Additional Evidence not allowed

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IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha J.
Mr. Justice Zulfiqar Ali Sangi J.

SPL. CRL A.T. JAIL APPEAL NO.202 OF 2021
SPL. CRL A.T. APPEAL NO.08 and 09 OF 2022
SPL. CRL A.T. JAIL APPEAL NO.10 and 13 OF 2022

Mr. Mehmood A. Qureshi, Advocate for Appellant in Appeal Nos.202/2021 and 10/2022.
Mr. Mansoor Mir, Advocate for Appellant in Appeal Nos.08 and 09 of 2022
Mr. Iftikhar Ahmed Shah, Advocate for Appellant in Appeal No.13 of 2022
Mr. Faisal Siddiqui, Advocate for the Complainant in all appeals and Applicant in CMA No.12863 of 2022.
Mr. Muhammad Iqbal Awan, Addl. Prosecutor General Sindh.

Date of Hearing : 03.11.2022

Date of Announcement : 08.11.2022

ORDER

ON MISC. APPLICATION NO.12863 OF 2022

Mohammad Karim Khan Agha, J. Appellants Mohammad Rahim Sawati, Muhammad Imran Sawati, Ahmed Khan @ Ahmed Ali @ Papu Shah Kashmiri, Muhammad Amjad Hussain Khan and Ayaz Ali @ Sawati were charge sheeted to face their trial in Special Case No.23(vii) of 2020 (Old Special Case No.17 of 2016) arising out of FIR No.104 of 2013 under section 302/201/202/109/34 PPC, r/w section 11-N/11-V(ii), 7 of ATA 1997 registered at PS Pirabad, Karachi. The appellants were convicted vide impugned judgment dated 17.12.2021 passed by the learned Judge, Anti-Terrorism Court No.VII, Karachi (Central) whereby the appellants were convicted and sentenced as under:-

i) Accused Muhammad Raheem Sawati s/o Syed Habib, Ayaz Ali alias Sawati s/o Muhammad Shireen, Muhammad Amjad Hussain Khan s/o Muhammad Jameel Khan, Ahmed Khan alias Ahmed Ali @ Papu Shah Kashmiri s/o Abdul Baqi convicted for the offence punishable under Section 7(1)(a) of ATA, 1997 r/w Section 21-I of ATA 1997 sentenced them to suffer R.I. for life and to pay fine of Rs.2,00,000/- (Two Lacs) each in case of default they shall suffer S.I. for six months each.

ii) Accused Muhammad Raheem Sawati s/o Syed Habib, Ayaz Ali alias Sawati s/o Muhammad Shireen, Muhammad Amjad Hussain Khan s/o Muhammad Jameel Khan, Ahmed Khan alias Ahmed Ali @ Papu Shah Kashmiri s/o Abdul Baqi convicted for the offence punishable under Section 302 PPC r/w section 109/34 PPC and

sentenced them to suffer R.I. for life and to pay fine of Rs.1,00,000/- (One Lac) each in case of default they shall suffer S.I. for six months each.

iii) Accused Ayaz Ali alias Sawati s/o Muhammad Shireen, Muhammad Amjad Hussain Khan s/o Muhammad Jameel Khan, Ahmed Khan alias Ahmed Ali @ Papu Shah Kashmiri s/o Abdul Baqi and Muhammad Imran Sawati s/o Muhammad Raheem Sawati convicted for the offence punishable under Section 201 PPC and sentenced them to suffer R.I. for seven years and to pay fine of Rs.50,000/- (Fifty Thousand) each in case of default they shall suffer S.I. for six months each.

iv) Accused Ayaz Ali alias Sawati s/o Muhammad Shireen, Muhammad Amjad Hussain Khan s/o Muhammad Jameel Khan, Ahmed Khan alias Ahmed Ali @ Papu Shah Kashmiri s/o Abdul Baqi and Muhammad Imran Sawati s/o Muhammad Raheem Sawati convicted for the offence punishable under Section 202 PPC and sentenced them to suffer R.I. for six months and to pay fine of Rs.25,000/- (Twenty Five Thousand) each in case of default they shall suffer S.I. for three months each.

