

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Revision Application
No. 54 of 2017

Present:

Justice Mrs. Kausar Sultana Hussain.

1. Syed Talib Ali son of Syed Riaz Ali,
Muslim, Adult, R/O House No. 210, Surjani town, Karachi.
2. Azhar Chohan son of Fazzal Chohan,
Muslim, Adult, R/O Surjani Town, Karachi..... Applicants/Accused.

V E R S U S

The State Respondent.

F.I.R. No.352/2013
U/s 392/34 P.P.C.
P.S. Surjani Town, Karachi

Date of hearing : 09.03.2018.

Date of Order: .04.2018.

Applicants thorough Mr. Agha Zafir Ali, Advocate.

Respondent through Mr. Ali Haider Saleem, Deputy Prosecutor General, Sindh.

ORDER

KAUSAR SULTANA HUSSAIN, J- This is a criminal revision application under section 439 Cr.P.C read with section 435 and 561-A, Cr.P.C filed by the applicants/accused, who being aggrieved and dissatisfied with the impugned order dated 22.03.2017, passed by learned IVth Additional Sessions Judge West Karachi in Sessions Case No. 1160 of 2013, whereby an application under section 540, Cr.P.C, filed by the applicants/accused for re-calling the prosecution witnesses namely Amir Jamil, Shoukat Ali, SIP Aziz Ahmed, Muhammad Tahir and Muhammad Mursaleen for the purpose of their re-examination and cross-examination was dismissed.

2. Learned counsel for the applicants/accused has argued that the impugned order dated 22.03.2017 passed by the learned trial Court on their application under section 540 Cr.P.C is based on erroneous findings and conjectures. Learned counsel for the applicants has further contended that the learned trial Court has failed to consider the gist of the criminal procedure code that the accused must be given fair chance to prove their

innocence. He further contended that the learned trial Court although interpreted the section 540 Cr.P.C but failed to consider that the words “at any stage of enquiry or trial” mentioned in section 540 Cr.P.C were intentionally used in order to enable the Court to summon witnesses even after the closure of the prosecution evidence, if in appropriate case the Court come to the conclusion that it was essential to find out the truth then technicalities ordinarily are not allowed to create hindrances or threats in safe administration of justice are to be permitted. The learned counsel for the applicants/accused has relied upon the case laws reported in as follows:

1. 2002 SMCR 664.
2. 2002 SCMR 468.
3. 2001 SCMR 308.
4. 2011 SCMR 713.
5. 1998 SCMR 326.
6. 1989 SCMR 397.
7. 2004 P.Cr.LJ 699.
8. 2005 P.Cr.LJ 638.
9. 1991 P.Cr.LJ 877.
10. 1992 P.Cr.LJ 729.
11. 1988 P.Cr.LJ 1464.
12. 1996 P.Cr.LJ 1439.
13. 2017 P.Cr.LJ 294.
14. 2016 P.Cr.LJ 1124.
15. 2016 P.Cr.LJ 667.
16. 1995 P.Cr.LJ 730.
17. 2003 P.Cr.LJ 624.
18. 2007 P.Cr.LJ 905.
19. 2002 P.Cr.LJ 1501.
20. 1995 P.Cr.LJ 730.
21. 1981 P.Cr.LJ 1004.
22. 2016 MLD 1937.
23. 1992 MLD 378.
24. 2006 MLD 327.
25. PLD 2012 Islamabad 35.
26. PLD 1984 Supreme Court 95.
27. PLD 2001 Lahore 463.
28. PLD 2002 Karachi 411.
29. PLD 1971 Supreme Court 709.
30. PLD 1991 Supreme Court 430.
31. 2016 YLR 62.
32. 2009 YLR 486.
33. 2007 YLR 851.

3. The learned counsel for the applicants/accused contended that P.Ws Mohammad Tahir and Mohammad Mursaleen are eye witnesses, while P.Ws Amir Javed, SIP Aziz Ahmed and Shoukat Ali are not eye witnesses and the previous counsel of the applicants/accused did not ask relevant questions from P.Ws, therefore, present

advocate may be allowed to further cross examine only P.W-1 and P.W-2 named above. He further contended that, if this Court allows P.W-1 and P.W-2 to be further cross examined he will withdraw the names of other P.Ws mentioned in this Revision application. Finally he prayed to set aside the impugned order dated 22.03.2017.

4. On the other hand, the learned D.P.G for the State has argued that change of counsel is not a ground for recalling P.Ws, hence the order passed by the learned appellate Court is just, legal and liable to be maintained.

5. I have heard the learned counsel for the applicants/accused and had the assistance of the learned D.P.G. Mere reading section 540 Cr.P.C. it transpired that this section is divided in two parts, first is desecrating in nature, whereas the second is mandatory. The provision allows the Court for recalling and re-examining any witness already examined but it is essentially subject to reaching to a just decision of the case, it is also a settled principle of law that no witness should be examined or re-examined merely to fill in the lacuna by the prosecution or the defence. The Hon'ble Supreme Court in judgment reported in 2011 SCMR 713 held that :-

“When any evidence is essential for just decision of case it is obligatory upon the Court to allow its production an examination.”

6. In the instant case, four prosecution witnesses had appeared and examined on Oath and were subjected to lengthy cross examination, thereafter with an interval of more than two years application under section 540 Cr.P.C was preferred to learned trial Court for re-summoning the witnesses owing to the reasons that the previous counsel for the applicants/accused due to lack of interest, oversight and incompetency could not ask some important questions that will be fatal to the prosecution case, hence the impugned order dated 22.03.2017 passed by the learned trial Court is not maintainable and liable to be set aside. The learned counsel for the applicants/accused however contended that, if two eye witnesses namely Mohammad Tahir and Mohammad Mursaleen may be allowed than two other P.Ws whose names he has mentioned in this Revision will be withdraw by him. Although these two eye witnesses have been cross-examined at length but in the larger interest of justice and in order to ascertain truth I am inclined to allow this Revision

Application to the extent of two eye witnesses named above as the facts of the prosecution case show that these both witnesses during commission of alleged offence were not only present there but one accused snatched repeater from P.W Mohammad Tahir and both P.Ws apprehended the accused persons with the help of other persons and confined them in C.N.G room. The learned trial Court is directed to re-summon both P.Ws namely Muhammad Tahir and Muhammad Mursaleen and the learned Counsel for the applicants/accused is directed to further cross examine both the P.Ws on first date of their respective appearance without obtaining adjournment. Order accordingly.

7. Before parting with this order I want to clear one thing that remarks of the learned counsel for the applicants/accused against the previous counsel in present Revision Application are objectionable and beyond his limits as an advocate. He should, in future, refrain from passing such derogatory remarks against his fellow colleagues as the remarks passed by the learned counsel are quite subjective and generalized without any substantial evidence.

J U D G E

Faheem Memon/PA