ORDER SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

Cr.Misc. Appl.No.S- 485 of 2017

DATE ORDER WITH SIGNATURE OF JUDGE

1. For orders on office objection.
2. For Katcha Peshi.
3. For hearing of MA 9304/2017.

Date of hearing: 16.02.2018.
Date of decision: 23.02.2018.

Mr. Ahmed Nawaz Khan, Advocate for applicant.
Syed Zakir Hussain, Advocate for respondent No.1.
Mr. Atique-ur-Rehman, A.D.P.P. for the State.

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ARSHAD HUSSAIN KHAN, J: Through instant criminal miscellaneous application, applicant has assailed the order dated 17.11.2017 passed by learned Sessions Judge, Mirpurkhas in Criminal Revision Application No.19 of 2017, whereby the learned Sessions Judge while allowing the said criminal revision application, set aside the order dated 30.10.2017 passed by learned Civil Judge & Judicial Magistrate-I, Mirpurkhas on application u/s 540 Cr.P.C. filed by respondent No.1 Muhammad Imran, with direction to the learned Magistrate to examine the witnesses and decide the case strictly in accordance with law.

2. The brief facts of the case as averred in the present application are that respondent No.1/accused was involved in case/crime No.159/2013 of P.S. Town Mirpurkhas u/s 489-F PPC and upon the conclusion of trial he was convicted and sentenced through judgment dated 16.10.2017 passed by the learned Civil Judge and J.M-I Mirpurkhas. Respondent No.1 challenged the said conviction in Criminal Appeal No.08/2017, which was allowed by the learned Sessions Judge, Mirpurkhas vide judgment dated 21.10.2017 and the case was remanded back to the trial court for decision a fresh only to the extent to decide the quantum of punishment in case of non-payment of fine. Respondent No.1 upon remand of the

case filed an application u/s 540 Cr.P.C. before the learned Magistrate which was dismissed vide order dated 30.10.2017. Thereafter respondent No.1 preferred criminal revision application before the learned Sessions Judge, Mirpurkhas which was allowed through order dated 17.11.2017 in the present proceedings. The applicant after having aggrieved by the said preferred this criminal miscellaneous application.

3. Upon notice of the present application, Syed Zakir Hussain advocate filed power on behalf of respondent No.1 and contested the matter. Whereas for the state learned ADPP argued the case.

4. Learned counsel for the applicant during the course of arguments has, inter alia, contended that after full dressed trial, respondent No.1/accused was convicted and sentenced by the learned trial court and in appeal, the learned Sessions Judge without discussing the merits of the case and without setting aside the conviction and sentence, remanded the case to the learned trial court to decide the point as the learned court while inflicting the conviction under section 420 PPC has omitted to mention the sentence to be suffered by the respondent No.1 in case of default in payment of fine as per section 64 PPC. Further contended that the learned trial court as per remand order of the learned Sessions Judge was only confined to record its findings to the extent to decide the quantum of punishment in case of non-payment of fine. Furthermore, the learned trial court has committed no illegality or material irregularity while dismissing the application of respondent No.1 for summoning of the witnesses for their examination. It is also contended that the remand order of the learned Sessions Judge clearly shows that the case was remanded to the learned trial court to decide the case on specific point, therefore, learned trial court was not competent to re-open the case by allowing the application of respondent no.1 for summoning the witnesses. Further contended that during trial, respondent No.1/accused had not availed such opportunity to

examine those witnesses in his defence, hence after the decision of the case on merits such application u/s 540 Cr.P.C. was not competent. It is also argued that learned Sessions judge while passing the impugned order in fact allowed the *de novo* trial of the case which is contrary to the spirit of remand order, wherein the learned Sessions Judge in appeal did not set-aside the conviction and sentence but it was only for the purposes to decide specific point. He lastly argued that the impugned order passed by the learned Sessions Judge suffers from material illegality, irregularity and infirmity hence liable to be set aside as it has resulted in miscarriage of justice.

5. On the other hand, learned counsel for the respondent No.1 mainly contended that Section 540 Cr.P.C. empowers the court to summon the material witness or examine the persons present at any stage of inquiry, trial or other proceedings under the Criminal Procedure Code. He further contended that the order passed by the learned Sessions Judge is in accordance with law as there is no bar u/s 540 Cr.P.C. to summon the witness for recording evidence even after delivering the judgment. Learned counsel further contended that the witnesses who have been sought to be examined in the case have already been enlisted in the challan sheet being prosecution witnesses and their evidence is necessary for just and fair decision of the case. He also contended that the learned Magistrate without assigning any cogent reason has dismissed the application filed by respondent No.1/accused, hence the said order of the magistrate was rightly set aside by the learned Sessions Judge. He lastly argued that the evidence of the witnesses mentioned in the application u/s 540 Cr.P.C. is very much essential as they are enlisted in the challan sheet and their 161 Cr.P.C. statements have been recorded during the course of investigation. He therefore, prays for dismissal of this criminal miscellaneous application.

