

THE HIGH COURT OF SINDH, KARACHI

Spl. Cr. Revision Nos. 297 to 301 of 2021

[Hanif Moosa & another versus State]

- Spl. Cr. Revision 297 of 2021 : Hanif Moosa son of Moosa and Humayun Hanif son of Hanif Moosa versus The State.
- Spl. Cr. Revision 298 of 2021 : Hanif Moosa son of Moosa and Humayun Hanif son of Hanif Moosa versus The State.
- Spl. Cr. Revision 299 of 2021 : Hanif Moosa son of Moosa and Humayun Hanif son of Hanif Moosa versus The State.
- Spl. Cr. Revision 300 of 2021 : Hanif Moosa son of Moosa and Humayun Hanif son of Hanif Moosa versus The State.
- Spl. Cr. Revision 301 of 2021 : Hanif Moosa son of Moosa and Humayun Hanif son of Hanif Moosa versus The State.
- For the Appellants : Mr. Iftikhar Hussain, Advocate.
[In all Spl. Cr. Revisions]
- For the Respondents/State : Mr. Ashiq Ali Anwar Rana, Special Prosecutor Customs and Mr. Mubashir Mirza, Assistant Attorney General for Pakistan.
[In all Spl. Cr. Revisions]
- Date of hearing : 05-12-2023
- Date of decision : 18-12-2023

ORDER

Adnan Iqbal Chaudhry J. - These revision applications under section 185-F of the Customs Act, 1969 challenge orders dated 25-10-2021 passed by the Special Judge (Customs, Taxation & Anti-Smuggling) respectively in Case No. 25/2015, Case No. 34/2015, Case No. 58/2015, Case No. 59/2015 and Case No. 60/2015, whereby she invoked section 540 CrPC *suo moto* to summon additional evidence. The Applicants are accused persons in all cases. Since the orders

impugned are identical, therefore these revision applications are decided together.

2. The facts highlighted by learned counsel for the Applicants are as follows. In the cases below, the prosecution had closed its evidence on 11-12-2019, statements of accused persons were recorded on 16-12-2019, and final arguments were heard on 16-03-2020 when the cases were posted for judgment. However, on 30-05-2020 the Special Judge invoked section 540 CrPC *suo moto* and issued summons to the I.O. and the Director TDAP for production of documents and for re-examination of the I.O. Those orders dated 30-05-2020 were challenged by the Applicants by Spl. Criminal Revision Applications No. 139/2020 to 143/2020. Those revisions were allowed by this Court with directions to the Special Judge to pass orders afresh after providing the Applicants a hearing. After hearing the Applicants, the Special Judge was still inclined to invoke section 540 CrPC *vide* impugned orders, hence these revisions.

3. Though learned counsel for the Applicants acknowledged the power of the Special Judge to invoke section 540 CrPC *suo moto*, he submitted that since the prosecutor had not summoned such evidence when given the opportunity under sub-section (2) of section 265-F CrPC, the power under section 540 CrPC cannot be exercised by the Court to fill *lacuna* in evidence left by the prosecution. He further submitted that such power could not be exercised at the stage when the cases were reserved for judgment. To support his submissions learned counsel placed reliance on judgments of the High Courts in *Tanveer Shahzad v. The State* (2003 PCr.LJ 751) and *Adil Serwar v. The State* (PLD 2020 Sindh 32).

4. On the other hand, the learned Special Prosecutor Customs submitted that section 540 CrPC can be invoked by the Court for a 'just decision' and at any stage of the case as held in the case of *The State v. Muhammad Yaqoob* (2001 SCMR 308); and that the Special

Judge had good reason to do so which is manifest in the impugned orders itself. The learned Prosecutor drew attention to the challan where the I.O. had categorically stated that the TDAP had not provided him documents that were crucial, and where the I.O. had requested the Special Judge to summon the same. The Assistant Attorney General too supported the impugned orders.

