IN THE SUPREME COURT OF AZAD JAMMU AND KASHMIR

(Shariat Appellate Jurisdiction)

PRESENT:

MR. JUSTICE KHAWAJA M. NASIM
MR. JUSTICE RAZA ALI KHAN

CRIM. REVISION No. 12 OF 2024

(Against the judgment dated 22.04.2024, passed by the Shariat Appellate Bench of the High Court in revision petition No. 37 of 2024)

Abdul Majeed s/o Jalal-ud-Din, caste Mir r/o Halan Janubi District Haveli Kahutta.

…Petitioner

VERSUS

Abdul Sammad s/o Muhammad Jameel, caste Rajpoot r/o Soli Tehsil and District Haveli Kahutta and The State.

…Respondents

Appearances:

For the Petitioner:	Ch. Ghulam Nabi, Advocate.
For Respondent No. 1:	Raja Akhlaque Hussain Kiyani, Advocate.
For the State:	Raja Mazhar Waheed Khan, Addl. Advocate-General.
Date of hearing:	12.09.2024

JUDGMENT:

***Raza Ali Khan, J*:-** This revision petition arises from the order passed by the Shariat Appellate Bench of the High Court (High Court) dated 22.04.2024, whereby the revision petition filed by the petitioner herein was dismissed.

2. The accused-respondent is currently under trial in a case involving offences under Sections 302/34-APC and 15(2) Arms Act, 2016, in the District Criminal Court, Haveli/ Kahutta. Following the conclusion of the investigation, the challan was presented in the District Criminal Court, however, when witness No. 18 in the calendar, Syed Asif Gardezi (the then SDM), appeared for recording his Court statement, the trial Court declined to record his testimony by order dated 23.06.2023. Subsequently, the petitioner filed an application requesting that Mst. Yasmeen Kousar, daughter of Muhammad Ashfaq, and Syed Asif Gardezi, be summoned as a witness to record their statements. The trial Court partially accepted this application by allowing for recording Mst. Yasmeen Kousar's statement but rejected it to the extent of Syed Asif Gardezi's statement through order dated 20.12.2023. The petitioner then sought revision of the said order before the High Court, which was dismissed through the impugned order dated 22.04.2024.

3. Ch. Ghulam Nabi, the learned Advocate representing the petitioner, contended that witness No. 18, a key prosecution witness, had recorded the statement of the accused/respondent under section 164, Cr.PC wherein, the accused had admitted the guilt and confessed the

murder of the petitioner’s son. Despite this, the trial Court erroneously refused to record the witness's statement. He further argued that the order dated 23.06.2023, passed by the trial Court, was not communicated either to the petitioner or his counsel, as is evident from the order itself, that no presence or attendance of parties is shown in the proceedings. Ch. Ghulam Nabi emphasized that having suffered with loss of his son, the petitioner is entitled to a fair trial, and the exclusion of the witness No. 18’s statement constitute a violation of his fundamental right. He concluded by asserting that the impugned orders of the lower Courts are liable to be set-aside.

4. Raja Mazhar Waheed Khan, the learned Additional Advocate-General, owned the arguments put-forth by the petitioner’s counsel. He asserted that both the High Court and the trial Court, erred in law while passing the impugned orders, which are legally unsustainable. He underscored the importance of recording of the statement of witness No. 18 as it is pivotal to ensure a just resolution of the case.

5. conversely, Raja Ikhlaque Hussain Kiani, the learned Advocate representing the accused-respondent, argued that both; the trial Court and the High Court acted in accordance with law in their respective rulings. He maintained that the trial Court’s order, which was affirmed by the High Court, was legally sound. According to the Advocate Kiani, the trial Court had correctly concluded that the statement of witness No. 18 under Section 164, Cr.PC by the said witness was not timely produced/sent before the framing of charge. He further asserted that the order is adhered to the legal provision and should not be overturned, particularly given the thorough reasoning

furnished by the High Court. He ultimately requested that the revision petition be dismissed.