6. Learned A.D.P.P. has not supported the impugned order passed by the learned Sessions Judge, Mirpurkhas.

7. I have heard the learned counsel for the parties and perused the material available on record.

8. From the perusal of the record it appears that respondent No.1 was involved in a case/crime No.159/2013 PS Town for the offence punishable u/s 489-F and 420 PPC as after purchase of two cars/vehicles from the applicant/complainant, he issued four cheques for the outstanding amount which on presentation were dishonoured. Thereafter, full dressed trial respondent No.1 was convicted and sentenced by the learned Magistrate vide his judgment dated 16.10.2017, relevant portion whereof for the sake of ready reference is reproduced hereunder:-

> ***"POINT NO.2: In view of the foregoing reasons, I am of the humble opinion that the prosecution has proved its case against the accused beyond the shadow of reasonable doubt, therefore, I hereby convict the accused namely Muhammad Imran s/o Muhammad Rafique U/S 245(ii) Cr.P.C. for an offence u/s 489-F for the period of two years and accused is also convicted for the period of 01 year and fine in sum of Rs.20,000/- for an offence U/S 420 PPC and both the punishment will run concurrently. The accused person is present on bail, he is taken into custody and is remanded to District Jail Mirpurkhas to undergo the above mentioned sentence. The bail bond for the accused stands cancelled and surety is discharged from all liabilities."***
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> [emphasis supplied]

Respondent No.1 challenged the above judgment in Criminal Appeal No.08 of 2017 before the District and Sessions Judge, Mirpurkhas. The said appeal was disposed of on 21.10.2017 and the case was remanded to the learned Magistrate with direction to decide the point discussed in order afresh after due hearing to the learned counsel for the parties. The relevant portion of the said judgment for the sake of ready reference is reproduced as under:

> ***"The learned counsel for the appellant contended that the judgment of the learned trial court is suffering from infringement of legal application in lieu of fine of Rs.20,000/- no imprisonment has been awarded in the judgment therefore the appellant/accused in default of fine would remain in jail for***

indefinite period. He submitted that section 64 of PPC provides that it shall be competent to the court which sentences such offender to direct by the sentence that in default of payment of fine the offender shall suffer imprisonment for a certain term but in the present case no sentence in non-payment of fine has been awarded.

The learned counsel for the complainant also conceded that judgment of learned trial court in respect of quantum of punishment is suffering from material illegality therefore if the matter is remanded back to the learned trial court he has no objection.

The learned I/C DPP is also of the opinion that the judgment of the trial court is against the principle of section 64 of the PPC which provides the punishment in default of payment of the fine. He added that the offence u/s 489-F PPC is punishable for imprisonment or fine or both, therefore, since the matter pertains to the payment of a cheque therefore, learned trial court was supposed to apply his mind in awarding the fine for the offence u/s 489-F PPC coupled with imprisonment.

The perusal of the impugned judgment on point No.2 reveals that learned trial court in sentence for the offence u/s 420 PPC has not awarded the punishment in default of payment of Rs.20,000/- therefore the appellant/accused would remain in jail for indefinite period which is against the natural justice. Section 64 of PPC provides that it shall be competent to the court which sentences such offender to direct by the sentence that in default of payment of fine the offender shall suffer imprisonment for a certain term. Section 64 of PPC is re-produced as under:-

> ***64. Sentence of imprisonment for non-payment of fine…. In every case of an offence punishable with imprisonment as well as fine in which the offender is sentenced to a fine, whether with or without imprisonment.***
> ***and in every case of offence punishable with imprisonment of fine, or with fine only, in which the offender is sentenced to a fine.***
> ***it shall be competent to the court which sentence such offender to direct by the sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be liable under a commutation of a sentence.***

More so the offence u/s 489-F PPC which relates to the non-payment of the amount and the law provides the punishment and fine too, therefore, the matter is remanded back to the learned trial court to decide the point discussed above after due hearing to the learned counsel of the accused and complainant.
Appeal in hand is allowed and matter is remanded back for its disposal."

[emphasis supplied]

Upon remand of the case, present respondent No.1 filed an application u/s 540 Cr.P.C. whereby he sought summoning and examining the prosecution witnesses for proper decision of the case on merits. The said application was dismissed by the learned Civil Judge and Judicial Magistrate-I Mirpurkhas on 30.10.2017. Relevant portion of the said order for the sake of convenience is reproduced as under:

> **"Heard the arguments of both learned counsels and after perusing the record and judgment of the learned Honourable Sessions Judge. <u>The case has been remanded to this court only for fresh disposal on the point of omission to mention the period of imprisonment in default of payment of fine in sum of Rs.20,000 if the learned counsel for accused want to produce additional evidence then he may take this plea before appellate court,</u> therefore the instant application is not maintainable and the same is dismissed."**
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> [emphasis supplied]

Respondent No.1 challenged the said order of the learned Civil Judge and Judicial Magistrate-I Mirpurkhas in Criminal Revision Application No.19 of 2017 before learned Sessions Judge, Mirpurkhas. The said revision application was allowed on 17.11.2017, relevant portion whereof, for the sake ready reference, is also reproduced hereunder:

> **"The order of the learned trial court appears to have been made in slip short; no detail has been provided in the impugned order, therefore, not termed as speaking order: therefore, the learned magistrate to pay his vigilance in future. Impugned order of the learned trial court is set aside: application u/s 540 Cr. P.C. is allowed and learned trial court is directed to examine the witness and decide the case strictly in accordance with law. Revision application is allowed. It is expected that learned trial court will conclude the trial within a period of one month."**

The present applicant challenged the said order in the present Criminal Miscellaneous Application.