All the sentences were ordered to run concurrently and benefit of Section 382-B were also extended to all the accused persons. Fine amount, if recovered, were ordered to pay the legal heirs of the deceased u/s.544 Cr.P.C.

2. Essentially the appellants were all convicted and sentenced for their involvement in the murder of Ms Parveen Rehman who was a Director of the Orangi Pilot Project (OPP).

3. All the appellants filed appeals against their convictions in either late 2021 or early 2022 which after notices to the concerned parties were fixed for regular hearing on 02.11.2022. One day before that date the complainant filed CMA 12863/21 in Spl.Cr.ATA No.9 of 2022 Muhammed Raheem Sawati V State under Section 428 R/W section 375 and 561-A Cr.PC through a legal heir of the deceased to take additional evidence in relation to the video recording of the interview of the appellant namely Muhammed Raheem Sawati by this court or this court directing it to be taken by learned ATC VII Karachi.

4. After briefly hearing from the learned counsel for the complainant we issued notice to all the appellants as the outcome of the application might effect each appellant's appeal which was waived by their learned counsel on 02.11.2022 who by consent all agreed to make their respective submissions on the complainant's application on 03.11.2022.

5. Learned counsel for the complainant contended that the complainant had locus standi to move this application as she was the sister of the deceased (legal

heir); that the complainant even under Section 25 of the ATA had the ability to move an appeal against acquittal and as such the complainant could also apply for additional evidence to be recorded at any stage of the case and that even otherwise this court could take notice of the additional evidence by taking suo moto notice of the application; on merits he stressed that additional evidence did not necessarily mean new evidence and that such evidence could be taken under S.428 Cr.PC even at the appellate stage; that the additional evidence was needed as the foundation of the prosecution case was the confessional statement of appellant Raheem Sawati who was the main accused in the case and the video rebuts the fact that he contended that he never made a statement before the police; that the video recording which was the new/additional evidence had only just come to the attention of the complainant and her counsel who were unaware of its existence at the time of the trial and as such the additional evidence should be admitted and the application be allowed. In support of his contentions he placed reliance on the cases of **Ishtiaq Ahmed Mirza v . Federation of Pakistan** (PLD 2019 SC 675), **Nasir Khan v The State** (2005 P Cr. L J 1), **Zahira Habibullah H. Sheikh v State of Gujarat** (2004) 4 Supreme Court Cases 158), **Salehon and Another v The State** (1971 SCMR 260), **Fazal Elahi v The State** (PLD 1952 Lahore 388), **Mojia Ratna v The State** (AIR 1961 MP 10), **Zuhrab Gul v The State** (2017 YLR 1376), **Taqi v The State** (PLD 1991 Quetta 39), **Muhammad Shafi v Muhammad Asghar** (PLD 2004 SC 875), **Nawaz Khan v Ghulam Shabbir** (1995 SCMR 1007), **Shahid Orakzai v Pakistan Muslim League (Nawaz Group)** (2000 SCMR 1969), **State of Gujara v Patel Vishnubhai Chaturdas and Ors.** (R/Cr. Appeal No.19/1996 and Cr. Rev. Appl. No.2982/1995), **R. B. Mithani v State of Maharashtra** (AIR 1971 Supreme Court 1630).

6. Learned APG did **not** support the application of the complainant and contended that the application did not meet the requirements of S.428 Cr.PC as it was not necessary as the prosecution had already produced the best evidence before the trial court concerning the confession of appellant Raheem Sawati in terms of Raheem Sawati's actual confession before the police which had been believed and relied upon by the trial court in convicting the appellants and as such no further evidence in this respect was either needed nor necessary. He drew our contention to the fact that three separate JIT's had already submitted their separate reports and that as the video had been aired on television in 2016 all and sundry including the prosecution had notice of it and it was not deemed

as necessary evidence as the best evidence had already been produced in this case by the prosecution and as such the application was devoid of merit and should be dismissed. In support of his contentions he placed reliance on the cases of **Shafiq Ahmad v The State** (PLD 2008 Peshawar 100), **Asfandyar and others v Kamran and others** (2016 SCMR 2084), **State (through Collector of Customs)** (2005 YLR 3280), **Dildar v The State** (PLD 2001 SC 384), **Ishtiaq Ahmed Mirza v Federation of Pakistan** (PLD 2019 SC 675), **The State v Ahmed Omar Sheikh** (2021 SCMR 873), **Nasir Khan v The State** (2005 P Cr. L J 1),