6. We have heard the learned counsel for the parties and gone through the record of the case made available. It transpires from the record that vide order dated 23.06.2023, the trial Court passed the following order: -

> "پکارا کرایا گیا ۔PPحاضر۔ ملزم اصالتاً حاضر معہ کونسل حاضر ۔امروز گواہ استغاثہ نمبر 18 حاضر آئے۔ ملاحظہ مسل سے پایا گیا کہ ملزم کا جو بیان زیر دفعہ 164 ض ف جب قلمبند ہوا تو بروقت وہ بیان عدالت میں ارسال نہ کیا گیا اور نہ ہی اس بیان کی اساس پر ملزم کا ستفسار اول قلمبند ہوا اور نہ ہی اس بیان کی اساس پر کوئی سوال پوچھا گیا۔ استفسار اول قلمبند ہونے سے قبل ملزم کو اس بیان کی نقل دی گئی بلکہ بیان زیر دفعہ 164 ض ف استفسار اول قلمبند ہونے کے بعد عدالت کو موصول ہوا تو ایسی صورت میں جب ملزم کو نہ تو نقل بیان 164 تقسیم ہوئی اور نہ ہی ملزم کا استفسار اول قلمبند ہوا ، ایسی صورت میں گواہ نمبر 18 کا بیان قلمبند نہ کیا جا سکتا ہے۔ "

After hearing the learned counsel for the parties and reviewing the record, it is clear from the order dated 23.06.2023, that the statement of the accused recorded under section 164, Cr.PC, was not promptly forwarded to the trial Court. Furthermore, the accused's statement section 242, Cr.PC was neither recorded based on this statement nor it was posed to the accused. Additionally, the accused was not provided with copy of the statement recorded under section 164, Cr.PC, before framing of charge under section 242, Cr.PC. Despite that the petitioner (complainant) requested for summoning witness No. 18 (Magistrate who recorded the statement of the accused under section 164, Cr.PC), and the trial Court unjustifiably refused.

7. A review of the record shows that Syed Asif Gardezi (then SDM) was listed as prosecution witness No. 18 in the report under Section 173, Cr.PC. He recorded the

statement of the accused-respondent under Section 164 Cr.PC. However, the trial Court rejected the petitioner's application to record this witness's statement solely on the ground that the statement recorded under section 164, Cr.PC was not submitted to the Court before the recording of the respondent's statement under Section 242 Cr.PC. This procedural lapse, although irregular, should not affect the case. It was an irregularity that the trial Court may have overlooked especially given the significance of the witness's testimony, which could substantially make an impact on the case. The learned trial Court acknowledged the irregularity but mistakenly concluded that as the order dated 23.06.2023, was not challenged by the prosecution, rendering it final and unreviewable. If the Court realized that the earlier order was based on procedural irregularity, then the appropriate course would have been to consider the petitioner's application and act accordingly. Alternatively, the trial Court had the authority under section 540-Cr.PC, to summon and examine any witnesses on its own. For reference, section 540, Cr.PC is reproduced below: -

> *"**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 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 the Court shall summon and examine or re-call and re-examine any such persons if his evidence appears to it essential to the just decision of the case."*

A careful examination of the section 540, Cr.PC reveals that the Court is vested with the expansive powers regarding the summoning and re-examination of witnesses,

even after cross examination. This provision entrusts the Court with discretion to summon any evidence if deems critical to uncovering the truth and reaching a just and fair conclusion. Consequently, the trial Court itself could have re-summoned the aforementioned witness, instead of adhering rigidly to the prior order, which remains in effect. The fact that this earlier order was passed in the petitioner's absence and not communicated to him offers compelling grounds for reconsideration. Considering the gravity of case, which involve a murder and irreplaceable loss of life, it is imperative the complainant party be afforded every opportunity to fully present its case. The fundamental right to a fair trial cannot be sacrificed on the altar of procedural technicalities. This Constitutional right forms the bedrock of the rule of law, the administration of justice and the principles of democratic society. It ensures that every individual is entitled to a fair, impartial trial before an independent and competent Court of law. A fair trial is essential not only to protect the rights of the accused but also to uphold the credibility, integrity and legitimacy of the Justice system itself. It guarantees that justice is not only done but it perceived to be done, thereby fostering public confidence in the judicial process. The right to fair trial shields individuals from arbitrary or unjust treatment by the State, ensuring that the legal system operates transparently and is held accountable; core principle of this right includes the presumption of innocence until proven guilty, the right to be heard, the impartial and competent Court or tribunal, legal representation, the examination and cross-examination of witness, the presentation of evidence and the right to a public hearing. It is the paramount duty of a criminal Court to fulfill its essential purpose; the pursuit of truth, in doing so, the Court must ensure that any

evidence relevant to the case is brought forth, considered and placed on record. This responsibility includes summoning, calling or re-examination of any evidence that can aid arriving at a fair and just decision. Once the evidence is on record, the Court must afford all parties to be heard, as well as the opportunity to cross examine, the witness, thereby ensuring that the proceedings are balanced, thorough and just.

