of justice and keeping in view the peculiar facts and circumstances, the aforesaid witnesses seem to be material witnesses. Their examination would not prejudice any party as equal opportunity of cross-examination would be provided to them. The mere fact that they were not examined under section 161 Cr.PC is also not a hindrance. On the face of the record, the case relates to an offence against women, who deserve a proper opportunity to produce evidence in support of their case as a matter of right. Indeed, the evidence of the proposed witnesses appears to be essential to the just decision of the

case. Both the petitions are thus dismissed. However, this judgment shall have no bearing on the merits of the case.

Announced.
Dt:05.9.2023.
*Imran/**

JUDGE

14/9

(S.B)
Hon'ble Mr. Justice Dr. Khurshid Iqbal