ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Misc. Application No.517 of 2019

Date	*Order with signature of Judge*

1. *For orders on office objection.*
2. *For hearing of M.A No.14108/2019.*
3. *For hearing of Main Case.*

04.02.2020

Mr. Aamir Mansoob Qureshi, Advocate for the applicant.
Mr. Ch. Waseem Akhtar, Assistant Attorney General, for Pakistan alongwith I.O/Assistant Director Saeed Ahmed Memon.

-x-x-x-x-x-

Muhammad Saleem Jessar, J.- Applicant Muhammad Rizwan is an accused of FIR No. 07/2015 of P.S FIA C.C.C, Karachi, for the offence under Section 420/168/471/472/473/474/477-A/109/34 PPC read with Section 36/37 Electronic Transaction Ordinance, 2002 and Section 3/4 Anti-Money Laundering Act, 2010, which is now pending for trial before the Court of VIIIth Additional Sessions Judge, Karachi (South) vide Sessions Case No.1599/2015 (re-the State Versus Farhan Qamal and others).

2. Through this application, applicant has challenged two (02) letters bearing No.VIII-ADJ(S)/142/2019 dated 31st October, 2019 & No.VIII-ADJ(S)/143/2019 dated 31st October, 2019, whereby the trial Court has made complaint against Prosecutor namely Syed Israr Ali, on the ground that he gave up material witnesses viz. mashirs/attesting witnesses of different memos etc and in another letter learned Presiding Officer has made complaint against I.O of the case Inspector Muhammad Ali Abro, who failed to submit charge sheet in respect of offence under Section 3 & 4 of Anti-Money Laundering Act, 2010. The notice of this application was given to other side/prosecution. Consequently, Mr. Chaudhry Waseem Akhtar, Assistant Attorney General for Pakistan as well I.O of the case Assistant Director Saeed Ali Memon, are in attendance before the Court today.

3. Learned counsel for the applicant submits that by issuing impugned letters, trial Court has exerted pressure upon the prosecution witnesses to record their evidence against applicant; thereby has prejudiced the case of applicant, hence has approached this Court through

this application. He submits that unless the impugned letters are quashed, applicant may not get justice from it; however, submits that if by quashing the impugned letters, directions are issued to the trial Court for proceeding with the case without causing any prejudice to the case of applicant, he is ready to proceed with the main case before the trial Court.

4. Learned Assistant Attorney General for Pakistan files statement on behalf of Deputy Director/Crime Investigation Officer of the case alongwith statement, which was submitted by I.O before the trial Court on 29.11.2016 as well comments/reply on behalf of Assistant Director Muhammad Ali Abro, same are hereby taken on record. Learned Assistant Attorney General for Pakistan submits that challan of the case has already been filed by I.Os under the relevant laws including Sections 3 & 4 of the Anti-Money Laundering Act, 2010 whereby cognizance of the case was taken by the trial Court and almost 19 prosecution witnesses have been examined. As far as impugned letters are concerned, learned Assistant Attorney General for Pakistan submits that impugned letters issued by the trial Court are against Prosecutor and I.O, who have not challenged the same and the applicant has no nexus or concern with the impugned letters. He further submits that it is prerogative of the prosecution to examine their witnesses who are considered to be necessary for its case. He; however, has emphasized that it will be appropriate for the applicant to proceed with the main case before trial Court instead to press instant application. He, therefore, submits that application merits no consideration and by dismissing it, directions be issued to trial Court to conclude the trial expeditiously by examining all material witnesses for which prosecution should produce all the remaining witnesses.

5. **Heard arguments and perused the record**.

6. It is settled principle of law that it is prerogative of prosecution to examine the witnesses, which, it (prosecution) considers as necessary in proving the charge. Such choice is available with the prosecution, so is evident from section 265-F of the Code of Criminal Procedure, 1898, which reads as:-

> 265-F. Evidence for prosecution: (1) if the accused does not plead guilty or the Court in its discretion does not convict him on his plea, the Court shall proceed to hear the complainant (if any) and take all such evidence as may be produced **in support of the prosecution:**

> Provided that the Court shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.
>
> (2) The Court shall ascertain from the Public Prosecutor or, as the case may be from the complainant, the names of any persons likely to be acquainted with the facts of the case and **to be able to give evidence for the prosecution**, and shall summon such persons to give evidence before it.