8. Moreover, the trial Court's observation that the statement in question was not presented prior to the recording of the statement under Section 242, Cr.PC cannot be attributed to any fault of the petitioner. Under Section 164(2) Cr.PC, a confessional statement, if made, must be recorded and signed following the procedure outlined in Section 364. These statements or confessions are then required thereafter to be forwarded to the Magistrate responsible for the inquiry or trial of the case. For clarity, the relevant text of Section 164(2) of the Cr.PC reads as follows: -

> **"Section 164**.
>
> (1) ……
>
> (2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried."

It is evident from this provision that the onus to forward the statement or confession to the trial Court, rests with the Magistrate, a duty that was overlooked. Instead of addressing this critical procedural oversight, the learned

trial Court unjustly penalized the petitioner by rejecting the application to record the statement of witness No. 18. This failure raises serious concerns, as the Magistrate neglect to comply with the statutory requirements under Section 164(2), Cr.PC, not only undermines the integrity of the legal process but also result in manifestly unjust consequents for the petitioner. Accordingly, it is imperative that an inquiry be initiated against the concerned Magistrate to determine why the statutory provisions of section 164(2), Cr.PC were disregarded heading to the present legal complication. The inquiry is essential to ensure accountability and to prevent similar procedural violations in the future. It has been consistently observed in numerous cases that Magistrate, while recording statements under section 164, Cr.PC failed to adhere strictly to the procedural requirements laid down in section 364, Cr.PC. This non-compliance often includes delays in forwarding these statements to the trial Courts, as mandated by sub-section (2) of Section 164 Cr.PC. Such delay and procedural lapses create significant obstacles in the administration of justice, leading to unnecessary complications for both; the trial Courts and parties, involved.

9. Under section 164(2), CrPC, once a statement is recorded, it must be signed by the Magistrate in accordance with the procedure outlined in section 164, Cr.PC and then promptly forwarded to trial Court or the Magistrate responsible for trial or inquiry. The purpose of these statutory provisions is to maintain the integrity and reliability of the statement recorded under section 164, Cr.PC to ensure that justice is served in timely manner. Failure to follow the procedure jeopardizes the

voluntariness and authenticity of the statement, which can have serious implication for the outcome of the trial, procedural lapses while recording statement under section 164, Cr.PC and delays in transmitting these statements may give rise to doubt about their credibility and in some cases result in a miscarriage of justice. To adhere to these recurring issues, it is essential that: -

(i) Magistrates, specially executive Magistrates must be reminded of their statutory obligations to follow the procedure set out in section 364, Cr.PC when recording the statement under section 164, Cr.PC and to forward the statements promptly as required by section 164(2) Cr.PC,

(ii) The learned High Court should take the note of this pattern of non-compliance and issue clear directions to all Magistrates, emphasizing the importance of adhering to procedural timelines and forwarding statements under section 164, Cr.PC without unnecessary delay,

(iii) A system of accountability should be put in place, where lapses on the part of the Magistrates in following the required procedure are thoroughly investigated and appropriate action is taken against those found to be negligent, and;

(iv) Magistrates should undergo regular training sessions to refresh their understanding of procedures under section 164, Cr.PC and 364 Cr.PC.

By addressing this procedure shortcoming, the judicial system can safeguard the rights of the people and uphold the principle of fair trial and justice.

10. We are equally dismayed by the judgment of the learned High Court who dismissed the revision petition on the grounds that petitioner failed to challenge the order of the trial Court dated 23.06.2023, thereby allowing it to become final. This dismissal occurred without the exercise of proper judicial discretion. The High Court possess

inherent powers under section 561-A, Cr.PC to ensure substantial justice and prevent any abuse of judicial process within its jurisdiction. The High Court's power under section 561-A Cr.PC are not contingent upon the filing of an application or petition by any party, rather the Court may invoke these inherent powers suo-moto when it identifies an abuse of the judicial process or when an action is deemed necessary to serve the ends of justice allowing the High Court to intervene independently to prevent injustice, correct procedural wrongs and uphold the integrity. Consequently, we believe both trial Court and the learned High Court erred in their judicial approach. We, therefore, accept the revision petition, set-aside both; the orders of the High Court as well as District Criminal Court, Haveli/Kahutta and direct the trial Court to summon and record the statement of Syed Asif Gardezi, witness No. 18. Furthermore, to ensure a just resolution of the case, the trial Court may also consider re-recording of the statement of accused under section 242, Cr.PC, if deems necessary for the ends of justice.

This revision petition stands accepted in the manner indicated above. A copy of this order shall be presented to the learned Chief Justice of the High Court through Registrar for appropriate action in line with the proceeding paragraphs No. 8 & 9.

JUDGE **JUDGE**

Muzaffarabad,
24.09.2024
Approved for reporting