

**IN THE FEDERAL SHARIAT COURT**  
**(Appellate Jurisdiction)**

**PRESENT**

**MR. JUSTICE SYED AFZAL HAIDER**

**CRIMINAL REVISION NO.86/L/2006**

Muhammad Sarwar son of Jalal Din, Caste Gujjar, resident of Mauza Bhari, District Narowal, at present residing in Godam Katran, Police Station Nishtar Colony, Ferozpur Road, Lahore.

..... Petitioner

Versus

1. The State.
2. Zulfiqar Ahmed son of Khushi Muhammad Caste Malik resident of Muaza Kot Wadhawa Singh Wala, Police Station Nishtar Colony, Ferozpur Road, Lahore.

..... Respondents

Counsel for the petitioner	...	Ch. Iftikhar Ahmad, Advocate
For the State	...	Qazi Zafar Iqbal, Additional Prosecutor General
F.I.R No. dated Police Station, district	... ...	546/04, dated 13.09.04 Nishtar Colony, Lahore.
Date of order of trial Court	...	21.02.2006
Date of Institution	...	31.07.2006
Date of hearing	....	04.03.2009
Date of decision	....	04.03.2009

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**JUDGMENT**

**SYED AFZAL HAIDER, J. -** This criminal revision, moved by Muhammad Sarwar, hereinafter called "the petitioner" is directed against the order dated 21.02.2006 passed by learned Additional Sessions Judge, Lahore, whereby right of the petitioner to cross-examine the PWs was closed.

2. Brief facts leading upto filing of this criminal revision are that complainant Zulfiqar Ahmad (respondent No.2) on 13.09.2004 lodged F.I.R No.546/2004, under section 377 of the Pakistan Penal Code and section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 at Police Station Nishtar Colony, Lahore stating therein that on 31.08.2004 his nephew Muhammad Nadeem, hereinafter called "the victim" went to see Mela of Baba Shah Noor alongwith Muhammad Amin. On their way back when they reached at Atta Baksh road, Faisal resident of Kamahan as well as Muhammad Afzal and Muhammad Sarwar the petitioner, alongwith two unknown

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persons came in a car and invited the victim to board the car along with them. On his refusal the said three accused forcibly put him in the car and drove him towards Bank Stop, Ferozpur Road, Lahore.

The victim was then taken to Godam Katran where all the accused subjected him to unnatural offence.

3. Police investigation ensued as a result of registration of the crime report. However, before registration of the case the victim was medically examined on 01.09.2004 and the swabs were sent for chemical examination. The report of the Chemical Examiner was received on 07.09.2004 which was positive. It was thereafter that statement of complainant Zulfiqar Ali PW was recorded for formal registration of the case. After conclusion of the investigation, report under Section 173 of the Code of Criminal Procedure was submitted by local police in the Court against the accused requiring them to face trial. The three accused were formally charged by the learned trial

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Court on 14.01.2006. The accused pleaded not guilty and claimed trial.

4. Statement of the victim was recorded as PW-1 by the learned trial Court on 21.02.2006. It is alleged by the petitioner that on 21.02.2006 his Counsel made a request for short adjournment as he was "not prepared to cross-examine PWs as he was asked by parties just to stand in the Court". The learned trial Court found "it is no ground for giving adjournment. He is directed to cross-examine the witness. He has stated that he be given 15 minutes time. Be called after 15 minutes". The case was called again after 15 minutes. The order sheet dated 21.02.2006 records further proceedings as follows:-

"After recording the statement of victim, Mr. Zaman Khan Adv stated in the court that he is not prepared to cross-examine the PWs because he was asked by parties just to stand in the court. It is no ground for giving adjournment. He is directed to cross-examine the witness. He has stated that he be given 15 minutes time. Be called after 15 minutes.

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Called again.

Mr. Zaman Khan Adv cross-examined the victim on behalf of Faisal accused. During cross-examination Mr. Muhammad Sidique Zafar Qadri Adv has submitted wakalatnama on behalf of Sarwar accused and requested for an adjournment. Court is of the view that it is no way to seek adjournments. Witnesses were present on last date. Ch. Abdul Ghani Adv submitted wakalatnama on behalf of Sarwar on last date and today Mr. Muhammad Siddique Zafar Qadri Adv has submitted wakalatnama on his behalf. Accused are trying to linger on the proceeding of this case. There is no reason to adjourn cross-examination of this witness especially when counsel of accused was present on last date so right of cross-examination on behalf of Sarwar accused is closed. During cross-examination of Mr. Zaman Khan Adv, Amjad was run away from the court so cross-examination on his behalf is also closed. His bail bonds are cancelled. Proceedings u/s 514 Cr.P.C. are initiated against his surety. He be summoned through non-bailable warrant of arrest for 4/3/06."

