Parveen Rehman murder.
Appeal against calling new witnesses u/s 540 dismissed

225

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Mohammad Karim Khan Agha
Mr. Justice Amjad Ali Sahito.

CRIMINAL REVISION APPLICATION NO.09 OF 2019.

Applicant:	The State through Mr. Ali Hyder Saleem, Deputy Prosecutor General.
Respondents:	Muhammad Amjad Hussain Khan, Mr. Aamir Mansoob Qureshi, advocate.

CRIMINAL REVISION APPLICATION NO.18 OF 2019.

Applicant:	Aquila Ismail through Mr. Saad Fayyaz, Advocate.
Respondent:	The State through Mr. Ali Hyder Saleem, Deputy Prosecutor General.
Date of hearing:	**20.10.2020.**
Date of Order:	**20.10.2020.**

ORDER

MOHAMMAD KARIM KHAN AGHA, J.- The Criminal Revision Application No.09 of 2019 has been filed by the State through Prosecutor General Sindh being aggrieved and dissatisfied with the impugned order dated 12.12.2018 passed in Special Case No.17(vii) of 2016 arising out of FIR No.104/2013 of P.S. Pirabad Karachi U/s. 302, 109, 201, 202, 34 PPC by the learned Anti-Terrorism Court No.XIII Karachi whereas Criminal Revision Application No.18 of 2019 has been filed by the applicant Aquila Ismail against the impugned order dated 22.12.2018.

2. Briefly stated the facts of the Criminal Revision applications are that learned counsel for applicants (complainant and State) made an application under S.540 Cr.PC for the trial court to allow the prosecution to call and examine members of the JIT which had been established by the Supreme Court as these were material witnesses who needed to be examined in order that the prosecution prove its case and to exhibit its JIT Report. This

application was declined by the trial court through the impugned order and hence the applicants have approached this court in its revisional jurisdiction.

3. Learned counsel for the applicants have made the same submissions as mentioned above as were earlier made in their S.540 Cr.PC application which was declined by the trial court through the impugned order and have essentially relied on the same and some other additional authorities being **State** (2017 YLR 1376), **Muhammad Sharif Shar v. The State** (2000 P Cr. L J 1882), **Muhammad Murad Abro v. The State** (2004 SCMR 966), **Nawabzada Shah Zain Bugti v. The State** (PLD 2013 SC 160), **Abdul Salam v The State** (2000 SCMR 102) and **Ansar Mehmood v Abdul Khaliq** (2001 SCMR 713).

4. On the other and Mr. Amir Mansoob Qureshi, Advocate who is appearing for Respondent No.5 has contended that there is no legal infirmity in the impugned order and that the same did not require interference. In particular he contended that Respondent No.5 had already spent 8 years in jail and that this was simply a tactic to further delay the trial as the prosecution had not been able to prove its case against Respondent No.5 beyond a reasonable doubt and as such the Criminal Revision applications should be dismissed. He placed reliance on **Province of Punjab V Muhammad Rafique** (PLD 2018 SC 178), **National Bank of Pakistan V Mumtaz Ahmed** (1984 PSC 297), **Allah Wasaya V The State** (2018 MLD 489), **The State V Khaista Rahman** (2013 MLD 1872), **Muhammad Ayub V Additional Sessions Judge Hafizabad & Ors.** (2011 YLR 2058) and **Syed Saeed Muhammad Shah V The State** (1993 SCMR 550).

5. We have considered the arguments of the parties, the record, the impugned order and the case law cited at the bar.

6. The latest Supreme Court order in this matter is CP.50 0f 2013 **HRCP V Province of Sindh and others** dated 24.09.2020 and reads as under;

> "The head of the JIT has filed a detailed report bearing CMA No.80 of 2020 giving the history of the case, its investigation and the persons who are presently in custody and facing trial. He states that five persons are involved in the commission of the offence of murder of Ms. Parveen Rehman on 13.03.2013. Four out of five alleged accused persons are in custody. **The prosecution evidence and statements of the accused persons**

have been recorded in those proceedings and the matter is now awaiting final arguments since January 2019.

2 **We are surprised that for the last 20 months the final arguments in the case have not been rendered. It is *directed* that the proceedings before the trial court be undertaken expeditiously for its conclusion within one month.**

3. To come up for report as to the judgment by the learned trial court. ("Bold added)

7. The above mentioned Supreme Court order which is binding on this court was passed on 24.09.2020 and as such the time limitation mentioned in the order for conclusion of the trial has almost expired.

