

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Revision Application No.115 of 2023

Date

Order with signature of Judge

1. For order on MA No.6024/2023 (Exemption)
2. For hearing of main case
3. For order on MA No.6025/2023 (Stay)

07.11.2023

Mr. Muhammad Aqil Zaidi advocate for the applicants alongwith applicants
Ms. Rubina Qadir, Deputy PG alongwith Mr. Sharafdin Kanhar, Assistant PG

Through this Criminal Revision application under Section 439 & 439-A Cr.P.C., the applicants Syed Alay Muhammad Zaidi and Waseem Ahmed Khan have questioned the order dated 15.03.2023 passed by the learned Special Judge Anti-Corruption (Provincial) Karachi in Special Case No. 27/2017, whereby the application filed by the prosecution to produce fresh CD contained the material aired on ARY TV was allowed with direction to the management of ARY Channel to produce the said CD through an official of concerned Section, who shall be subjected to cross Examination by both sides.

2. Learned APG has submitted that to strengthen its case, the prosecution was required to produce a fresh C.D of the subject program since the CD produced earlier, had been found empty due to technical fault, therefore the trial court rightly allowed the application, which has now been objected by the applicant accused. In support of his contention he relied upon the cases of Nawabzada Shah Zain Magsi and others v The State, Shah Jehan and others v Raheem Shah and others (2022 SCMR 352), Ansar Mehmood v Abdul Khaliq and others (2011 SCMR 713) and Pervaiz Ahmed v Munir Ahmad and others (1998 SCMR 326).

3. Learned counsel for the applicants has refuted the stance of the prosecution on the ground that there is no 161 Cr. P.C. statement of the proposed witnesses and now at the stage of conclusion of the trial prosecution wants to fill the lacunas by producing a fake and managed C.D prepared through use of VFX effects application, which cannot be allowed under the law. He emphasized that P.W Asif Abbas belonging to the ARY channel has already been examined by the prosecution and he has been cross-examined by the defense at some length. He argued the prosecution cannot be allowed to get the officer of ARY summoned as a

court witnesses on the ground that nothing new they would depose different from the evidence of PW Asif Abbas as his Cross has been completed; therefore, the new proposal of the prosecution regarding proposed witnesses evidence cannot be accepted. He next submitted that the CD contained the same material which has already been aired on ARY TV production of fresh C.D. would prejudice the case of applicants. He emphasized that it is now very easy to edit, a voice or picture in an audio tape or video and, therefore, without a forensic examination, audit, or test of an audio tape or video it is becoming more and more unsafe to rely upon the same as a piece of evidence in a court of law. He next argued that merely producing any CD as a piece of evidence in the Court is not sufficient to be relied upon unless and until the same is proved to be genuine. He asserted that the prosecution has examined the person who prepared such a CD however nothing was brought on record against the applicants as such examining the witness on the same point amounts to covering up the prosecution case which is not permissible under section 540 Cr. PC. He submitted that no audio tape or video can be relied upon by a court until the same is proved to be genuine and not tampered with or doctored. He lastly submitted that no one can be permitted to fill in the lacunas at the belated stage according to his whims. In support of his contentions; He relied upon the cases of *Ishtiaq Ahmed Mirza and others v Federation of Pakistan and others* (PLD 2019 S.C 675), *Muhammad Zahir Shah Khan and others v Nasiruddin and others* (1986 CLC 2463) and *Muhammad Usman v The State* (PLJ 1991 Cr. C Karachi 175)

4. I have heard the learned counsel for the parties and perused the record with their assistance and case law cited at the bar.

5. The main crux of the arguments advanced by the learned counsel for the applicants is that the Trial Court while adjudicating the matter to the application which was filed under section 540, Cr.P.C. has gone beyond the scope of the law as a new witness cannot be brought on the record unless and until he/she is necessary for the just decision of the case and those can be brought if they had joined investigation from the initiation of the proceedings. The application for summoning of officer from ARY Channel to produce a CD when the case is on the verge of conclusion was/is unwarranted and as such it would squarely prejudice the case of the applicants, therefore, the findings recorded by the learned trial court while exercising powers under section 540 Cr.P.C. was/is uncalled for.

6. To thrash out and settle the controversy to some logical end, I feel it essential to refer to Article 164 of the Qanun-e-Shahadat Order which envisions that the court may allow to produce any evidence that may have become available because of modern devices or techniques.

7. In the case of Government of Sindh v. Fahad Naseem & others reported in **2002 P.Cr.L.J. 1765**, the learned division bench of this court held that the video cassette falls within the purview of 'document' for the reason that the definitions of document contained in section 29 P.P.C. and Article 2(b) of Qanun-e-Shahadat, 1984 leave no bit of doubt that video cassette squarely falls within the purview of 'matter expressed or described upon any substance through letters, figures or marks.

8. The Supreme Court in the case of The State Vs. Usman has held that there is no limitation as to the stage of the inquiry or trial when a court can, in the exercise of its power under this Section, make an order for the production of any document. The only condition for the exercise of the power under Section 94 is that the production of the document must be necessary or desirable for the inquiry or trial before the court. The word 'whenever' in Section 94 indicates that a court can exercise the power of requiring the production of any document under this Section at any stage of the inquiry or trial. Further, Section 94 does not restrict as to whose point of view, whether of the prosecution or the accused, the required document may be necessary or desirable for the inquiry or trial. A Court being a neutral arbiter does not act for either the prosecution or the accused but for the dispensation of justice. For the dispensation of justice, the court is to ascertain the truth in respect of the matter under inquiry or trial before it. The production of a document that would facilitate the court in this regard is to be considered necessary or desirable for the inquiry or trial. It is immaterial whether the production of such a document would support the prosecution case or the defense of the accused. Therefore, any party may at any stage of the inquiry or trial apply to the court, under Section 94, for the production of a document and is entitled to its production if it satisfies the court that the production of that document is necessary or desirable for such inquiry or trial. Section 94(1) affords both the parties to an inquiry or trial (not to the accused alone) the opportunity to cause the production of any document at any stage of such inquiry or trial, with the condition that the party applying for it must satisfy the court that the production of the required document is necessary or desirable for the inquiry or trial.

9. It is well-settled law that even before the commencement of the trial, the prosecution and accused can apply to the trial court to exercise its

power under Section 94, Cr. P.C, and direct the prosecution or the Witness to produce a document, in its or his possession or power, which is not covered under Section 265-C, Cr. P.C, if the production of that document is necessary or desirable for the inquiry or trial and on the question; that even before entering on his defense, an accused can make an application for the production of a document under Section 94 despite the provisions of Section 265-F(7), Cr. P.C., which provides a similar opportunity to him at the stage of defense evidence.

10. To enjoy the protection of the law and to be treated under the law is an inalienable right of every citizen of Pakistan under Article 4 of our Constitution and Article 10-A, which provides the right to a fair trial, which is a fundamental right of a person.

11. In the wake of the above discussion, the impugned order dated 15.3.2023 is based on the correct appreciation of the law and does not require interference. The Revision Application is dismissed in terms of law laid down by the Supreme Court as discussed supra.

JUDGE