

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MUSHIR ALAM

MR. JUSTICE DOST MUHAMMAD KHAN

MR. JUSTICE SAJJAD ALI SHAH

Civil Appeal No.1085 of 2017

(On appeal from the order dated 18.4.2017
passed by the Peshawar High Court, Peshawar
in W.P. No.1230-P/2017)

Chairman NAB

...Appellant

VERSUS

Muhammad Usman and others

....Respondents

For the appellant(s):

Mr. Arshad Qayyum, Special Prosecutor

For respondents No.1 & 2:

Mr. Shumail Butt, ASC

Date of hearing:

21.9.2017

JUDGMENT

Dost Muhammad Khan, J:-

This appeal with the leave of the Court is against the judgment of the Peshawar High Court dated 18.4.2017. The Accountability Court, Peshawar vide order dated 9.3.2017 declined request of the respondents for summoning 33 prosecution witnesses, who were already examined and cross-examined, however, it was set aside through the impugned judgment.

We have heard the learned ASC for the appellant and the learned ASC for the respondents-accused and have gone through the relevant provisions of law and also the case-laws cited at the bar.

2. The respondents were charged for collecting huge money from several persons, wanted to perform "Hajj", however, they allegedly misappropriated the same and did not perform their promise.

3. Initially, cognizance of the case was taken by the FIA, Peshawar but then it was transferred to the NAB. The latter after conducting inquiry, converted it into investigation and at the conclusion thereof, Reference No.2 was filed in the Accountability Court, Peshawar. At the conclusion of the prosecution evidence, the respondents accused submitted a long list of defence witnesses including 33 witnesses of the prosecution, they wanted to examine as defence witnesses, albeit these witnesses were earlier examined by the Prosecution and were cross-examined, however, no reason much less plausible was shown for such a venture.

4. The learned Division Bench of the High Court in paras 6 & 7 of the impugned judgment has held as under:-

"Under the provisions of sections 265-F and 540 Cr.P.C the trial Court has wide powers and the respondent accused/defence has a right to produce any witness already examined by the Prosecution and this right cannot be denied to the accused-respondent."

To know the true meaning and import of the two provisions of law, same are reproduced as follows: -

"S.265-F. Evidence for prosecution:

(1).....(not relevant)

(2).....(not relevant)

(3).....(not relevant)

(4).....(not relevant)

(5).....(not relevant)

(6) *If the accused, or any one of several accused, says that he means to adduce evidence, the Court shall call on the accused to enter on his defence and produce his evidence;*

(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.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."

6. Under the former provision of Cr.P.C, it is the Prosecution to produce and examine its witnesses, who are necessary to place before the Court the true version of a case, while the accused/defence has a right to cross-examine them, which opportunity on all the 33 witnesses was fully availed by the accused-respondents.

7. The latter provision i.e. section 540 Cr.P.C. empowers the Court to examine any witness, present in Court or to produce any document in his possession or to summon and re-examine any person/witness already examined and it shall summon and examine any such witness, if it is of the view that its evidence or further evidence is

necessarily required to reach at a just conclusion by securing the ends of justice.

8. The production and examination of witnesses has also been explained by various provisions contained in Chapter 10 of the **Qanun-e-Shahadat Order, 1984**. This provision in unequivocal terms prescribes the mode and manner of examination of witnesses. The prosecution witnesses or any party calling and examining the witnesses is called, '**examination-in-chief**' while examination of the same witnesses by the opposite party is called, '**cross-examination**'. Subsequent examination of the same witnesses by the party calling it, is called '**re-examination**'. The latter exercise is conducted with the permission of the Court whenever any ambiguity or vacuum is created in the testimony of witness/witnesses during the course of cross-examination to explain the same and not for dishonest improvement.

9. The Courts are required to guard and protect the witnesses against undue harassment and undesirable cross-examination, not relevant to the fact in issue but directed against the witnesses by way of bush-beating, putting them to unnecessary strain and stress so that something is brought about from their mouth after they are exhausted through such undue process.

10. The famous Jurist on the *law of evidence*, "Wigmore" has placed the status of the witnesses on high pedestal and has described them 'engines and machines/essential tools', without whose assistance and evidence the Courts would be unable to do justice or to reach at a correct conclusion therefore, he suggests that it is the primary duty of the Court to safeguard the interest of the witnesses in a reasonable manner and they are to be protected from undue harassment.

11. The 3rd category of witnesses is called '**Court witnesses**', who are examined or re-examined by the Court, when at trial, the Court is of the view that their evidence is essential for the just and fair decision of the case in discovering the truth. These powers have been conferred on the Court with the only object that justice is not slipped out of the hands of the Court nor it get out of its domain because doing justice in each case is the primary obligation of every Court and not the party in an **adversarial system** of justice. The role of the Court under the provision of S.540 Cr.P.C is **inquisitorial** where it endeavours to discover the truth, suppressed by both or one party to the case to incapacitate the Court to reach at a just conclusion. The role of the Judge does not undergo change because in exercising inquisitorial powers, the law has imposed obligation on it to discover the truth and to secure the ends of justice.