7. Learned counsel for the appellants submitted that the complainant had no locus standi to move the application as she was not the complainant; that she was not the legal heir of the complainant and that such application could only be moved by the APG; that the video was completely in admissible under Article 38 and 39 Qanoon-e-Shahadat Ordinance 1984 which was recorded whilst the appellant was in police custody before armed police; that the video was aired on 24 News Channel in the year 2016 and as such it was in the public domain before even the matter was challaned and in fact had been exhibited before the trial court by a prosecution witness and as such it was not new or additional evidence at all as it was already part of the case file and as such the application to bring this additional evidence was completely frivolous and was designed only to further delay the appeals being heard and prolong the agony of the appellants; that the video evidence was not necessary as the trial court by placing reliance on the confession of the appellant Raheem Sawati and using the confession to convict the appellants despite it being retracted rendered the video superfluous and was not needed; that the application was only being made so late in time in order to attempt to fill in the lacuna's in the prosecution case and as the application was devoid of merit and frivolous and had been filed only for the purpose of delaying the hearing of the appeals it should be dismissed. In support of there contentions they placed reliance on the cases of **Sartaj and others v Mushtaq Ahmad** (2006 SCMR 1916), **Aijaz Ali v Ali Nawaz** (PLD 2022 Sindh 12), **Hayatullah v The State** (2018 SCMR 2092), **Dildar v The State** (PLD 2001 SC 384), **National Bank of Pakistan v Mumtaz Ahmad** (1984 PSC 297), **The State v Khaista Rahman** (2013 MLD 1872), **Ghulam Rasool v The State** (PLD 2013 Sindh 214), **Allah Wasaya v The State** (2018 MLD 489), **Muhammad Naveed v The State** (PLD 2019 SC 669), **Mazhar Naeem Qureshi v The State** (1999 SCMR 828), **Asif Jameel v The State** (2003 MLD 676), **The State v Ahmed Omar Sheikh**

(2021 SCMR 873) and **Ishtiaq Ahmed Mirza v Federation of Pakistan** (PLD 2019 SC 675).

8. We have heard learned counsel for the complainant, learned APG and the learned counsel for the appellants on the limited question of law involved concerning the recording of additional evidence without touching the merits of the case which will be decided at the time when the appeals are heard and considered the relevant law including the case law cited at the bar.

Turning to the question of maintainability in terms of the locus standi of the complainant to make this application.

9. Admittedly the complainant was the driver of the murdered Parveen Rahman who has since expired. As such his legal heirs could have moved the application however the application has been moved by the a legal heir of the deceased (sister of the deceased) and as such under the relevant law it is difficult to see how such an application is maintainable especially since the courts have held that sisters of the deceased are not the legal heirs of the deceased. In this respect reliance is placed on the cases of **Sartaj** (Supra) and **Aijaz Ali** (supra).

10. Another obstacle in the way of the complainant is that even if we treat the complainant as being a complainant in the case as she is a legal heir of the deceased is the restricted role which a complainant has in a criminal trial. Section 493 Cr.PC which deals with this aspect of the case is set out below for ease of reference;

> *"493. Public Prosecutor may plead in all Courts in cases under his charge. Pleaders privately instructed to be under his direction. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal,* ***and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions.*** (bold added)

11. We find that S.493 Cr.PC makes it clear that any counsel appointed by the complainant shall act under the directions of the prosecutor or at best assist the prosecutor and as such it was only the prosecutor who could have filed this application after being assisted by/consulting with the counsel for the complainant if he deemed it necessary and **not** by the complainant. In this case since the prosecutor whose primary duty it is to conduct the trial and the appeal has opposed the application it is difficult to see how such application made by

the counsel for the complainant is maintainable keeping in view the limited role of the complainant under S.493 Cr.PC. In this respect reliance is placed on the cases of **National bank of Pakistan V Mumtaz Ahmed** (Supra), **State** v Advocate **general V Khaisat Rahman** (Supra) **Ghulam Rasool** (Supra) and **Allah** Wasaya (Supra).

