

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C.J.
Raja Saeed Akram Khan, J.

Criminal Appeal No.21 of 2016
(Filed on 29.09.2016)

Nazir Hussain s/o Hakim Din r/o Bantal,
Tehsil Sharda, District Neelum, Azad
Kashmir.

....APPELLANT

VERSUS

1. Muhammad Aslam Mir,
2. Yousaf Mir sons of Sarwar Mir,
3. Hamza Mir s/o Muhammad Hussain,
4. Shareen s/o Anwar Mir,
5. Noor Jahan w/o Hamza Mir,
6. Tariq s/o Ashiq Hussain,
7. Hameed s/o Munawar Mir r/o Bantal,
Tehsil Sharda, District Neelum.

....RESPONDENTS

8. The State through Advocate-General Azad
Jammu & Kashmir.

....PROFORMA-RESPONDENT

[On appeal from the judgement of the Shariat Court dated 02.08.2016 in Criminal Revisions No.157 and 158 of 2016]

FOR THE COMPLAINANT: Mr. Amjid Hameed Siddique, Advocate.

FOR THE ACCUSED: Mir Tanveer Hussain, Advocate.

FOR THE STATE: Sardar Javaid Naz, Additional Advocate-General.

Date of hearing: 12.01.2017

JUDGMENT:

Raja Saeed Akram Khan, J.— The supra appeal has been addressed against the judgment of the Shariat Court dated 2nd August, 2016, whereby, the revision petitions filed by the complainant-appellant, herein, have been dismissed.

2. Necessary facts for disposal of the instant appeal are that the accused-respondents, herein, are facing trial in the Tehsil Court of Criminal Jurisdiction Sharda in

the offences under sections 10/19 of the Offence of Zina (Enforcement of Hudood) Act, 1985 and 342, APC. At the stage of evidence, the complainant-appellant moved two applications; one for summoning and recording evidence of prosecution witnesses, i.e. Muhammad Siddique, ASI, Rashida Parveen, Sadaf Bibi, Constables; and the second for re-summoning/re-examining the prosecution witness Muhammad Yaqoob, SI/SHO (time) before the trial Court. The learned trial Court after necessary proceedings dismissed the applications vide order dated 29.04.2016. Feeling aggrieved, the complainant appellant filed two revision petitions before the learned Shariat Court which met the same fate, hence, this appeal.

3. Mr. Amjid Hameed Siddique, Advocate, the learned counsel for the complainant-appellant, argued that the

judgment passed by the learned Shariat Court is against law and facts of the case which is not sustainable in the eye of law. He added that the learned Shariat Court failed to apply its judicial mind while passing the impugned judgment. He further added that the trial Court is empowered under law to summon/re-summon the witnesses, the statements of whom are essential to reach the just decision of the case but the trial Court failed to discharge its legal duty and the same illegality has been committed by the learned Shariat Court. He contended that it is clear from the record that the counsel for the complainant-appellant failed to appear when the case was fixed for recording of evidence, due to land sliding and the defence counsel also consented for adjournment but later on the trial Court recorded the evidence through Prosecuting Inspector (P.I.), which has not been recorded

in consonance with the statements recorded under section 161, Cr.P.C. He further contended that both the Courts below failed to adhere to that it is a case of heinous offence; therefore, the witnesses mentioned in the applications filed by the complainant were required to be summoned/re-examined. He added that the learned Shariat Court failed to adhere to the law while holding that the evidence of the prosecution witnesses Muhammad Yaqoob Mughal, SI/SHO has comprehensively been recorded and the same is enough to reach the just conclusion without taking into consideration that he got recorded his statement against the facts and the documentary evidence. In this scenario, the remedy provided under section 540, Cr.P.C. was rightly invoked by the complainant.