12. From the entire scheme of above provisions of Cr.P.C. and of the provisions of the **Qanun-e-Shahadat Order, 1984**, it becomes clearer than crystal that the two categories of witnesses i.e. the prosecution witnesses and the defence witnesses are distinctly placed pole apart and both cannot and shall not be intermingled.

13. The words used, **Vexation, causing delay in the trial or defeating the ends of justice** are of vital connotation and discretion is vested in the Trial Court to refuse the summoning or examining any witness by the Defence if the purpose is to defeat such ends.

14. There may be very rare and exceptional cases, where, the prosecution has dropped any material witness whose evidence, if given, may have a direct bearing on the end result of the case, in that event, the Court is blessed with unfettered powers to summon and examine such

witness only for the purpose of discovery of truth, for the purpose of doing complete justice however, such powers are not to be exercised at random and without application of proper judicial mind with reasonable depth to the facts of each case. Unmistakenly, in view of the provision of S.540 Cr.P.C. the witnesses are examined as 'court witnesses' and not for prosecution or defence, therefore, none of the parties to a case can claim such a right. These powers shall only be exercised to put justice into correct channels.

15. The discretion so vested in the Trial Court ordinarily cannot be questioned and that too in extraordinary constitutional jurisdiction unless it is shown and established that exercise of such powers by the Trial Court or by not exercising the same, has resulted into a grave miscarriage of justice, therefore, calling the witness of the other party as its own witness, even in criminal trials, already examined, is not acknowledged by the law on the subject, therefore, it is neither desirable nor such a practice can be approved. In exceptional cases, where material witness has been dropped by the prosecution in the circumstances discussed above, the Court may exercise powers with due care and caution. However, in that case too, the prosecution witness/witnesses cannot be examined as defence witnesses but court witness/witnesses and for that, a written request is made to the Court showing cogent and convincing reasons for calling and examining any witness of the prosecution, not examined or has already been examined to be re-examined as court witness.

16. If the witnesses of the prosecution already examined in bulk like in this case, are called as defence witnesses u/s 265-F Cr.P.C. this would defeat the ends of justice besides corrupting the system of justice

through intrigues. In case they make improvement in favour of the defence, making radical departure from their earlier statements, they would compromise their integrity and would also expose themselves to criminal prosecution on the charge of perjury therefore, such a course shall be avoided in all circumstances to streamline the process and to ensure that trials are not delayed and course of justice is not thwarted by such tactics and tricks.

17. It is the bedrock principle of law that discretion once exercised by the Court vested in it by law, shall in no manner be disturbed or set aside by the courts superior in rank. This principle shall apply more vigorously in constitutional jurisdiction of the High Court under Article 199 thereof, which shall be exercised sparingly and considerable restraints should be exercised in this regard.

18. As held time and again that the powers of judicial review vested in High Court under Article 199 of the Constitution is no doubt a great weapon in the Judge's hands however, the same shall not be exercised in a case where discretion is exercised by the subordinate court/Tribunal in a fair and just manner without violating or disregarding statutory provision of law, likely to occasion the failure of justice. Ordinarily such extraordinary jurisdiction shall not be exercised at random and in routine manner. The following case law is reproduced for the guidance of the learned Judges of the High Court for future course of action:-

- (i) Brig.(Rtd.) Imtiaz Ahmed v. Government of Pakistan, through Secretary, Interior Division, Islamabad (1994 SCMR 2142)
- (ii) Shahnaz Begum v. The Hon'ble Judges of the High Court of Sindh and Baluchistan (PLD 1971 SC 677)
- (iii) Malik Shauktat Ali Dogar v. Ghulam Qasim Khan Khakwani

(PLD 1994 SC 281)

19. In our considered view, the learned Division Bench of the Peshawar High Court through the impugned judgment has certainly overstepped its jurisdiction vested in it under Article 199, probably due to lack of proper assistance at the bar, however, one cannot ignore the fundamental principle relating to administration of justice that law is written on the sleeves of the Judges and it is the primary duty of a Judge to apply the correct law to a case before it and even the party is not bound to engage a counsel for telling the Court how a particular law is to be applied and how the jurisdiction is to be exercised thus, the impugned judgment being not sustainable in law, is set at naught.

According, this appeal is allowed and the impugned judgment of the Peshawar High Court dated 18.4.2017 is set aside while that of the Accountability Court is restored.

Judge

Judge

Judge

Islamabad, the
21st September, 2017
Nisar /-

'Approved for reporting.