12. It appears that the only option left for the complainant is for this court to take notice of this application as was held by the Supreme Court in **Istiaq's case** (Supra) in the following terms whilst discussing S.428 Cr.PC:

> *"**Under this section an appellate court can take additional evidence on its own or upon an application of a party to the appeal, i.e. the appellant, the State or the complainant** but in both such cases the appellate court has to record its reasons why it thinks that taking of additional evidence is necessary. The necessity of taking additional evidence at the appellate stage must be felt by the appellate court itself and the same is not to depend upon what a party to the appeal thinks of such necessity.(bold added)*

13. Although for the reasons which will become apparent when we consider the application on merits were are not particularly inclined to take up this application on our own in the interests of justice we do so and will now consider the application on merits.

Turning to the application for calling additional evidence on merits.

14. At the outset we find that reference to S.375 Cr.PC in the application is of no relevance as this section only applies to confirmation cases and these appeals do not concern confirmation of a death sentence as only life imprisonment and other lesser sentences were handed down to the appellants.

15. The relevant section cited in the application is therefore Section 428 Cr.PC which is set out below for ease of reference;

> *"428. Appellate Court may take **further evidence** or direct it to be taken. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks **additional evidence** to be **necessary,** shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.*
>
> *(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.*

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

16. It is relevant to reproduce para's 4 and 5 of the affidavit attached to the CMA filed by the applicant which in essence sets out the complainants understanding of the legal requirement and purpose/object of S.428 Cr.PC and the reason why the evidence which is sought to be adduced now could not be produced at the time of the trial. Para's 4 and 5 are reproduced as under;

"4. That it is most respectfully and most humbly submitted that the present Application has been filed to seek directions from this Honoruable Court to record additional evidence in relation to the video recording of the interview of the appellant namely Mr. Muhammad Rahim Sawati. ***It is submitted that there is no bar on the filing of the Application for recording of additional evidence at Appellate stage, as the only two requirements for recording of the additional evidence by the Appellate Court under Section 428 Cr.P.C. 1898 is that firstly the same be necessary for the just decision of the case. Secondly, that the evidence was either not available at the time of trial or the party concerned was prevented from producing same by circumstances beyond its control or by reason of misunderstanding or a mistake.*** *It is settled law that the Honourable High Court at the time of hearing of an Appeal, may take additional evidence if the same is necessary for the just decision of the case.* ***The main object of Section 428 Cr.P.C. 1898, in relation to taking of additional evidence is that a guilty person should not escape through carelessness or ignorant proceedings of the Trial Court*** *or innocent person should not be wrongly accused when the Court, through some carelessness or ignorance, had omitted to record the circumstantial evidence essential for explanation or for reaching the truth.*

5. That the present Application has been filed at this Appellate stage because the aforementioned video recording of the interview of the Appellant namely Mr. Muhammad Rahim Sawati ***has only come into the knowledge of the Applicant/Complainant after the Judgment was announced by the learned Anti-Terrorism Court No.VII, Karachi in Special Case No.23(vii)/2020. It is submitted that the aforementioned video recording of the interview of the Appellant namely Mr. Muhammad Rahim Sawati was not in the knowledge of the Complainant/Applicant at the time when the trial proceedings were being conducted, therefore, it is clear that the same was not available with her at the time of the trial and hence, she was prevented from producing the same by circumstances which were beyond her control.*** *Hence, the present Application is maintainable and it is imperative that this Honourable Court may graciously be pleased to take additional evidence, in relation to the video*

recording of the interview of the Appellant namely Muhammad Rahim Sawati interview, by itself or direct it to be taken by the learned Anti-Terrorism Court No.VII, Karachi" (bold added).