5. Thereafter, the petitioner on 11.07.2006 submitted an application under section 540 of the Code of Criminal Procedure but the learned trial Court while rejecting the application of the petitioner on 22.07.2006, passed the following order:-

"I have considered the arguments and have gone through the record carefully. This is fact that impugned order was

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passed in the presence of counsel of petitioner and counsel of petitioner did not cross-examine the victim, therefore, it is wrong to say that petitioner was not given chance to cross-examine the victim. Impugned order is detailed one. Even on the date prior to the date of impugned order, witnesses were present and counsel of accused requested for an adjournment. Therefore, there is no reason for this court to call PW-1. Thus this application is dismissed. Remaining PWs be summoned for 26/8/06.”

6. The order dated 22.07.2006 has been challenged through this Revision Petition. Notice was issued to State on 20.09.2006 whereas on 01.01.2009 the petitioner was directed to file “complete order sheet of the trial Court, which is necessary to appreciate the arguments of the learned Counsel for the petitioner”. The needful has been done. I have perused the record of this case. The point involved in this case is the scope of Section 540 of the Code of Criminal Procedure and its application to the facts and circumstances of this case. Section 540 reads as under:-

**“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**

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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.”

7. The phraseology of Section 540 shows that this provision of law consists of two parts. The first portion is discretionary. This power can be exercised on the application of a party or it may be executed suo moto. The power is unlimited as the Court may at a) any stage of an enquiry; b) trial or c) other proceeding under the Code to d) summon any person as a witness or e) examine any person in attendance f) though not summoned as a witness or g) recall and re-examine any person already examined. Such a wide power has been given also to cover cases where fresh evidence is discovered by any party to the proceedings or it has come to the knowledge of the Court. However this discretionary power has built-in limitation in the sense that the Courts exercise this power with due care and caution and certainly the purpose in view is the safe administration of justice and its purpose is neither to advance the case of defence nor uphold the cause of the prosecution. A balance has to be struck and it is only the

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cause of justice that has to be advanced by Courts. The testimony of a witness has of course to be tested on the touchstone of cross-examination which right cannot be denied to the party affected adversely by such deposition.

8. The second portion of the Section however is mandatory

in the sense that the Court acts where it considers that the evidence of a person to be recalled is essential to the just decision of the case.

There is no option but to summon such a witness for examination in such an eventuality even though he may have to be recalled. It means that a person who has been examined earlier but has not been cross-examined on one or another cause may also be summoned for the just decision of the case. This power has not to be employed for filling the gaps of the case of prosecution. Documents which can help to decide the fate of the case may also be admitted. It has been rightly held that the Courts are not to be left at the mercy of the parties, witnesses or the Counsel of the parties. The Court is an active participant in the



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proceedings and has been empowered to play its role in the larger interest of justice at any stage of the trial or enquiry or proceeding under the Code.

9. The Apex Court of Pakistan in the case of Muhammad Murad Abro Versus The State 2004 S.C.M.R. 966 (968) held as follows:

“The purpose of section 540, Cr.P.C. is to enable the Court to go at the truth of the matter to come to a proper conclusion in the case under trial and in the peculiar circumstances, imposes a duty on the Court to summon a person in the witness-box, whose evidence is essential for just decision of the case. Under first part of the section, the Court may in its decision summon or recall a person or a witness for examination or re-examination but under the second part, it is obligatory for the Court to summon and examine or recall and re-examine any person if his evidence appears essential for just decision of the case but the Court cannot use the power under section 540, Cr.P.C. to advance the case of prosecution or that of the defence. However, this discretionary power should liberally be used in a case in which the examination of a person is material and is essential to come to the proper conclusion.”

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10. For a detailed discussion on this subject reference may be made to the case of Muhammad Azam Versus Muhammad Iqbal PLD 1984 SC 95 (118, 120, 121). Reliance was placed on the following precedents in the case of Muhammad Murad Abro:-

- i. Syed Ali Nawaz Gardazi Versus Lt. Col. Muhammad Yousaf PLD 1963 SC 51
- ii. State Versus Maulvi Muhammad Jamil and others PLD 1965 SC 681
- iii) Rashid Ahmad Versus The State PLD 1971 SC 709 and
- iv) Abdul Latif and others Versus State of Utter Pradesh AIR 1978 SC 472
- v) The State Versus Muhammad Yaqoob and others PLD 2001 S.C.M.R. 308

11. In the above-mentioned case of Muhammad Yaqoob the

Hon'ble Supreme Court of Pakistan was pleased to hold on page 324

as under:-

“The objection of the learned Advocate-General that when the application of the appellant was rejected by the trial Court on 30.03.1997 and the appellant having given statement on 31-3-1997 that he would not produce defence in spite of the fact that a day earlier in his statement under section 342, Cr.P.C. he had stated that he would produce defence debars him from any redress, finds a clear reply in the above judgment. On interpreting

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the second part of the section it has been emphasized that irrespective of the fact that the prosecution or defence was negligent in producing the relevant evidence at the proper time and in spite of the objection that it would amount to filling up the facts in the case of one side or the other side, and also irrespective of the criticism of any side about the partiality of the Court in his exercise even then the Court is bound to perform its duty of examining the evidence which appears to be essential for just discussion of the case.”