4. On the other hand, Meer Tanveer Hussain, Advocate, the learned counsel for the

accused, strongly controverted the arguments advanced by the learned counsel for the complainant-appellant. He submitted that both the Courts below evaluated the material available on the record and rightly came to the conclusion that no valid reason whatsoever, has been assigned by the complainant for summoning of witnesses namely Muhammad Siddique, ASI, Rashida Bibi and Sadaf Bibi, Constables, who are not mentioned in the Calendar of witnesses and re-examination of witness namely Muhammad Yaqoob, SHO, whose statement has comprehensively been recorded before the trial Court on 15.03.2016. He drew the attention of this Court towards the contents of application while submitting that no reason has been assigned by the complainant for filing application under section 540, Cr.P.C. and in absence of that the

provisions of the said section cannot be invoked in routine.

5. Sardar Javaid Naz, Additional Advocate-General, while supporting the arguments of the learned counsel for the complainant submitted that the counsel for the appellant could not appear in the trial Court on the day when the case was fixed for recording of evidence, therefore, the statement of a prosecution witness Muhammad Yaqoob was got recorded through P.I. which due to inefficiency of P.I., has been recorded against the documentary evidence. He added that the witnesses mentioned in the applications filed by the complainant under section 540, Cr.P.C. are required to be summoned/re-examined in the interest of justice. He further added that it is a part of the record that the victim was examined by the Doctor at CMH, Muzaffarabad, in the custody of Muhammad

Siddique, ASI, Rashida Parveen and Sadaf Bibi, Constables, Police Station Lowat but this fact has not been brought on record while recording the statement of Muhammad Yaqoob, SHO, through P.I. which may affect the case of the prosecution.

6. We have heard the arguments of the learned counsel for the parties, the learned Additional Advocate-General and gone through the record made available along with the impugned judgment. The complainant moved two applications before the trial Court under section 540, Cr.P.C., one; for summoning of Muhammad Siddique, SI, Rashida Perveen and Sadaf Bibi as witnesses and second; for re-examining one of the witnesses, Muhammad Yaqoob, SHO (time), Police Station Lowat. The trial Court dismissed both the applications against which revision petitions were filed before the Shariat Court which were also

dismissed. The case of the complainant established before this Court is that at the date when the statement of PW, Muhammad Yaqoob, SHO, was recorded, the counsel for the complainant was unable to appear before the trial Court and the Court got recorded the statement of the said witness through P.I. and the same has not been recorded according to the record and documentary evidence. Moreover, it is the part of the record that the victim was examined by the doctor at CMH, Muzaffarabad, in the custody of Muhammad Siddique, ASI, Rashida Parveen and Sadaf Bibi, Constables, but during the statements of the said witness, this fact has not brought on the record which can adversely affect the case of the complainant party and may prevent the trial Court to reach the just decision. Furthermore, some witnesses have not been examined which are necessary to be examined

to reach the right conclusion of the case. We have examined the contents of the applications in the light of the argument of the counsel for the complainant. After going through the contents of the applications and the relevant record, we are of the view that the arguments advanced by the learned counsel for the complainant are weighty in nature as due to recording of evidence through P.I. by the trial Court in the absence of learned counsel for the complainant, the facts alleged by the prosecution in part of the record have not been got corroborated. The findings of the learned Shariat Court that the majority of the witnesses have been examined and at this stage it will not be in the interest of justice to summon/re-examine the witnesses, is against the spirit of provisions of section 540, Cr.P.C. which empowers the Court to summon and examine any person as a witness, re-call or re-

examine any person already examined provided that the same is essential to reach the just decision of the case. The said section confers wide discretionary powers on the Court in this regard; however, the Court is bound to examine or re-examine any person as a witness if his evidence appears to be essential for just decision of the case. The discretion should be exercised judiciously and it must not be arbitrary, vague and fanciful. In this regard reliance may be placed on a case reported as *Shahzaib vs. Liaquat Ali and another* [2015 P.S.C. CrI. 63], wherein, it has been observed as under:-

“6. The administration of justice is primary duty of the Courts. The object of Section 540, Cr.P.C. is to enable the Court to re-check the truth for drawing the correct conclusion after ascertaining the truth in a case

under inquiry or trial. The Section enables the Court to reach the truth so that the statement of such a person be recorded which is helpful in reaching the just decision of the case. The Section confers wide powers in the Court for summoning the witness for examination, re-examination and cross-examination for ascertaining the truth, which has not been examined, re-examined or cross-examined due to negligence or intentional act of a party. Such powers shall not be exercised for filling in the lacunas in the prosecution case or supporting the version put-forth by the accused. The Section confers wide discretionary powers in the Court but discretion must be exercised judiciously. It shall not be arbitrary and should be exercised with due caution and

circumspection. In the case titled *Sardar Muhammad Khan v. Muhammad Afsar Khan & 3 others* [1991 P.Cr.L.J. 508], it was observed as under:---