17. To our mind in deciding this application we need to balance the interest of the parties and in particular the rights of the accused to a fair trial which is now enshrined in our Constitution by Article 10(A) which reads as under;

> "10A. **Right of fair trial.** *For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process".*

18. Section 428 Cr.PC seems to have two limbs which need to be satisfied. The first is that the additional evidence is necessary and **secondly** that it was not available at the time of the trial and has only recently come to light. It is also well settled that additional evidence cannot be adduced under section 428 Cr.PC if its purpose is to fill in lacuna's in the prosecution case. In this respect reliance is placed on the case of **Dildar V State** (PLD 2001 SC 384) where it was held as under;

> *"9. There can be no cavil with the proposition that under the law a Court is empowered to 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 such person if his evidence appears to it essential to the just decision of the case. Likewise, in dealing with any appeal under Chapter XXXI of the Code of Criminal Procedure, if the Appellate Court considers additional evidence to be necessary, it may either take such evidence itself or direct it to be taken by a Magistrate or a Court of Session after recording its reasons.* ***However, there is a rider clause to the exercise of such powers and these provisions are not to be utilized at the appellate stage to cure the inherent infirmities or fill up a lacuna in the prosecution case. It is well-settled by now that such powers are to be exercised only where the additional evidence was either not available at the trial or the party concerned was prevented from producing it either by circumstances beyond its control or by reason of misunderstanding or mistake.***
>
> *10. A plain reading of the provisions quoted hereinabove tend to show that widest possible powers have been conferred on a Court for summoning a witness or re-calling and re-examining a witness already examined.* ***Apparently the discretion vested in a Court appears to be unrestricted nevertheless such power being in the nature of public trust can only be exercised if such evidence appears to be essential to the just decision of the case and not to fill in the lacuna in a case owing to gross negligence, inefficiency, carelessness and recklessness of a party. An important and relevant ground for the exercise of discretion may be where some evidence is discovered***

subsequently which could not be collected earlier despite due diligence earlier or where a party was prevented from adducing such evidence at the trial for extraordinary reasons beyond its control and power. But in the instant case photocopies of documents were placed on record therefore non-production of such documents in evidence and its admissibility or otherwise amounted to sheer negligence and carelessness on the part of prosecution. We are fortified in this view by the dictum of the Federal Court rendered in Ali v. Crown PLD 1952 FC 71 in which a Full Bench headed by Abdul Rashid. C.J. (as his lordship then was) ruled that the terms in which the power is given by sections 375 and 428, Cr.P.C. vary to some extent. Under section 428, Cr.P.C. the Appellate Court may call for additional evidence "if it thinks additional evidence to be necessary" but must give reasons for its action. Under section 375, no reasons need be given but the additional evidence required must be upon a "point bearing upon the guilt or innocence of the accused". The essential question for the Court being in either case that of the guilt or innocence of the accused person, the distinction between the two sections in relation to this case is more apparent than real. The limitations of section 428 are obvious. Such an order, stating reasons, would operate to exclude evidence which is not directly relevant to such reasons. Federal Court cautioned by emphasising that the powers must be exercised judicially, that is to say, so as to preserve in all respects the essential fairness and even-handed justice to both parties. They should not be utilized to cure all the infirmities in the prosecution case in the Appellate Court".(bold added)

19. This position was recently reiterated by the Supreme Court in the case of **The State V Ahmed Omar Shaikh** (2021 SCMR 873) which held as under with respect to additional evidence;

> *"13. It is by now a settled principle of criminal administration of law that the appellate courts are to be cautious in allowing the production of additional evidence at an appellate stage, especially when such fact was available and in the knowledge of the party seeking to produce it, as additional evidence. The underlying reason for the Appellate Court to exercise restraint is that it might prejudice the case of the accused or be used to fill the lacunas of the prosecution case. Therefore, unless the said evidence could not have been collected earlier, despite due diligence or where the said party was prevented from collecting and producing the same at the trial for reasons beyond its control and power, the appellate courts are not to allow production of such additional evidence.* (bold added) .....
>
> *"(i) The learned counsel for parents of Daniel Pearl argued that the defence counsel summoned the body of Daniel Pearl when it was flashed in the newspaper that his dead body was recovered from a grave in a courtyard. Although the said postmortem report was summoned on the application of the defence but the said postmortem report was of an unknown person whose parentage and other particulars were not*

> *known. It is also not brought on record by the prosecution that as to how and on whose pointation the said dead-body was recovered.* ***No effort was made by the prosecution to produce the doctor who conducted the postmortem and prepared the report. At this stage, learned counsel for parents of Daniel Pearl cannot claim that the flaws and lacunas left by prosecution due to their negligence be filled by invoking jurisdiction under section 428, Cr.P.C. The Courts remain impartial and they are not meant to fill up the lacunas/gaps and other infirmities left by either party. So prosecution remained fail to establish the factum of murder through cogent evidence.***(bold added).....