5. Heard learned counsel and perused the record.

6. The charge against the Applicants is that a number of Form-E under which they exported gold/silver consignments to the UAE, were found to be fake. The investigation was that the Applicants had doctored CNICs to register 5 imposter firms with the All Pakistan Gem Merchants & Jewelers Association and then with the TDAP for procuring Jewelry Pass Books, which were then used for obtaining authorization to export jewelry. In the challan the I.O. had categorically stated that the record of registration of those 5 imposter firms and Jewelry Pass Books available with the TDAP were crucial documents which had not been provided to him by the TDAP despite a number of letters. The I.O. had went on to pray in the challan for appropriate directions to the TDAP. Apparently, that aspect of the challan escaped the attention of the Special Judge at the time. Nevertheless, during trial, the prosecutor remained indifferent towards the evidence that was produced, rather the evidence that was not produced.

7. The reasons then assigned by the Special Judge for invoking section 540 CrPC are set-out in para-7 of the impugned orders as follows:

“(7) Section 540 Cr.P.C empowers the trial court with ample jurisdiction to ensure that court dig out truth during trial. Since it is a duty of a court to do complete justice, carelessness or ignorance of one side or other, or delay in the conclusion cannot be an hindrance in achieving the object. It has been seemed that I.O during investigation and had collected material documents but had not produce on the record during his evidence. The word re-examination is also mentioned in this section. I, therefore, for just decision and to arrive at the correct conclusion direct the I.O. under Section 540 Cr.P.C to produce all those documents which he collected during investigation and mentioned in the charge

sheet i.e. documents submitted for registration/membership of following five companies in APGMJA to be its member, details are as under:

S. No.	Name of Firm	NTN No.	Registration No. in TDAP
1.	M/s. B.d. Enterprises	3131889-4	TDAP/G&J/M&N/834/2012
2.	M/s. Rubab Corporation	0532281-2	TDAP/G&J/M&N/868/2012
3.	M/s. Saani Impex	2280661-0	TDAP/G&J/M&N/867/2012
4.	M/s. Makkah Enterprises	3877723-1	TDAP/G&J/M&N/866/2012
5.	M/s. Reaz Corporation	2020946-7	TDAP/G&J/M&N/815/2011

Further Director or his duly authorized representative of TDAP is summoned to appear before the court (as requested by I.O. in the charge sheet) and produce all relevant documents on the basis of which TDAP issued Jewelry Pass Book, who collected Jewelry Pass Book, who paid fees for the process and all relevant documents for these five companies. Matter be posted for re-examination of the I.O. and examination of Director/representative of TDAP and for production of documents”.

8. It is apparent that the impugned orders are not without basis and have been passed with a judicial mind. Clearly the Special Judge is of the view that the evidence summoned under section 540 CrPC is necessary for a just decision in the case. The question is whether such orders amount to filling in *lacuna* in the prosecutions’ evidence, whether section 265-F(2) CrPC constitutes a bar, and whether such power cannot be exercised after the cases were reserved for judgment.

9. The leading judgment on the intent and scope of section 540 CrPC is the case of *Muhammad Azam v. Muhammad Iqbal* (PLD 1984 SC 95) where it was observed that:

“This provision is divided into two parts: one where it is only discretionary for the Court to summon a Court-witness suo motu or on application, and the second part where it is mandatory for the Court to do so. The main condition to be satisfied with regard to the second part is that the evidence to be summoned under this part should appear to the Court to be essential to the just decision of the case. As has already been observed the evidence in question relating to Nikah was undoubtedly essential for the just decision of the case. In the circumstances of this case the failure of the learned trial Judge to act under the said part of section 540, Cr.P.C. has not only, deprived the Appellate Courts of essential material for the just decision of the appeal, but has also occasioned miscarriage of justice.”

The perception that the power exercised under section 540 CrPC amounts to filling *lacuna* in the evidence, was laid to rest as follows:

“Sometimes apprehension is expressed that any action by the trial Court under section 540, Criminal Procedure Code would amount to filling the gaps and omissions in the version or evidence of one or the other party. It may straightaway be observed that in so far as the second part of section 540 goes, it does not admit any such qualification. Instead, even if the action thereunder is of the type mentioned, the Court shall act in accordance with the dictates of the law. In fact the Court has no discretion in this behalf. It is obligatory on it to admit evidence thereunder if it is essential for the just decision of the case.”

