

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa

Mr. Justice Sardar Tariq Masood

CRIMINAL PETITION NO.1246 OF 2019

(On appeal against the judgment dated 22.11.2019 passed by the Peshawar High Court, Peshawar, in Cr. Revision No.213-P/2019)

Muhammad Bashir

... .. *Petitioner*

Versus

Rukhsar and others

... Respondent(s)

For the Petitioner :

Mr. M. Amin Khattak Lachi, ASC
Mr. Muhammad Ajmal Khan, AOR(Absent)

For the State :

Mr. Aatif Ali Khan, Addl. AG.
Yousaf, SI

Date of hearing :

16-04-2020

ORDER

Qazi Faez Isa, J. Muhammad Waseem Raza was murdered on 22nd March 2018 at 5.15 pm and the crime was reported to the police the same day and FIR No. 96 was registered at Police Station Ustarzai, District Kohat at 6.40 pm. The crime was reported by the deceased's uncle, Muhammad Bashir, who is the petitioner herein. Four persons were nominated in the FIR of which two were identified as Rukhsar and Suhail.

2. The learned counsel representing the petitioner states that statement of the complainant Muhammad Bashir (PW-6) was recorded in Court on 20th April 2019 and on the same date his *joint cross-examination* (at pages 29 to 30) was conducted by the counsel representing the accused Rukhsar and Suhail. However, subsequently, Rukhsar, through his counsel, submitted an application under section 540 of the Code of Criminal Procedure, 1898 ("**the Code**") stating that he had not been provided an

opportunity to cross-examine the petitioner-witness therefore an opportunity to do so be provided. This application was allowed by the learned Sessions Judge, Kohat. The petitioner assailed the same by filing a criminal revision petition before the Peshawar High Court however the learned Judge of the High Court upheld the impugned order and dismissed the revision. The order of the Sessions Judge and the judgment of the High Court allowing the cross-examination by Rukhsar of the petitioner-witness have been assailed herein.

3. Mr. Aatif Ali Khan, learned Additional Advocate General Khyber Pakhtunkhwa, opposes this petition and states that *joint cross-examination* is not prescribed under any law and that the cross-examination of the petitioner does not disclose on which accused's behalf it was conducted and by which counsel. He states that the Court can exercise powers vested in it by section 540 of the Code to recall a witness and had exercised this power in accordance with the said section and supports his submission by relying on the cases of *Muhammad Murad Abro v the State* (2004 SCMR 966), *Ansar Mehmood v Abdul Khaliq* (2011 SCMR 713) and *Muhammad Amjad v the State* (PLD 2003 Supreme Court 704).

4. We have heard the submissions of the learned counsel representing the petitioner. We inquired from the learned counsel what prejudice will be caused to the petitioner if he is cross-examined by the accused Rukhsar and he says that since the petitioner has already been subjected to *joint cross-examination* there is no reason to summon him and again be subjected to cross-examination. We then asked him to show us from the record whether the counsel of Rukhsar was given an opportunity to cross-examine the petitioner, however, the learned counsel was unable to do so. Suhail and Rukhsar are represented by separate counsel before the Trial Court and the record does not disclose that Rukhsar or his counsel was given an opportunity to cross-examine the petitioner.

5. The Constitution of the Islamic Republic of Pakistan prescribes important safeguards against depriving a person of his

*"life or liberty"*¹ and with regard to *arrest and detention*², which includes *"the right to consult and be defended by a legal practitioner of his choice"*³. The Constitution also mandates a *"fair trial and due process"*⁴. A person arrested for an offence (1) must be informed of the grounds of his arrest; (2) must be permitted to consult with and be defended by a lawyer; (3) must be provided with the information of the offence he is charged for; (4) must be provided with an opportunity to cross-examine witnesses who depose against him; (5) must be given an opportunity to explain the circumstances disclosed in evidence against him; and (6) must also be provided an opportunity to produce evidence in his defence. These are also necessary ingredients to ensure the fairness of a trial.

6. Chapter X of the Qanun-e-Shahdat Order, 1984 sets out the methodology for the examination of witnesses. Examination of witness by the party calling him is the *"examination-in-chief"*⁵ which is followed by *"cross-examination"*⁶ by the defence and then such witness' *"re-examination"*⁷ may take place. The right to cross-examine is the right of *"the adverse party"*⁸ which right he/she may forego but one which he/she cannot be deprived of. Since the accused Rukhsar was not granted an opportunity to cross-examine the petitioner who had deposed against him he submitted an application under section 540 of the Code to summon the petitioner-witness and to permit him to cross-examine the petitioner-witness. The application allowed by the Additional Sessions Judge and his decision was upheld by the High Court. Rukhsar was deprived of a valuable right to cross-examine the petitioner-witness therefore allowing him to be summoned and cross-examined fully accorded with the law. A criminal trial of an accused must *"be conducted with utmost*

¹ Article 9 of the Constitution of the Islamic Republic of Pakistan

² Article 10 of the Constitution of the Islamic Republic of Pakistan

³ Article 10(1) of the Constitution of the Islamic Republic of Pakistan and section 340(1) of the Code of Criminal Procedure, 1898

⁴ Article 10A of the Constitution of the Islamic Republic of Pakistan

⁵ Article 132(1) of the Qanun-e-Shahdat Order, 1984

⁶ Article 132(2) of the Qanun-e-Shahdat Order, 1984

⁷ Article 132(3) of the Qanun-e-Shahdat Order, 1984

⁸ Article 133(1) of the Qanun-e-Shahdat Order, 1984

*fairness*⁹. The Fundamental Right of *fair trial* which the Constitution guarantees is violated if an accused is deprived of the opportunity to cross-examine a witness deposing against him.

7. The learned counsel stresses that the petitioner-witness had already been subjected to *joint cross-examination*. However, this concept of *joint cross-examination* is one which is not recognized by the law. We may observe that courts and counsel should not resort to methodologies which are not sanctioned by the law as in doing so they may inadvertently create unnecessary complications. They must also realize that resort to novel concepts may undermine the prosecution case and benefit the accused.

8. We take this opportunity to state that, in cases where there are more than one accused, the presiding officer while recording the cross-examination of a witness should mention the name of the accused and/or his lawyer who is cross-examining the witness.

9. For the reasons mentioned above no case is made out to grant leave, therefore, this petition is dismissed.

Judge

Judge

Approved for Reporting

Bench-IV
Islamabad
16-04-2020
(M. Saeed)

⁹ Per Hamoodur Rahman, J (as he then was) in *Noor Ahmed v State* (PLD 1964 Supreme Court 120, 125C)