8. Interestingly, none appeared on behalf of the applicant (complainant) nor the Prosecutor General's office before the Supreme Court when the order was passed by the Supreme Court and none present before the Supreme Court objected about the time frame or even mentioned to the Supreme Court about the impugned order dated 22.12.2018 or the fact that a revision application had been moved before this court on 21.01.2019 which order was passed/application made over 18 months **before** the above reproduced Supreme court order **and the fact that the trial had not concluded** because **the applicants had obtained a stay from this court on 12.02.19 staying the announcement of the Judgment which they failed to inform the Supreme Court about. This conduct appears to be rather sneaky on the part of the applicants counsel especially as on the last 11 dates which followed the stay being granted the learned counsel for the applicant sent someone to hold brief on his behalf or sought time to argue the revision application whilst the stay was maintained** which conduct is to be deprecated and in our view indicates that the applicants were trying to deliberately linger on the trial whilst the accused rotted behind bars as only final arguments were left to be heard.

9. Respondent No.5 has been behind bars for almost 8 years. If he is acquitted this time cannot be given back to him nor can he be compensated for it. This was a case under the ATA 1997 which envisaged speedy trials yet after 8 years the trial has not been concluded mainly it appears due to the delaying tactics used by the prosecution and the complainant.

10. It is an admitted position that the prosecution has closed its evidence and the matter is now ready for final arguments and Judgment as indicated by the Supreme Court in its aforementioned order.

11. The prosecution by virtue of its S.540 Cr.CP application and as stated at the bar by learned counsel for the applicants wanted to both introduce the JIT report in evidence and examine 6 to 7 members of the JIT at the very fag end of the case whose evidence may not necessarily affect the final outcome of the case. In fact it appears that the prosecution is attempting to fill in the lacuna's in its case at the last minute and prolong the case to the detriment and prejudice of the accused who remain rotting behind bars for years on end.

12. In recent cases where the courts have opted to remand cases due to failings of the prosecution the Supreme Court has deprecated such practices if such remands will help fill in the lacuna's in the prosecution case to the prejudice of the accused.

13. In the case of **Muhammad Naeem V The State** (unreported) dated 10.05.2019 in Criminal Appeals 81-L and 82-L of 2017 the Supreme Court held as under:-

> *"In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. The judge should not enter the arena so as to appear that he is taking sides.* ***The court cannot allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence tendered by them. Any such step would tarnish the objectivity and impartiality of the court which is its hallmark. Such favored intervention, no matter how well-meaning, strikes at the very foundations of fair trial, which is now recognized as a fundamental right under article 10-A of our Constitution.***
>
> *In the present case the direction of the High Court for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner* ***amounts to granting the prosecution a premium on its failure to put up a proper case in the first instance. Such judicial intervention is opposed to the adversary principle and offensive to the fundamental right of fair trial and due process guaranteed under the Constitution.*** *See Dildar v. Sate; Painda Gul v. State and State v. Amjad Ali". (hold added).*

14. Likewise in this respect in the recent Supreme Court case of **Nusrat Ali Shah and other V The State** (unreported) dated 20-02-2019 in Criminal Appeal No.24-26-K of 2018 it was held as under:-

> *"The law is settled by now that a piece of evidence or a circumstances not put to an accused person at the time of recording of his statement under section 342, Cr.P.C. cannot be considered against the accused person facing the trial.* ***In the case in hand through an act or omission of the Court a serious lacuna in that regard had crept into the case of the prosecution and the accused persons could not be prejudiced on account of the said act or omission of the Court. Through the impugned judgment passed by it the High Court had allowed that lacuna to be filled through remand to the detriment of the appellants. The High Court was expected to hold the scales of justice in balance and not to tilt the same in favour of the prosecution. In this view of the matter remand of the case by the High Court to the trial court to fill that lacuna to the detriment of the accused persons has been found by us to be militating against the interests of justice.*** *These appeals are, therefore, allowed, the impugned judgment passed by the High Court remanding the case to the trial Court is set aside, the matter is remanded to the High Court for deciding the appeals filed by the convicts against their convictions and sentences on their merits on the basis of the existing record and in accordance with law."* (bold added)."