'....It is correct that the Trial Court has discretion to exercise under Section 540, Cr.P.C., to recall a witness and record his statement but such a discretion is subject to all just exceptions; it should not be exercised to fill the lacuna in a case or to encourage a witness to change his loyalty as a resist of any pressure or for ulterior motive. The second part of Section 540, Cr.P.C. envisages that the Court, shall recall or examine a witness if his evidence appears 'essential to just decision of the case'. It is correct that first part of Section 540, Cr.P.C. does not place any such embargo on the powers of the Court but all the same the reason for recalling a witness but be based on sound judicial principles.'

In a case titled *Ghulam Farid and & others v. Muhammad*

Shafique and another [2003 SCR 509], it was observed as under:-

'6. Under Section 540, Cr.P.C. a Court may at any stage of inquiry, trial or other proceedings under this Code, summon any person as witnesses or examine any person in attendance or to recall and re-examine any person already examined if his evidence appears essential to the just decision of the case. The provisions of law consist of two parts, the first part which is discretionary and the second is mandatory if required. The Section gives unrestricted power to the Court to call evidence at any stage, provided it is satisfied that it is essential for a just decision. However, the power reserved to the Court to call witness at any stage including the close of a case is intended to be used very sparingly and in emergent cases. The Court cannot use these powers to advance the cause of the prosecution or that of the defence.'

In the case titled *Ghazi Ogahi v. The State* [PLD 2002 Karachi 411], it was observed as under:-

'The purpose and import of the law laid down under Section 540, Cr.P.C., is that Court should examine any person who has any knowledge about the case and the controversy therein so as to bring on record all the relevant, and material facts and to do complete justice after taking into consideration all the aspects of the case.'

In the case titled *Sharafat Hussain v. The State* [2002 P.Cr.L.J. 78], it was observed as under:---

'7. The object of this section is as much the prevention of the escape of the guilty person through inadvertence of the prosecution as well as the vindication of the innocence of the accused because of the carelessness or ignorance of any party.'

It may be observed here that the trial Court must have exercised its discretion under

section 540, Cr.P.C., for the ends of justice but the trial Court failed to do so. The learned Shariat Court has not taken into consideration the real controversy involved in the matter and dismissed the revision petitions on the ground that most of the witnesses have been examined in the Court. The ground assigned by the Shariat Court for dismissal of the revision petitions has no legal backing as for summoning/re-summoning of the witnesses, no such condition is imposed in section 540, Cr.P.C. and its language is quite clear and unambiguous which reveals that at any stage the Court may exercise its powers for the ends of justice. Section 540, Cr.P.C., speaks as under:-

“540. Power to summon material witness or examine person present. Any Court may at any stage of any inquiry, trial or other proceeding under this

Code, summon any person as 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.”

In this state of affairs, we are of the view that both the Courts below failed to exercise the vested discretion in a legal manner while dismissing the applications for summoning/re-examination of witnesses. We agree with the argument of the learned Additional Advocate-General who fairly argued that the witnesses are material and necessary to be summoned/re-examined to reach the just decision of the case.

On the basis of what has been discussed above, this appeal is accepted while setting aside the judgements passed by the Courts below. The trial Court is directed to summon/re-summon the witnesses as mentioned in the applications filed by complainant and after recording their statements, decide the case expeditiously.

Muzaffarabad
___01.2017.

JUDGE

CHIEF JUSTICE

Nazir Hussain

Vrs. Muhammad Aslam
Mir & others

ORDER:

The Judgment has been signed. The same shall be announced by the Registrar after notifying the learned counsel for the parties.

Muzaffarabad
____01.2017

CHIEF JUSTICE

JUDGE