12. The basic question for consideration as held in the case of Mehrzad Khan Versus The State PLD 1991 Supreme Court 430 is whether the summoning of the given witness was essential for arriving at a just decision of the case. If the answer is in the affirmative the said witness will be summoned or recalled as the case may be and the case shall from that stage proceed and finalized in accordance with law. The following eleven cases were also considered by the Hon'ble Supreme Court in the case of Mehrzad Khan:-

- i. Stephen Seneviratne v. The King AIR 1936 PC 289
- ii. In re: Donald Dixon AIR 1938 Mad. 900
- iii. Ghulam Rasul v. The State PLD 1960 (W.P) Lah. 48
- iv. Mahboob Khan v. The State PLD 1979 Lah. 691

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- v. Jewan and 9 others v. The State 1980 P Cr. LJ 570
- vi. Abdul Rashid v. The State 1980 P. Cr. LJ 119
- vii. Abdul Ghafoor v. The State and 2 others PLD 1983 Lah. 139
- viii. Muhammad Azam v. Muhammad Iqbal and others  
PLD 1984 SC 95
- ix. Maulvi Hazoor Bakhsh v. The State PLD 1985 SC 233
- x. Muhammad Nawaz Khan v. Naiful Islam alias Kaifi and  
another 1986 P. Cr. LJ 2631
- xi. Mohsin-ur-Rehman v. The State and others 1986 S C M R 1687

After considering the impact of these precedents Mr. Justice

Ajmal Mian (as his lordship then was) observed as follows:-

“The question, whether a particular witness is to be called and examined as a Court-witness, will depend if the Court forms the view that his or her evidence is essential to the just decision of the case. Such an opinion is to be formed on the basis of appraisal of evidence already brought by the prosecution on record and the factum what evidence, the witness sought to be examined as a Court-witness, is expected to give in view of his police statement or section 164, Cr.P.C.’s statement. The above mandatory provision contained in the second part of section 540 of the Code is to be pressed into service with care and caution, as it is intended and designed to achieve the basic object of a judicial proceeding i.e. to find out the truth in order to arrive at a just and correct decision, but at the same time it cannot be pressed in aid to demolish the prosecution case, which is otherwise

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proved by other reliable evidence. The Courts cannot be unmindful on the factum that with the passage of time the values in our society have changed. In our Holy Qur'an, Allah has repeatedly commanded at various places his believers to appear as witnesses even inter alia against their own parents. -----The golden principle of appraisal of evidence that the Court is to sift grain from chaff is to be followed in every criminal case."

13. Reference may also be made to the case of Hakim Khan and 4 others Versus The State P.L.J 1993 SC 33 where, considering the scope and extent of Section 540 of the Code of Criminal Procedure, it was observed by the Apex Court as follows:

"It should be clearly understood that the duty of the Court is to do justice, in accordance with the law. And in doing so the foremost task of the Court is to endeavour to discover the truth in the matter before him to the extent that is humanly possible. Undoubtedly, in this endeavour of trying to discover the truth he cannot act in manner or adopt a procedure which causes prejudice to one of the parties or places any party in a disadvantageous position and where such a procedure is adopted it cannot be countenanced. But by the same token no artificial limitations or inhibitions can be placed upon the powers of the Court in following any course which enables it to do complete justice in the cause. All efforts in this direction subject to the restraints stated above would be quite unobjectionable and indeed laudable."

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14. In this view of the matter the learned trial Court at the initial stage on 21.02.2006 should have granted short adjournment as requested by learned Counsel for the accused. The order sheet does not disclose that many adjournments had been sought with the object of obstructing the natural flow of the prosecution of the trial. And if an application had been moved under Section 540 of the Code of Criminal Procedure it should have been allowed on the short ground that the victim, the principle witness in the case against the accused, had to be cross-examined. It is an extremely valuable right of the accused to cross-examine a witness and put his deposition on test in the larger interest of justice. Such a right cannot be denied on the ground that because the Court condescended to grant just 15 minutes to the Counsel to prepare his case for cross-examination of the star witness. In the case of Sifullah etc. Versus The State 2003 UC 174 a learned Single Judge of the Sindh High Court on the question of right of cross-examination held as under:-

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“No doubt the right of cross-examination since times immemorial has been held to be a most valuable right to a party. A statement of a witness under the Qanun-e-Shahadt is not effective and complete unless it has stood the test of cross-examination. The right of cross-examination is of particular importance for accused persons in criminal trials involving their life and liberty depending on the verbal statements of the witnesses deposing against them.”

15. As a consequence of what has been stated above, this revision is accepted. The impugned order dated 21.02.2006 is set aside. Sarwar accused shall be given one opportunity to cross-examine PW.1 Muhammad Nadeem.

*Syaid*

JUSTICE SYED AFZAL HAIDER

Announced at Lahore  
Dated: 4<sup>th</sup> March, 2009  
*Imran\**

Fit for reporting.

*Syaid*

JUSTICE SYED AFZAL HAIDER