15. The operative part of the impugned order reads as under;

> *"I have considered the arguments of learned APG for the state, counsel for the complainant and counsel for the accused, and have also gone through the record. From perusal of record, it appears that at very initial stage of the case and according to the complainant counsel that High-ups of the police disclosed in the press conference that real culprits involved in the above crime have been killed in police encounter. But later on the sister of deceased Mst. Parveen Rehman namely Aquila Ismail had filed the CP bearing No.50/2013 before the Hon'ble Supreme Court of Pakistan with prayer to constitute the commission to probe the matter, later on. JIT constituted and on the reports and advised of JIT police had arrested the accused and interrogated them during the investigation. Perusal of record further shows that neither the member of JIT are cited as witnesses in this case nor the I.O. recorded their statements u/s.161 Cr.PC. during the investigation, even the report and findings of JIT are not attached with the final charge sheet nor supplied the same to the accused before commencement of trial,* ***if the evidence of member of JIT were so necessary as stated by the learned APG for the state then as to why prosecution failed to associate them as witnesses in the calendar of witness.*** *It is held in PLD2018 SC 178:-*
>
> *(e) Criminal Procedure Code (V of 1898)----*
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> *.....S.173....Joint Investigation Team (JIT) formed to probe into a crime---Report of JIT---Evidentiary value--- Said report, which was an opinion of the members of JIT, could at the most be considered, as a report under S.173 Cr.P.C. ---Report under S.173 Cr.P.C. was inadmissible in evidence.*

The charge sheet and report u/s. 173 Cr.P.C. after being thoroughly scrutinized by the Law Officer of Prosecution Agency, then police submitted before the Court of Law, who is responsible to see that incomplete or complete charge sheet and other necessary papers are attached and that the witnesses according to the list entered in the charge sheet and there is no defect or omission in the investigation, after fulfilling all the legal formalities the charge sheet is required to be put in the Court. ***The law does not permit to the Court to full up the lacunas in the prosecution case. The instant case is pertaining to the year 2013 and could not finalize due to above act of learned counsel for the parties and now there are directions of Hon'ble High Court of Sindh to conclude the matter within 02 months and stipulated period is near to end as such all the material witness have been examined including the I.O. of the case and learned APG for the state instead of closing the side of prosecution has submitted this application at the belated stage only to prolong the matter without any substance. Hence I do not find any merit in the instance application and same is hereby dismissed. Application is disposed of accordingly."*** (bold added)

16. It is apparent from the impugned order **that the applicant has not been able to persuade the trial court that allowing its S.540 Cr.PC application was essential to reaching a just decision in the case which appears to be the gold standard in allowing such applications taking into account the other relevant factors mentioned in this order. The ends of justice in our view would also not be served by allowing the trial to be further delayed for a substantial period of time whilst 6 to 7 witnesses were examined and potentially cross examined by a number of the accused** to the detriment of the accused who have been languishing in jail for 8 years on account of the failure of the prosecution to properly present and prosecute its case and try to fill in lacuna's at the very end of the trial to the prejudice of the accused. The scales of justice cannot be titled too far in favour of the prosecution to the prejudice of the accused in even so called high profile cases. As such we agree with the assessment made by the trial court through the impugned order at this belated stage which we find to be well reasoned and without any legal infirmity especially as it is settled by now that a JIT Report is equivalent to a S.173 report and is of no evidentiary value; that no member of the JIT who is now sought to be added as a witness(whose name was known at the time when the calendar of witnesses was submitted and could have been dropped later if deemed necessary by the prosecution) was included in the calendar of the prosecution witnesses; that no member of the JIT has recorded a S.161 Cr.PC statement and as such the accused would be prejudiced during cross examination and in any event

we regard the S.540 Cr.PC application at such a belated stage as an attempt to fill in the lacuna's in the prosecution case which is prejudicial to the accused and would be violative of both Article 10 (A) of the Constitution and the due process rights of the accused.

17. The courts cannot simply allow trials to continue for indeterminate periods whilst accused rot behind bars for years on end due to the failure of the prosecution to investigate and present its case properly at trial. This is the obligation and duty of the State through its investigators and prosecutors and in any event the accused cannot be prejudiced by such failures and left languishing in jail and/or being denied his right to an expeditious trial and other due process rights guaranteed to him under the Constitution and the law especially as the accused is the favored child of the law and is innocent until proven guilty.

18. Thus, for the reasons discussed above we find no illegality or infirmity in the impugned order which is upheld. Both of the criminal revisions applications stand dismissed **and accordingly any stay on the trial courts proceedings stands vacated.**

19. A copy of this order shall be sent by fax immediately by the office to ATC No.XIII Karachi, Judicial complex Central prison Karachi hearing Special Case No.17(vii) of 2016 arising out of FIR No.104/2013 of P.S. Pirabad Karachi U/s. 302, 109, 201, 202, 34 PPC where the learned trial judge is **directed** to proceed with the trial on a day to day basis and not allow any adjournments by any party and **ensure that the deadline for conclusion of the trial be complied with as per the directions of the Supreme Court reproduced earlier in this order.**

20. The criminal revision applications stand disposed of in the above terms.

MAK/PS