# JUDGMENT SHEET
# IN THE LAHORE HIGH COURT LAHORE
## JUDICIAL DEPARTMENT

**W.P.No.2559 of 2015**

*Abdul Razzaq* *Versus.* *The State etc.*

***J U D G M E N T.***

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| Date of Hearing | 30.3.2015 |
| Petitioner by | Mr. Mushtaq Ahmad Tanveer Advocate. |
| Respondents Nos.1 & 2 by | Malik Muhammad Bashir Lakhesir, Assistant Advocate General along with Nosherwan S.I. |
| Respondent No.3 by | Malik Muhammad Iftikhar Advocate. |

**MAHMOOD AHMAD BHATTI, J:** Through this writ petition, Abdul Razzaq, the petitioner has assailed the validity of the order dated 18.2.2015 passed by the learned Judge Anti-Terrorism Court, Dera Ghazi Khan, whereby an application moved by the petitioner under section 540 Cr.P.C. to summon Call Detail Report (C.D.R.) of Zafar Iqbal, Altaf Hussain, Muhammad Riaz Hussain and Naseebullah, P.Ws was turned down.

2. The facts necessary for the disposal of this petition are that the petitioner is indicted for abduction and murder of Muhammad Umar aged 06, son of Altaf Hussain, the complainant. As per the F.I.R., the deceased minor disappeared on 24.11.2013 from outside his house. The complainant along with Muhammad Aslam and Muhammad Naseer set out to search the missing child but they could not find any clue. At long last, four days after the disappearance of the child, case F.I.R. No.616/2013 was

lodged under section 363 PPC at Police Station Chowk Azam, District Layyah against unknown accused. Subsequently, Sections 365-A and 302 PPC were added. The petitioner was implicated in the case through a supplementary statement, made by Altaf Hussain (P.W.1). Be that as it may, the petitioner was charged with the offences of abduction and murder of Muhammad Umar, the minor. The prosecution produced Altaf Hussain (P.W.1), Zafar Iqbal (P.W.2), Muhammad Riaz Hussain (P.W.3) and Muhammad Naseer (P.W.4). Inam-ul-Haq ASI/In charge Crime Scene, DPO Office Layyah was also examined as P.W.12, who made a detailed statement about the C.D.R. He also produced 27 pages of C.D.R. as Exh.P.6/1 to 27. Since the petitioner's side has annexed the copies of the testimonies of only 4/5 witnesses, we have no other details about the other witnesses examined by the prosecution. Even otherwise, their evidence does not appear to have a bearing on the outcome of the controversy in issue. Before the aforesaid witnesses could be subjected to cross-examination, the defence moved an application on 16.2.2015 under section 540 Cr.P.C. to summon the C.D.R. of Zafar Iqbal, Altaf Hussain, Muhammad Riaz Hussain and Naseebullah P.Ws. However, it was dismissed by the learned trial Court vide order dated 18.2.2015, observing that the Call Data/Detail Record was not put to P.Ws and that it was too late to summon the same for the benefit of the defence. It was also observed that the accused did not take any plea at the initial stage with reference to C.D.R. Another reason which prevailed with the learned trial Court to reject the application of the petitioner was that the case of the prosecution might be

prejudiced by summoning the C.D.R., as prayed by the accused/petitioner.

3. In support of this petition, the learned counsel for the petitioner has reiterated the grounds urged in the writ petition. It is stressed by him that the reasons which weighed with the learned trial Court are not contemplated by the provisions of Section 540 Cr.P.C. It is argued by him that any witness or document might be summoned at any stage of the proceedings. According to him, it must be summoned by the Court when the relevant record is found essential for the just decision of the case. To reinforce his submissions, he has placed reliance upon the case reported as **"Ansar Mahmood v. Abdul Khaliq"**(2011 SCMR 713).

4. On the other hand, the learned counsel for respondent No.3/the complainant has supported the impugned order. He puts forth the argument that the C.D.R. sought to be summoned by the petitioner is irrelevant and the sole purpose of the petitioner in moving the application under section 540 Cr.P.C. is to drag on the proceedings and to sidetrack the proceedings. Curiously enough, the learned Assistant Advocate General appearing for the State did not support the impugned order. It was fairly conceded by him that under the provisions of Section 540 Cr.P.C, the learned trial Court cannot evade the onerous responsibility to summon any witnesses or record from anywhere provided the same is essential to the just decision of the case. He was candid enough to state that the delay in moving an application under section 540 Cr.P.C. is by itself no ground to dismiss the same.

