

IN THE HIGH COURT OF SINDH, KARACHI

Criminal Revision Application No. 95 of 2017

Appellant: Syed Muhammad Irfan Qadri
through Mr. Muhammad Muneer Ahmed, Advocate.

Respondent: The State through Mr. Ghulam Shabbir Baloch
Assistant Attorney General

Date of hearing: 04.08.2017

Date of judgment: 14.11.2017

JUDGMENT

OMAR SIAL, J: The Applicant has impugned an order dated 3-5-2017 passed by the learned Special Court (Offences in Banks) Sindh, Karachi. In terms of the said order, the Applicant's application u/s 540 praying that 6 prosecution witnesses be re-called and re-examined was turned down.

2. The facts relevant for the purposes of the present application are that on 21-11-2009 a FIR was registered u/s 406, 420, 468, 471 and 109 PPC at the FIA, CBS-1 police station in Karachi against the Applicant.

3. We have heard the counsel and perused the record. Our observations are as follows.

4. To appreciate the issue raised, it would be pertinent to keep in mind the scope of section 540 Cr.P.C. which vests powers in courts to examine anyone as a witness which according to it is essential for the just decision of the case. The said provision reads as follows:

Power to summon material witnesses or examine persons present –Any Court may, at any stage of any inquiry, trial or other proceedings 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.

5. It is clear from the above section that it gives rather wide powers to the Court to examine or recall any witness at any stage of the case. It has been held by the *Hon'ble*

Supreme Court in Nawabzada Shahzain Bugti and others vs The State (PLD 2013 SC 160) that a court cannot summarily dismiss an application under section 540 Cr.P.C. by merely holding that either the said witness was not mentioned in the challan or that it was a belated application or that it might fill up lacunas in prosecution case, unless the totality of material placed before it can be considered to find out whether the examination of a witness is essential for a just decision of the case.

6. The charge against the Applicant was framed on 10-3-2010 to which he pleaded not guilty and claimed trial. 4 out of 6 prosecution witnesses who the Applicant wants to re-call and re-examine were examined on 31-3-2010 whereas the remaining 2 were examined on 5.4.2010. Subsequently, 14 other witnesses were examined. The prosecution closed its side on 9-2-2017. Subsequently, when the case was fixed for recording the statement of the Applicant u/s 342 Cr.P.C on 17-4-2017, the Applicant moved the application u/s 540 Cr.P.C. praying that he may be permitted to re-call the first six witnesses as he was not given the chance to cross-examine them through a lawyer.

7. It is admitted by the Applicant that the counsel was representing him in trial however when the first 6 witnesses were examined, the counsel remained absent due to his religious activities.

8. We have observed that PW-1, PW-2, PW-3 and PW-4 were examined on 31-3-2010 but on that date the defence counsel for a co-accused declined to cross examine the witnesses by saying that he will cross-examine the witnesses after the counsel for the Applicant had cross-examined them first. The cross examination was reserved by the court. It was not until 11.11.2013 that the witnesses were recalled once again for cross-examination. The counsel for the Applicant remained absent while the counsel of the co-accused conducted his cross examination. As regards PW-5 and PW-6, they were examined on 5-4-2010 when the counsel for the co-accused made a similar statement that he will cross-examine the witnesses after the counsel for the Applicant had cross-examined them first. The cross examination was reserved by the court. It was not until 27-2-2013 that PW-5 was recalled once again for cross-examination. On this date the counsel for the Applicant was present and did in fact cross examine the witness. It appears that PW-6 never appeared for his cross examination even though summons were sent to him several times.

9. A cursory look at the case diary of the trial court reveals that the Applicant changed counsel during trial several times. Prima facie it also appears that the delay on

the part of the Applicant to examine witnesses was deliberate. The Applicant's counsel's argument that he could not cross examine the witnesses because he was busy in religious rituals between 31.3.2010 and 5-4-2010 is of no use to the Applicant, as firstly cross examination was reserved by the court during these dates and secondly, the case diary reveals a different position. Substantial time was granted by the trial court to the Applicant's counsel to conduct the cross examination of PW-1, 2, 3 and 4 but he failed to do so.

10. To conclude, while the Court has ample power to recall and re-examine a witness if it is of the view that such a move is essential for the just decision of a case, the power u/s 540 Cr.P.C. cannot be used merely to fill lacunas in the prosecution or defence case. In the present case, an application to recall witnesses was made after a long period of 7 years. Further, not even one reason or ground has been argued before us which would enable us to conclude that recalling and re-examining the witnesses is essential for the just decision of the case. Accordingly, the application in hand is dismissed.