ORDER SHEET IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Revision Application No. 160 of 2018

Date Order with signature of Judge

For hearing of main case.

31.01.2019

Mr. Ali Khan, Advocate for the Applicant.

Mr. Nasrullah Khatri, Advocate for the Complainant.

Mr. Faheem Hussain, D.P.G.

Salahuddin Panhwar- J:- Through instant revision application, appellant has challenged order dated 30.08.2018, whereby application under Section 540 Cr.P.C. was dismissed.

2. Heard learned respective parties being relevant last paragraph of impugned order is reproduced herewith:-

From a careful perusal of entire record, it appears that there is no clue of gathering people at the occurrence place soon after road accident, not a single documents such as, FIR, memos, challan and statements of witnesses showing the circumstances of people attraction or helping the accused in shifting dead body of deceased to hospital or causing injury by any other person. In view of these unresolved questions it is hard to believe that witnesses named by complainant are the essential witnesses rather they are appearing to be premeditated and managed after thought. The wisdom conscious of this court itself forming a view that if court examines those persons as witnesses who were produced by complainant after knowing of regarding weakness of evidence already brought on record than it would become practice of every litigants whenever they want bring any person stand before the court as material and eye witness of incident. Although it could possible when there were any complaint against investigation officer to maliciously not cited them in case as witnesses or avoiding carrying out honest investigation or deliberately evade to record their statements under section 161 Cr Pc, there is no such thing agitated by the counsel for complainant with congenial reasons that as to how and in what circumstances, the evidence of these witnesses are necessary and material for just decision particularly when case is about to ending after two years fair trial. So far as the case laws relied upon by the advocates for complainant are much respectable but same are not distinguishable in the current situation of case.

3. Candidly, names of the witnesses, sought to be examined by the complainant, are not mentioned in challan which, *prima facie*,

suggests that these witnesses never approached the investigation officer during investigation process nor the complainant during such process claimed them as 'witnesses of incident'. Further, it is also a matter of record that complainant never challenged such list of witnesses, detailed in the challan by filing a direct complaint. Such act, normally, would suggest satisfaction of the complainant about names of witnesses came to surface during course of investigation, therefore, complainant, being not an investigating officer, would not be justified in bringing new names as witnesses which, too, after conclusion of trial else this may prejudice the purpose of 'list of witnesses' which is, prima facie, is given to let the accused know of evidence likely to be led against him within meaning of Section 265-F PPC. The section 265-F PPC, ensures a fair opportunity to both prosecution and defence in bringing their respective witnesses / material on record but not as a 'surprise' or to prolong the conclusion of trial. Hence, after examination of material witness, such application apparently is filed to fill the lacuna of prosecution case which, I would insist, is sufficient ground to decline such a request, as held in the case of <u>Chairman</u>, <u>NAB v. Muhammad Usman</u> PLD 2018 SC 28. Needless to mention that trial court is competent to call any witness on the application as a "court witness" but in such an eventuality where prosecution wishes to examine a witness, not named in list of witnesses, then it could not claim as 'right' but shall be required to satisfy conscious of the court that such examination is, indeed, for discovery of truth. Guidance is taken from the case of Chairman, NAB supra wherein it is observed as:-

"14. There may be very rare and exceptional cases, where, the prosecution has dropped any material witness whose evidence, if given, may have a direct bearing on the end result of the case, in that event, the Court is blessed with unfettered powers to summon and examine such

witness only for the purpose of discovery of truth, for the purpose of doing complete justice however, such powers are not to be exercised at random and without application of proper judicial mind with reasonable depth to the facts of each case. Unmistakenly, in view of the provision of section 540 Cr.PC, the witnesses are examined as 'court witnesses' and not for prosecution or defence, therefore, none of the parties to a case can claim such a right. These powers shall only be exercised to put justice into correct channels"

In this case, admittedly prosecution has not moved any application but complainant *himself* has filed the instant application who, otherwise, is legally obliged to act through the prosecutor, as directed by Section 493 Cr.PC. Further, the reasons, given by the trial Court, in the impugned order, are quite justified as well within line of principles of criminal administration of justice and that of Section 540 of the Code, hence same is not open to be interfered.

4. In consequence to what has been discussed above, I find no merits in instant revision petition and same is, accordingly, dismissed.

JUDGE