

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD**

Present:

Justice Muhammad Junaid Ghaffar  
Justice Irshad Ali Shah

**Cr1. Rev. A. No.D-18 of 2018.**

The State / Anti-Narcotic Force through  
its Assistant Director. . . . .Applicant.

Versus.

3<sup>rd</sup> Additional Sessions Judge / Special  
Judge CNS Court, Hyderabad. . . . .Respondent.

Mr. Muhammad Ayoub Kassar, Special Prosecutor ANF,  
Hyderabad.

Mr. Faqir Rehmatullah Hisbani, Advocate files Vakalatnama on behalf  
of accused Manak and Naseer, taken on record.

Date of hearing and order: 29.06.2018.

**ORDER**

**IRSHAD ALI SHAH, J.** By way of making an application under Section 540 Cr.P.C, the applicant / prosecution sought for examination of Incharge Malkhana and the official who taken the case property to Chemical Examiner, it was dismissed by the learned trial Court vide order dated 18.05.2018, such order the applicant / prosecution has impugned before this Court by way of instant Criminal Revision Application.

2. It is contended by learned counsel for the applicant / prosecution that learned trial Court by dismissing the application for examination of the above said witnesses has committed wrong, which could be made right by this Court by way of instant criminal revision application. By contending so, he sought for direction against the learned trial Court to summon and examine the above said witnesses.

3. It is contended by learned counsel for the accused that the applicant / prosecution is intending to fill in the lacuna by examining the above said witnesses. By contending so, he sought for dismissal of instant criminal revision application.

4. We have considered the above said arguments and perused the record.

5. In order to appreciate the issue involved, it would be pertinent to keep in mind the scope of section 540 Cr.P.C. which reads as follows;

**“540. Power to summon material witness or examine persons present.---**Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.”

6. The bare reading of above said section of law shows that it gives wide powers to the Courts to examine any person as a witness at any stage of trial. It enables the Courts to impose a duty on it to summon any person as a witness who otherwise could not be brought before the Courts. The above section of law is consisting of two parts, one gives discretionary powers to the Courts and other imposes an obligation on it.

7. In case of **Jamatraj Kewalfi Govani v. State of Maharashtra (AIR 1968 SC 178)**, while dealing with similar issue it was held,

“(10) Section 540 is intended to be wide as the repeated use of the word ‘any’ throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word ‘may’ in the first part and of the word ‘shall’ in the second firmly establishes this difference. Under the first part, which is permissive, the court may act in one of the three ways; (a) summon any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are, however, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly’.

8. In case of **Ikramullah and others v. The State (2015 SCMR 1002)**, it was observed by the Honourable Supreme Court of Pakistan that the prosecution has failed to produce before learned trial Court the official who taken samples of charas to the Chemical Examiner to depose about the safe custody of the samples entrusted to him.

9. Perhaps following the law laid down by the Honourable Supreme Court of Pakistan in case of **Ikramullah and others** (Supra), the applicant/prosecution filed an application under section 540 Cr.P.C. before learned trial Court to summon and examine the above said witness to prove its case to its satisfaction. If accused claims fair trial then applicant/prosecution could equally be provided fair chance to prove its case to its satisfaction. It is settled by now, that the technicalities should be avoided by the Courts while dispensing with the justice to arrive at right conclusion. In these circumstances, learned trial Court ought not to have dismissed the application of the applicant/prosecution under section 540 Cr.P.C. to summon and examine its witnesses.

10. In case of **Nawabzada Shah Zain Bugti and others** (PLD 2013 SC 160), it was held as under;

“Court could not summarily dismiss an application for additional evidence in terms of S.540, Cr.P.C by merely holding that either the said witness was not mentioned in the challan or that it was belated or that it might fill upon lacunas in the prosecution case, unless the totality of material placed before the court was considered to find out whether examination of the said witness was essential for a just decision of the case.

11. The material, which is brought by the applicant/prosecution, on the file of the learned trial Court indicates that it was the case of the prosecution that on recovery of the contraband substance it was kept in Police “Malkhana” and then it was sent to the Chemical Examiner for chemical analysis. That being so the examination of the above said witnesses was essential, for just decision of the case.

12. In view of above, the impugned order could not be sustained. It is set aside. The learned trial Court is directed to summon and examine the above said witnesses.

13. The instant criminal revision application is disposed of accordingly.

JUDGE

JUDGE