5. We have heard the learned counsel for the petitioner, the complainant and the learned Law Officer, besides perusing the record annexed to the writ petition with their assistance.

6. Without commenting upon the evidence produced by the prosecution, suffice it to say that the case of the prosecution rests to a large extent upon Call Detail Record. Allegedly, the complainant received calls on his Cell Phone, demanding a ransom of Rs.20,00,000/- for the return of the child, who had gone missing. Likewise, Zafar Iqbal (P.W.2) made a deposition regarding his mobile phone (Exh.P.1) and SIM No.344-3687306 (Exh.P.2). In the same way, Inam ul Haq, P.W.12, who was posted as ASI/In charge Crime Scene, DPO Office Layyah in 2013 testified on oath about C.D.R. consisting of 27 pages, which were exhibited as Exh.P.6/1 to 27. When the prosecution has employed the modern device and adopted sophisticated technique to connect the petitioner with the commission of the offence, the petitioner has got every right to prove himself innocent by making use of the very same C.D.R. It goes without saying that the dispensation of justice is to be even-handed and under no circumstances should it be allowed to be tipped in favour of one party at the cost of the other.

7. The provisions of Section 540 Cr.P.C. have repeatedly engaged the attention of the Hon'ble Supreme Court of Pakistan. It would be advantageous to make reference to a few celebrated cases reported as **"Muhammad Azam v. Muhammad Iqbal"(PLD 1984 S.C. 72)**, **"Maulvi Hazoor Bakhsh v. The State"**(PLD 1985 S.C. 233), **"The State v.**

**Muhammad Yaqoob"**(2001 SCMR 308) and **"Imran Ashraf and 7 others v. The State"**(2001 SCMR 424).

8. In the case of **"Muhammad Azam v. Muhammad Iqbal"(PLD 1984 S.C. 72),** the Hon'ble Supreme Court elaborated the provisions of section 540 Cr.P.C. as under:

> "It needs to be observed that for purpose of acting under section 540, Cr.P.C. (whether the first or second part), it is permissible to look into the material not formally admitted in evidence, whether it is available in the records of the judicial file or in the police file or elsewhere. The perusal of both these records would show that if evidence, in connection with the items already noticed, would have been properly entertained the reasoning and decision of the learned two Courts might have been different.
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> 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 straightway 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. It was held in Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf (PLD 1963 SC 51) that even if a

witness who is ultimately to be produced by the accused in his defence is examined by the trial Court as a Court-witness at an earlier stage than notwithstanding the fact that the defence would have an extra advantage of putting leading questions to the witness when standing in the witness-box as a Court-witness, it would not affect the power of the Court (under section 540, Cr.P.C.) to summon and examine the witness if, of course, as was observed in that case, it was in the interest of justice and thus presumably essential for the just decision of the case. Again in The State v. Maulvi Muhammad Jamil and others (PLD 1965 SC 681) when examining the effect of change in the criminal procedure, regarding right to further cross-examination, during the transitional period, this Court held that even though it would be for the benefit of the defence, the trial Court could avoid any prejudice to the defence by acting under section 540, Cr.P.C. After holding so a very weighty observation was made which needs to be reproduced:--

> This section empowers a Court at any stage of inquiry, trial or any other proceeding under the Code, to summon any person as witness, or recall and re-examine any person already examined, and it is obligatory for the Court to summon and examine or recall and re-examine any such person, if his evidence appears to it essential for the just decision of the case." (emphasis added)

9. In the case of **"The State v. Muhammad Yaqoob"**(2001 SCMR 308), the law on the subject was reiterated in the following words:

> "It is thus manifest that calling of additional evidence is not always conditioned on the defence or prosecution making application for this purpose but it is the duty of the Court to do complete justice between the parties and the carelessness or ignorance of one party or the other or the delay that may result in the conclusion of the case should not be a hindrance in achieving that object. It is salutary principle of judicial proceedings in criminal cases to find out the truth and to arrive at a correct conclusion and to see that an innocent person is not punished merely because of certain technical omission on his part or on the part of the Court. It is correct that every criminal case has its own facts and, therefore, no hard and fast rule or criteria for general application can be laid down in this respect but if on the facts of a particular case it appears essential to the Court that additional evidence is necessary for just decision of the case then under second part of section 540 Cr.P.C. it is obligatory on the Court to examine such a witness ignoring technical/formal objection in this respect as to do justice and to avoid miscarriage of justice." (emphasis added)