20. The trial of the appellants commenced on 07.11.2016 when the charge was framed and was completed on 17.12.2021 when the judgment in the trial was handed down. The trial had therefore taken about 5 years to complete and thereafter appeals were filed in December 2021 and January 2022 by the appellants against there conviction which is about 6 years ago. This was a high profile case which was widely reported in both the print and electronic media. The video in question which is sought to be produced by the applicant was **aired on TV News Channel in 2016 at the very initial stages of the trial** as conceded by learned counsel for the complainant. This video was therefore known and openly available to any member of the public from that date including the prosecution and the complainant if they had wanted to obtain it for the purpose of a trial which proceeded over a 6 year period. The person who recorded the video could have been traced out relatively easily at that time as it was a recent video and an application could have been made by the prosecution under Section 540 Cr.PC to the trial court to exhibit it through the evidence of its maker and enabled the appellants to cross examine on it if it deemed it necessary. The authenticity of the video could also have been proven through forensic analysis as required under the law.

21. According to learned counsel for the applicant neither the prosecution nor the complainant had ever heard of this video's existence until a few days ago not withstanding the fact that it aired over 6 years ago while the trial was proceeding. Learned counsel for the applicant has contended that it only came to his knowledge through a researcher of Ms Rehman's book who found it on the internet a few days ago and brought it to his attention. Now in this day and age of great reliance on technology through the internet through search engines such as google we have little, if any, doubt that this video could have been found on the internet if due diligence had been exercised by the prosecution or the

complainant during the trial especially as it was widely shown on the television. One of the counsel for the appellants had contended that the video had been uploaded on *you tube* in 2016. Thus, we did a simple google search and found that the video had indeed been uploaded on the internet in 2016 and that it had been viewed over 7,000 times up till now. As such in our view it beggars belief that the prosecution and the complainant could not have found this evidence during trial if they had carried out basic due diligence searches on open source material. In our view this was clear negligence on the part of the prosecution and complainant and they cannot rely on their own negligence to fill in the lacuna's in their case which would prejudice the accused right to a fair trial under Article 10 (A) of the Constitution keeping in view that the accused is the favored child of the law who in a criminal case always receives the benefit of even a single doubt. **This is more so as in this case the prosecution seek to adduce this evidence after more than one year of the completion of the trial where the appellants have been convicted and sentenced and have already been languishing in jail for around 7 or 8 years each.**

22. **What is even more damaging to the complainant's application is the fact that this is not new or additional evidence at all.** This is because one of the learned counsel for the appellants directed us to P.999 B of the paper book which is the evidence of PW 26 Babar Bakhat who had exhibited a JIT report at P.1039 of the paper book which at serial No. (vii) clearly shows that the members of the concerned JIT had in their possession the evidence which the applicant seeks now to adduce through the application. This is therefore not new evidence at all and was considered by a JIT whose report was exhibited by the prosecution at trial and was considered by the trial court. Since learned counsel for the applicant was assisting the prosecution during the trial the assertion by the applicant and her counsel that this was new evidence which had recently come to light of which they had no knowledge following research on a book concerning Ms Rahman **is totally belied** by the evidence on record as adduced by the prosecution of which the applicant's counsel would have been aware as he was intrinsically involved with the case throughout and assisting the prosecution at the time. **Thus, we do not find that the video is evidence which has recently come to light as it was known years ago and was even mentioned in the JIT report which was exhibited at trial by the prosecution and as such cannot be admitted as additional evidence under S.428 Cr.PC at this late stage.**

23. In addition to allow such applications based on the particular facts and circumstances of this case would virtually open the flood gates for any shoddy prosecution to be strengthened years after the completion of the trial when the appellants might have already been convicted and sentenced and then have to go through yet further delay before there appeal can be heard on account of the prosecution producing additional evidence which was available to it at the time of the trial had it done its due diligence.