Muhammad Azam's case was followed in *Imran Ashraf v. The State* (2001 SCMR 424) and *The State v. Muhammad Yaqoob* (2001 SCMR 308).

10. From the case of *Shah Zain Bugti v. The State* (PLD 2013 SC 160), the following principles are further discerned:

- (i) section 540 CrPC does not impose any limitation on the power the Court as to the stage at which the trial has reached;
- (ii) the determinative factor is that there may not be failure of justice on account of mistake of either party in bringing in evidence;
- (iii) “If the Court finds that the investigation is defective, it cannot just sit idle as a timorous soul and has to exercise all the enabling provisions under the law including section 540, Cr.P.C. to discern the truth.”

11. More recently, in *Sajid Mehmood v. The State* (2022 SCMR 1882) it was held that:

7. The very purpose of section 265-F is to ensure the concept of a fair trial and to achieve this purpose equal opportunity has been given to both the accused and the prosecution for summoning the evidence. There is nowhere mentioned in this Section that only those witnesses could be examined whose statements under section 161, Cr.P.C. have been recorded. Under this provision of law i.e. section 265-F the Trial Court is not bound to record the statements of only those witnesses who have been listed in the calendar of witnesses. On the other hand, section 540, Cr.P.C. empowers the Trial Court to summon a material witness even if his name did not appear in the column of witnesses provided his evidence is deemed essential for the just and proper decision of the case.....

8. This section is divisible in two parts. In the first part, discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the Code, (a) to summon

anyone as a witness, or (b) to examine any person present in the Court, or (c) to recall and re-examine any person whose evidence had already been recorded. On the other hand, the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears to it essential to the just decision of the case. The object of the provision, as a whole, is to do justice not only from the point of view of the accused and the prosecution but also justice from the point of view of the society. The Court examines evidence under this section neither to help the prosecution nor to help the accused. It is done neither to fill up any gaps in the prosecution evidence nor to give it any unfair advantage against the accused. Fundamental thing to be seen is whether the Court considers this evidence necessary in the facts and circumstances of the particular case before it. If this results in only "filling of lacuna" that is purely a subsidiary factor and cannot be taken into consideration. There is no bar that a witness, whose statement under section 161, Cr.P.C. had not been recorded at the time of investigation, cannot be allowed to examine under section 540, Cr.P.C. When a witness examined in Court, whose statement has not been recorded at the time of investigation under section 161, Cr.P.C., the evidentiary value to be attached to the evidence of such witness has to be looked into and if it is found that prejudice has been caused to the accused then the evidence of such witness may or may not be acted upon. Therefore, the argument of the learned counsel for the appellant is misconceived."

12. From the case-law discussed above, it is apparent that the intent of sections 265-F and 540 CrPC is separate and distinct. Under section 265-F CrPC, it is to ensure a fair trial by providing equal opportunity to both the prosecution and the accused to summon evidence. Under section 540 CrPC it is to ensure a just decision by summoning evidence that appears to the Court to be essential to such decision, and if the consequence of that may also lead to the filling of *lacuna* in the evidence on the record, then such a consequence is collateral to the main purpose and would not come in the way of exercising the power. Further, section 540 CrPC itself provides that it can be invoked at "any stage". If the intent of the provision is to secure a 'just decision', then given the circumstances of these cases discussed above, it did not matter that the provision was invoked when the cases were reserved for judgment.

13. For the foregoing reasons, the objections of the Applicants to the impugned orders have no force. Needless to state that the Applicants' right to cross-examine any witness summoned by the

Court under section 540 CrPC, to be confronted with that evidence under section 342 CrPC, and to lead evidence in their defense if they so desire, all remain intact. With that observation these revision applications are dismissed.

The office shall place a copy of this order in all cases listed above.

JUDGE

Karachi
Dated: 18-12-2023