10. In the case of **"Imran Ashraf and 7 others v. The State"**(2001 SCMR 424), the law laid down in the case of

Rasheed Ahmad v. The State (PLD 1971 S.C. 709) was cited with approval as under:-

> "In yet another case Rashid Ahmad v. The State (PLD 1971 SC 709), this Court made it more clear that 'a Criminal Court is fully within the rights in receiving fresh evidence even after both the sides have closed their evidence and the case, is adjourned for judgment, for till then the case is still pending. The only question therefore, is as to whether in the interest of fairness further opportunity should have been given to the accused' and, it was held that 'there is no bar to the taking of additional evidence in the interest of justice, at any stage of inquiry or trial as provided by the provisions of section 540, Cr.P.C'. In these cases if the question regarding so-called filling of the gaps would have been raised more squarely, the answer in view of what has been noticed above would have been the same as already rendered; namely, that if it is essential for the just decision of the case, then the same is the command of the law under the second part of section 540, Cr.P.C. it would not be possible to canvass that when the action under the said provision amounted to so-called filling of a gap, the Court would for this reason, avoid its duty to admit the additional evidence. Two more decisions by this Court as illustrative of the practice, may also be noted. They are: Bashir Ahmad v. The State and another (1975 SCMR 171) and Yasin alias Cheema and another v. The State (1980 SCMR 575)."

11. In the latest pronouncement on the subject, reported as **"Nawabzada Shah Zain Bugti and others v. The State"**(PLD 2013 Supreme Court 160), the Apex Court observed as under:

> "8. A close reading of afore-mentioned provision indicates that it gives rather wide powers to the Court to examine any witness as a court witness at any stage of the case. It enables the Court rather in certain situations imposes a duty on it to summon witnesses who could not otherwise be brought before the Court. The section consists of two parts: one giving discretionary power to the Court and the other imposing an obligation on it. In Jamatraj Kewalfi Govani v. State of Maharashtra (AIR 1968 SC 178), the Court was seized of a similar issue when it held as follows:--
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> > "(10) Section 540 is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the court may act in one of the three ways: (a) summon

> any person as a witness, (b) examine any person present in court although not summoned, and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are, however, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly."

9. The Court cannot summarily dismiss an application for additional evidence in terms of

section 540 Cr.P.C. by merely holding that either the said witness was not mentioned in the challan or that it was belated application or that it may fill up lacunas in prosecution case, unless the totality of material placed before it is considered to find out whether examination of the said witness is essential for a just decision of the case. While dilating on the purpose of an analogous provision in Indian Criminal Procedure Code (Section 311), the Supreme Court of India in Iddar and orders v. Aabida and another (AIR 2007 SC 3029) observed as follows:--

> "The object underlying section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports

> the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trial under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

10. The Court has also to keep in mind that in trying a case it has to find out the truth to render a judgment in accord with canons of justice. If it 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. For the purpose of this provision, the Court even without any formal application from prosecution or accused, can summon any person as witness or

examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined. In Ansar Mehmood v. Abdul Khaliq (2011 SCMR 713), the judgment of the High Court was reversed and that of the trial Court restored which had allowed examination of additional evidence in terms of section 540, Cr.P.C. While doing so, the Court commented on the ambit of this provision in terms as follows:--

> "5. Bare reading of section 540, Cr.P.C. transpires that where an evidence is essential for just decision of the case, it is obligatory upon the Court to allow its production and examination. Examining the law on the subject, reference can be had to Muhammad Murad Abro v. The State through A.G. Balochistan (2004 SCMR 966), wherein it was held that provision of section 540, Cr.P.C., is to enable the Court to go at the truth of the matter, so as to come to a proper conclusion. In the case under trial, it is obligatory to summon a person whose evidence is essential for just decision of the case. Similar view was taken in Painda Gul and another v. The State and another (1987 SCMR 886), with

addition that the Court has widest powers under section 540, Cr.P. C. and can summon a witness for examination at any stage of the case. However, while exercising discretion it must guard itself against the exploitation of this power by a litigant party and keep in view the guiding principle, what the ends of justice demand. Cases titled as Dildar v. State through Pakistan Narcotics Board, Quetta (PLD 2001 Supreme Court 384) and the State v. Muhammad Yaqoob (2001 SCMR 308), lay down guide. Observations made in 2001 SCMR 308, are quoted:--