24. We also see **no necessity** in allowing this application which is one of the key requirements under Section 428 Cr.PC as we understand that the video evidence which is sought to be adduced in evidence is not necessary as it relates to the retracted confession of one of the appellants which the trial court placed reliance on in convicting the appellants. It appears that one year after the trial the applicant is seeking to **yet further strengthen** the prosecution case with respect to this aspect of the case (i.e the confession of one of the appellants) when the trial court has already agreed with the prosecutions point of view concerning the admissibility of the confession and the **APG himself has conceded that the additional evidence is not required as the prosecution has already relied on the best evidence being the confession of the appellant** as opposed to a video recording with no providence and as such **we find that it is not needed/necessary** to produce this additional evidence because the trial court has already believed the confession of one of the appellants despite it being retracted by the appellant which this additional evidence in USB form relates to and thus we find on this count as well the video evidence cannot be adduced as additional evidence under S.428 Cr.PC.

25. Article 10(A) of the Constitution as referred to earlier in this order also encompasses the right to have an appeal against conviction **heard expeditiously especially as it concerns the liberty of a person which is a fundamental right**. In this case the appellants have already been in jail for about 7 to 8 years each pending trial and now appeal and as such to allow this additional evidence which is by way of video recording which admissibility would need to be proven in accordance with the guidelines laid down in **Istiaq's case** which guidelines are set out below for ease of reference is only likely to greatly extend the agony of the appellants for months if not years more and further delay the hearing of there appeals through no fault of their own but on account of the applicant **not** the prosecution wanting to adduce further evidence **which is already on record and is unnecessary keeping in view the finding of the trial court in the impugned**

judgment in relation to the retracted confession and as such this application cannot be allowed on this count as well.

26. The case of **Ishtiaq Ahmed Mirza V Federation of Pakistan** (PLD 2019 SC 675) laid down the following guidelines concerning the admissibility of video/audio tape evidence as under;

> ***11. The precedent cases mentioned above show that in the matter of proving an audio tape or video before a court of law the following requirements are insisted upon:***
>
> * *No audio tape or video can be relied upon by a court until the same is proved to be genuine and not tampered with or doctored.*
> * *A forensic report prepared by an analyst of the Punjab Forensic Science Agency in respect of an audio tape or video is per se admissible in evidence in view of the provisions of section 9(3) of the Punjab Forensic Science Agency Act, 2007.*
> * *Under Article 164 of the Qanun-e-Shahadat Order, 1984 it lies in the discretion of a court to allow any evidence becoming available through an audio tape or video to be produced.*
> * *Even where a court allows an audio tape or video to be produced in evidence such audio tape or video has to be proved in accordance with the law of evidence.*
> * *Accuracy of the recording must be proved and satisfactory evidence, direct or circumstantial, has to be produced so as to rule out any possibility of tampering with the record.*
> * *An audio tape or video sought to be produced in evidence must be the actual record of the conversation as and when it was made or of the event as and when it took place.*
> * *The person recording the conversation or event has to be produced.*
> * *The person recording the conversation or event must produce the audio tape or video himself.*
> * *The audio tape or video must be played in the court.*
> * *An audio tape or video produced before a court as evidence ought to be clearly audible or viewable.*
> * *The person recording the conversation or event must identify the voice of the person speaking or the person seen or the voice or person seen may be identified by any other person who recognizes such voice or person.*

* *Any other person present at the time of making of the conversation or taking place of the event may also testify in support of the conversation heard in the audio tape or the event shown in the video.*

* *The voices recorded or the persons shown must be properly identified.*
* *The evidence sought to be produced through an audio tape or video has to be relevant to the controversy and otherwise admissible.*

* *Safe custody of the audio tape or video after its preparation till production before the court must be proved.*
* *The transcript of the audio tape or video must have been prepared under independent supervision and control.*

* *The person recording an audio tape or video may be a person whose part of routine duties is recording of an audio tape or video and he should not be a person who has recorded the audio tape or video for the purpose of laying a trap to procure evidence.*

* *The source of an audio tape or video becoming available has to be disclosed.*

* *The date of acquiring the audio tape or video by the person producing it before the court ought to be disclosed by such person.*

* *An audio tape or video produced at a late stage of a judicial proceeding may be looked at with suspicion.*

* *A formal application has to be filed before the court by the person desiring an audio tape or video to be brought on the record of the case as evidence.*