Therefore, the Court can't compel the prosecution or complainant, as the case may be, to produce the witness which the Court thinks necessary, at such stage. This, however, would never be an excuse in exercising jurisdiction under section 540 Cr.P.C if the Court comes to an opinion that evidence of ***'any person'*** is necessary for **'just decision of the case'.** Therefore, the Court (s), *normally,* should not make such kind of complaint during trial proceedings; however, would be justified to make observations regarding conduct of any officials, associated / attached, in conduct of the trial of the case which includes but is not limited to **witnesses** alone. Thus, proper course for trial Court was always to have proceeded with the case which includes exercise of jurisdiction, provide by Section 540; and to discuss this issue in the judgment. Hence, impugned letter dated 31.10.2019 (Annexure-A available at page-25 of the Court file) should not have been issued by the trial Court. As far as other letter (Annexure-A1 available at page-27 of the Court file) is concerned, the statement submitted by the I.O present before the Court today, reveals that Inspector Muhammad Ali Abro, the then I.O of the case has already filed such charge sheet/challan before the trial Court and charge was also framed by the trial Court against accused on 15.10.2016 for the offence under Section 3 & 4 of the Anti-Money Laundering Act, 2010 vide Complaint No.16/2015 of FIA Corporate Crime Circle, Karachi and said report is also part and parcel of the R&Ps/case before the trial Court. Hence, second letter also seems to have wrongly been issued.

7. Be that as it may, there appears no legal justification for the applicant to have come to this Court by making referred letter as base for instant petition. The grievance, if any, from such letters should have been for those, complained therein, who, admittedly, is not the present applicant. It needs not be mentioned that the either parties i.e prosecution and defence have rights to examine witnesses in proof or disproof. In short, only objection which one can present is that, detailed in subsection (3) of section 265-F of the Code which reads as :-

> (3) The Court may refuse to summon any such witness, if it is of opinion that such witness is being called for the purpose of **vexation or delay or defeating "the ends of justice**. Such ground shall be recorded by the Court in-writing.

Such objection, *too,* is to be presented before the Court. However, such right, nowhere, allows either sides to compel production of witness of his / its choice by his / its rival. Guidance is taken from the case of *Chairman, NAB v. Muhammad Usman & Ors* PLD 2018 SC 28 wherein the *balance* between rights of parties and authority of Court (s) have been detailed as:-

> 11. …. The role of the Court under the provision of section 540 Cr.PC is inquisitorial where it endeavours to discover the truth, suppressed by both or one party to the case to incapacitate the Court to reach at a just conclusion. The role of the Judge does not undergo change because in exercising inquisitorial powers, the law has imposed obligation on it to discover the truth and to secure the ends of justice.
>
> 12. From the entire scheme of above provisions of Cr.P.C. and of the provisions of the Qanun-e-Shahdat Order, 1984, it becomes clearer than crystal that the two categories of witnesses i.e the prosecution witnesses and the defence witnesses are distinctly placed pole apart and both cannot and shall not intermingled.
>
> 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 bless 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.P.C, 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.
>
> 15. …… exercise of such powers by the Trial Court or by not exercising the same, has resulted into a grave miscarriage of justice, therefore, **calling the witness of the other party as its own witness, even in criminal trials, already examined, is not acknowledged by the law on the subject, therefore, it is neither desirable nor such a practice can be approved**. In exceptional cases, where material witness has been dropped by the prosecution in the circumstances discussed above, the Court may exercise powers with due care and caution. However, in that case too, the prosecution witness / witnesses cannot be examined as defence witnesses but court witness / witnesses and for that, a written request is made to the Court showing cogent and convincing reasons for calling and examining any witness of the prosecution, nor

examined or has already been examined to be re-examined as court witness.

Thus, it would be safe to say as far as anxiety of the applicant is concerned, no prejudice has been caused to his case nor he is competent to challenge the said letters on behalf of the prosecution rather it could have been challenged by the prosecution itself which has not been done so far. I am in agreement that accused has no right to challenge any letter or notice issued to prosecutor or investigation officer hence instant petition being devoid of merits is dismissed along with pending applications(s). Consequently, interim order dated 11.12.2019 is hereby recalled.

8. Accordingly, trial Court is hereby directed to proceed with the case expeditiously and ensure early conclusion of the trial within short possible time under intimation to this Court through MIT-II.

9. Copy of this order be faxed today to learned trial Court, for compliance.

JUDGE

Zulfiqar/P.A