9. From the perusal of record, it also reveals that the present applicant lodged FIR against respondent No.1, who was working in the police department, in respect of cheques amounting to Rs.20,00,000/- issued dishonestly by respondent No.1, which were dishonored due to insufficient funds. Initially the investigation officer submitted the report u/s 173 Cr.P.C recommending cancellation of FIR lodged by the present applicant, under 'C' class but the learned Magistrate did not agree with such report and took cognizance of the case. Thereafter, the learned Magistrate after the full dressed trial convicted respondent No.1. From the perusal of the record it also transpires that respondent No.1 neither produced any witness nor had filed any application under section 540 of Cr.P.C. for summoning of any witness in his defence. Conversely, respondent No.1 during the trial while recording the statement under section 342 of Cr.P.C. not only refused to examine

any witness in his defence but he also refused to record statement on oath under section 340(2) of Cr.P.C. Apparently, respondent No.1 filed an application under section 540 Cr.P.C. after he was convicted in the case that too when the learned Sessions Judge Mirpurkhas while disposing of the appeal, filed by respondent No.1, remanded the case to learned trial court with direction to decide the point No.2, wherein the learned trial court while awarding the fine failed to award punishment in case of default in payment of fine, afresh after providing the opportunities to the counsel for the parties.

10. From the perusal of judgment dated 21.10.2017 passed in Criminal Appeal No.8 of 2017, it clearly reflects that case was remanded for a deciding afresh only to the extent of point No.2, which is purely a legal question and was to be decided upon the arguments of learned counsel for the parties. Such fact is also reflected from the directions contained in the remanding order dated 21.10.2017. The Operative of the judgment be read in consonance with the discussion mentioned in the judgment. The learned Magistrate has rightly dismissed the application u/s 540 Cr.P.C. filed by the respondent No.1/accused as the learned Magistrate was directed only to decide the specific point of the judgment dated 16.10.2017 not the whole trial of the case.

11. There is no cavil to the proposition that right of summoning a witness is a valuable statutory right and the court has ample power in terms of section 540 Cr.P.C, to call any person if his evidence appears to be essential for the just decision of the case. However, such a plea cannot be allowed to prolong the proceedings of trial. The Object of this section is to defend the interest of justice and not to defeat the same. Reliance in this regard can be placed on the case of *Zahida Parveen v. The State and 2 others* **(2013 P.Cr. L.J. 1043)**

12. In the present case, it is an admitted position that the learned counsel for respondent No.1 did not opt to examine these witnesses during the trial of the case nor the accused himself disclosed in his statement recorded u/s 342 Cr.P.C. to examine these witnesses in his defence. Furthermore, from the record it also appears that no explanation whatsoever has been furnished by respondent No.1 / accused that why the witnesses, which were sought to be examined after remand of the case, have not been examined at the time of trial and why after such a long delay respondent No.1 has chosen to examine these witnesses. Seeking examination of witnesses after full dressed trail does not appeal to a prudent mind as examining these witnesses the entire case would be re-opened and much time would be required to decide the case afresh which is not warranted under the law as the criminal cases are to be decided expeditiously without any delay. Delay defeats the ends of justice, and may seriously undermine the possibility of a fair trial. The edifice of criminal law is premised on the principle that trials must be concluded within a reasonable time, expeditiously and without unnecessary delay. Delay in any trial, but in criminal trials in particular, is intolerable. To allow such type of applications at such belated stage would serve no other useful purpose but to increase the agonies of the complaint party, who initiated the subject proceedings in the year 2013. Therefore, there is no need to summon those witnesses as it would amount to sheer wastage of the precious time of the learned trial court besides delay in disposal of the case. Learned counsel for the respondent No.1 has not been able to advance any good reason for maintaining the impugned order dated 17.11.2017.

13. In view of what has been discussed above, this criminal miscellaneous application is allowed and the impugned orders dated 17.11.2017 passed by the learned Sessions Judge Mirpurkhas is set aside and in consequence the order dated 31.10.2017 passed on the application under section 540, Cr.P.C. is restored

and since the considerable time has been passed therefore, the learned trial Court is directed to decide the case, in accordance with the direction contained in the remanding order dated 21.10.2017, within a period of one month.

JUDGE

Tufail