> "It is thus manifest that calling of additional evidence is not always conditioned on the defence or prosecution making application for this purpose but it is the duty of the Court to do complete justice between the parties and the carelessness or ignorance of one party or the other or the delay that may result in the conclusion of the case should not be a hindrance in achieving that object. It is salutary principle of judicial proceedings in criminal cases to find

> out the truth and to arrive at a correct conclusion and to see that an innocent person is not punished merely because of certain technical omission on his part or on the part of the Court. It is correct that every criminal case has its own facts and, therefore, no hard and fast rule criteria for general application can be laid down in this respect but if on the facts of a particular case it appears essential to the Court that additional evidence is necessary for just decision of the case then under second part of the section 540, Cr.P.C., it is obligatory on the Court to examine such a witness ignoring technical/formal objection in this respect as to do justice and to avoid miscarriage of justice."

11. In Shahbaz Masih v. The State (2007 SCMR 1631), a similar view was reiterated by the Court and it was held as under:--

> 7. .....Court enjoys full, powers to summon and, examine any person as a witness at any stage of trial; rather it is imperative for the Court within terms of

> section 540, Cr.P.C. to summon and examine a person when evidence of such person appears to the Court essential to do the just decision of the case. Also, the Court can examine any person in attendance though not called as a witness. The underlying object, always, is to reach truth ....."

12. The Hon'ble Federal Shariat Court formulated its opinion on the provisions of Section 540 Cr.P.C. in the case reported as **"Muhammad Shafi alias Sakhi Muhammad v. The State and another"**(2012 Y L R 2302) as under:-

> "It is an established principle of law that provisions of section 540, Cr.P.C. in examining, recalling, or summoning any witness were incorporated to confer jurisdiction on the Court to arrive at the truth in accordance with law and technicalities should not be allowed to interfere with that function. A learned Division Bench of the Peshawar High Court in the case of Maqbool v. The State 2006 P.Cr.L.J. 110 held "Provisions contained in section 540, Cr.P.C. in examining, recalling or summoning any witness are wide enough to give free hand to a Court of law to see that the justice does not slip out of hand or is defeated on the technicalities of law."

13. Apart from the provisions of Section 540 Cr.P.C., Section 94 Criminal Procedure Code, 1898 is also relevant in the

context of this case. It would be expedient to reproduce subsection (1) thereof, which reads as under:-

> "94. **Summons to produce document or other thing**. (1) Whenever any Court, or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officers a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order:"

14. From the case law cited above, it is abundantly clear that the mere delay in moving an application under section 540 Cr.P.C. is not a valid ground in the eyes of law to reject it. As for the apprehension of the learned trial Court that some of the Call Detail Record relates to those witnesses who have already been examined and not confronted with the same, suffice it to observe that they might be re-summoned and re-examined by the prosecution so as to provide them an adequate opportunity to explain their conduct and point of view with regard to the C.D.R. in question. Such a course followed by the learned trial Court would strike a balance between the prosecution and the defence. Needless to say, that the raisin deter of the Courts is to dispense justice and strive hard to get to the truth rather than rushing through the trials/cases.

15. For what has been stated above, this petition is **allowed** by setting aside the order dated 18.2.2015 passed by the learned Judge Anti-Terrorism Court, Dera Ghazi Khan. Consequently, the application moved by the petitioner under section 540 Cr.P.C. before the learned Trial Court is accepted, with the result that the Call Detail Record (C.D.R) requisitioned by the petitioner shall be duly sent for and brought on the record in accordance with the law.

**(Ch. MUHAMMAD IQBAL)**
**JUDGE**

**(MAHMOOD AHMAD BHATTI)**
**JUDGE**

**Approved for Reporting**

**JUDGE** **JUDGE**

*Rana Zahid Bashir**