12. *As the trial court in the case of Mian Muhammad Nawaz Sharif has already become functus officio and as his appeal against his conviction and sentence recorded by the trial court is presently pending before the Islamabad High Court, Islamabad, therefore, the only Court which can take the relevant video in evidence of that case is the Islamabad High Court, Islamabad. An appellate Court can take additional evidence under section 428, Cr.P.C. which provides as follows:*

> 428. ***Appellate Court may take further evidence or direct it to be taken.*** *(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.*
>
> *(2) Where the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.*
>
> *(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken.*

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

Under this section an appellate court can take additional evidence on its own or upon an application of a party to the appeal, i.e. the appellant, the State or the complainant but in both such cases ***the appellate court has to record its reasons why it thinks that taking of additional evidence is necessary. The necessity of taking additional evidence at the appellate stage must be felt by the appellate court itself and the same is not to depend upon what a party to the appeal thinks of such necessity.*** *After feeling the necessity of taking additional evidence and after recording reasons for such necessity the appellate court may either take such evidence itself or direct it to be taken by a Magistrate or, when the appellate court is a High Court, by a Court of Session or a Magistrate. Where the additional evidence is taken by the Court of Session or the Magistrate it or he shall certify such evidence to the appellate court and the appellate court shall then proceed to decide the appeal on the basis of the pre-existing evidence as well as the additional evidence lawfully becoming a part of the record. It is, thus, obvious that in the context of the present matter if the Islamabad High Court, Islamabad, either on its own motion or on an application submitted by the appellant namely Mian Muhammad Nawaz Sharif, feels the necessity of taking additional evidence in the form of the relevant video then it may record its reasons for feeling such necessity and may then follow the steps mentioned in section 428, Cr.P.C.* ***It goes without saying that in such a case the relevant video may be taken as (additional) evidence only after complying with the requirements detailed above for proving a video before a court of law.***(bold added)

27. We are also not impressed by the timing of the application which was made one day before these appeals were date and time fixed to be heard and apparently the additional evidence had only been discovered a few days before the hearing. We find this to be too much of a coincidence especially since the language as used in the affidavit as reproduced above seems to have come directly from reported case law which would have needed some research along with preparing the application and affidavit and *prima facie* it appears that the application was made in order to delay the hearing of the appeals which we find to be most disappointing.

Summary.

28. We dismiss the application for the reasons mentioned above in particular;

(a) This video was **already in the knowledge of the prosecution** at the time of the trial and was even mentioned in the JIT report which was exhibited by the prosecution during the trial through a prosecution witness and as such there is no question of this so called additional

evidence only just coming to light. Even otherwise it could have been found during the trial by either the prosecution and/or the complainant exercising due diligence and as such it cannot be allowed as additional evidence since it is an attempt to fill in the lacuna's in the prosecution case **by attempting to strengthen** the prosecution case.

(b) The additional evidence is **not necessary** as its purpose is to bolster a confession which albeit retracted the trial court relied upon to convict the appellants and as such the evidence is already on record in terms of the retracted confession and the existence of the video through the exhibited JIT report.

(c) To allow the additional evidence at this late stage **one year** after the convictions and sentences had been handed down to the appellants based on the particular facts and circumstances of this case would cause **prejudice to the appellants** and would be in violation on Article 10 (A) of the Constitution.

(d) Even if the application was allowed it would further prejudice the accused by delaying there appeals by months if not years as the piece of evidence which is sought to be adduced would have to under go stringent tests before it could even be held to be admissible based on the principles of admissibility laid down in **Ishtiaq's case** (Supra) in respect of such types of evidence.

29. Resultantly the application is dismissed and all the aforesaid appeals being No's Spl. Cr. AT Jail Appeal No.202 of 2021, Spl. Cr. A.T. Appeal No.08 of 2021, Spl. Cr. A.T. Appeal No.09 of 2021, Spl. Cr. A.T. Jail Appeal No.10 of 2021 and Spl. Cr. A.T. Jail Appeal No.13 of 2021 shall be **fixed for hearing on 10.11.2022 at 9.15 am** with direct intimation notice to all the learned counsel for the appellants, learned APG and learned counsel for the complainant.

30. The application stands disposed of in the above terms.