

**SUPREME COURT OF AZAD JAMMU AND KASHMIR**  
[Appellate Jurisdiction]

**PRESENT:**

Raja Saeed Akram Khan, J.  
Ghulam Mustafa Mughal, J.

Cri. Revision No. 15 of 2017  
(Filed on 18.10.2017)

Muhammad Javed s/o Muhammad Yaseen,  
caste Gujar r/o Kumar Bandi, Tehsil and  
District Muzaffarabad, Azad Kashmir at present  
Confined in District Jail, Muzaffarabad.

.... PETITIONER

**VERSUS**

1. State through Advocate General of Azad Jammu & Kashmir, Muzaffarabad.
2. Muhammd Shabir s/o Alaf Din, caste Gujar r/o Kumar Bandi, Tehsil and District, Muzaffarabad.

..... RESPONDENTS

(On Revision from the judgment of the High Court  
dated 5.10.2017 in Criminal revision No. 156 of  
2017)

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FOR THE PETITIONER: Ch. Shoukat Aziz, Advocate.

FOR THE RESPONDENTS: Mr. Zubair Ahmed Raja,  
Additional Advocate General  
and Raja Gula Majeed  
Khan, Advocate.

*Date of hearing:* 8.12.2017

**JUDGMENT:**

***Ghulam Mustafa Mughal, J***—The captioned revision petition has been directed against the judgment dated 5.10.2017 passed by the learned High Court in criminal revision No. 156 of 2017.

2. The precise facts forming the background of the revision petition are that the petitioner and the co-accused are facing a murder trial before the District Court of Criminal Jurisdiction, Muzaffarabad. The case was at the verge of recording the evidence when the petitioner, herein, moved an application under section 540, Cr.P.C. before the learned trial Court for summoning Muhammad Aslam, Muhammad Din, Raja Abdul Waheed and Raja Manzoor PWs. for cross examination. It was stated in the application that the occurrence

took place in the house of Bani Begum, who has been abandoned by the prosecution and the two other witnesses whose statements have already been recorded. Some impartial witnesses have also submitted some affidavits in the Court in which they have stated that the witnesses whose statements were recorded, were not present on spot. It was claimed that in the light of the affidavits submitted by the other witnesses, these witnesses may be recalled for the ends of justice for cross-examination. The complainant filed objections stating therein that the affidavits have been obtained by the accused after recording the evidence, which indicate that they have won over the witnesses, hence, this application is mala-fide and is not covered by the provision of section 540, Cr.P.C., therefore, the same may be rejected. The learned trial Court heard the parties and vide judgment dated 3.6.2017 rejected the application. The order dated 3.6.2017 was challenge through a revision petition before the Azad Jammu & Kashmir High

Court on 21.6.2017, which was also dismissed on 5.10.2017. Now the order dated 5.10.2017, passed by the learned High Court is the subject matter of the instant revision petition.

3. Ch. Shoukat Aziz, the learned Advocate appearing for the petitioner contended that the witnesses who have appeared on behalf of the prosecution as eye witnesses, in fact, were not available on spot and in this respect the impartial witnesses of the prosecution as well as the respectables of the area have filed affidavits in the Court. The learned Advocate submitted that in order to dig out the truth and for the just decision of the case, it was enjoined upon the learned trial Court to summon these witnesses for cross examination. The learned Advocate submitted that the powers available under section 540, Cr.P.C. are meant for administration of justice and should have been exercised in a judicial manner and not arbitrarily. The learned Advocate argued that the refusal on the part of the learned High Court as

well as the trial Court summoning the witnesses is arbitrary and illegal. In support of his submission, the learned Advocate placed reliance on the case reported as *Azmat Alias Papu and 3 others vs. Mst. Nisa Begum & 2 others* (2007 SCR 67), *Muhammad Khan vs. The State* (2003 P Cr. LJ 1778) and *Muhammad Yaseen alias Mithou and another vs. The State* (2010 P Cr. LJ) 1253).

4. Conversely, Raja Gul Majeed Khan, the learned Advocate and Zubair Ahmed Raja, the learned Additional Advocate General, appearing for the respondents vehemently argued that the application for summoning the witnesses was mala-fide and not at all justified because the statements of the witnesses have been recorded and the accused has made deliberate attempt to win-over the witnesses produced by the prosecution. They further argued that the affidavit, if any, is placed on the record had to be considered by the trial Court at the final stage of the case. They argued that the learned trial

Court as well as the High Court has properly exercised its discretion in refusing the application for summoning the witnesses. In support of their submission, the learned Advocates placed reliance on the cases reported as *Sardar Muhammad Khan vs. Muhammad Afsar Khan and 3 others* (1991 P Cr. LJ 508), *Khalid Nawaz and another vs. The State* (1995 P Cr. LJ 1932).

5. We have heard the learned Advocates representing the parties and have gone through the record of the case. It may be stated that the trial Court has discretion to exercise the powers under section 540, Cr.P.C., to recall the witnesses and to record the statement, but such discretion is subject to all the just exceptions. The law is well settled that discretion vested in the Court under the aforesaid provision of law, should not be exercised to fill in the lacuna in the case or to encourage a witness to change his loyalty as a result of any pressure or ulterior motive. In the administration of criminal

justice, a court is duty bound to watch the interest of justice and disallow such frivolous applications which have been made after recording the evidence of the witnesses. In the case reported as *Sardar Muhammad Khan vs. Muhammad Afsar Khan and 3 others* (1991 P Cr.L J) 508), this Court has considered the scope of the provision and came to the following conclusion:-

“We have given our due thought to the question as to whether in the circumstances of the case the statement of Muhammad Ayub should have been recorded by the trial Court as Court witness. We have come to the conclusion that the trial Court, in the circumstances indicated above, should not have recorded the statement of Muhammad Ayub second time. 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

loyally as a result 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 must be based on sound judicial principle. In the instant case the affidavit placed on the record by Muhammad Ayub, P.W., showed that he had resiled from his previous statement recorded by the Court. The trial Court could decide about the reliability of the witness one way or the other in view of the affidavit and his statement which had been recorded by the Court. The procedure followed by the Court may open a flood gate for facilitating the practice of winning over the witnesses. If such a procedure is encouraged, there would be no end to a criminal trial. In the instant case, Muhammad Ayub had filed an affidavit in the Court wherein he had deposed that his previous statement recorded by the Court was nothing but lie; the



Court should not have called him to record his statement afresh as Court witness because the witness, on his own saying, was not a truthful witness and, thus, his testimony could not be regarded as essential to the just decision of the case; nor there was any other valid reason to recall him as Court witness. The Court, if it was in any doubt, could have summoned the witness only to ascertain as to whether the affidavit was deposed by him. There was no justification for recording the statement of witness and elicit explanation as to why he had resiled from his previous statement. The Shariat Court also committed error in dismissing the revision petition against the relevant order of the trial Court without appreciating the correct connotation of section 540, Cr.P.C.”

In *Khalid Nawaz's* case (1995 P Cr.L J 1932), It was observed by the learned High Court that a witness whose evidence has already been recorded can only be recalled for elucidation of any points in his evidence which needed clarification, in either of the three stages of his

examination i.e. examination-in-chief, cross examination or re-examination. Judging the present controversy in the light of the aforesaid case law, we feel that the judgment recorded by the learned trial Court and maintained by the learned High Court does not suffer from any illegality.

The upshot of the above discussion is that the revision petition has no substance, it is hereby dismissed.

JUDGE  
Muzaffarabad.  
\_12.2017.

JUDGE

Date of announcement: 15-12-2017