HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

Criminal Revision No.87 of 2022

Mohammad Ehtisham Abbasi

Versus

The State and another

Petitioner by	**:**	**M/s Tallat Mehmood Zaidi and Tanveer Iqbal Khan, Advocates.**
Respondents by	**:**	**Malik Abdur Rehman, State Counsel.** **Mian Mohammad Imran, S.I., P.S. Secretariat.**
Date of Hearing	**:**	**10.11.2022**

Babar Sattar, J:- The petitioner is aggrieved by order dated 19.10.2022 passed by the learned Additional Sessions Court (West), Islamabad, pursuant to which his application under Section 540 of the Code of Criminal Procedure, 1898 **("Cr.P.C.")**, to cross-examine the eye-witnesses has been dismissed.

2. The learned counsel for the petitioner submitted that the subject matter of the petition relates to the closure of the petitioner's right to cross-examine four private eye-witnesses i.e. PW-10, PW-11, PW-14 and PW-15 **("Witnesses")** in a case registered pursuant to FIR No.56/2021 dated 03.03.2021, where a charge under Section 302 of PPC had been framed against the petitioner. He submitted that the cross-examination of the Witnesses would constitute material testimony for

purposes of establishing the innocence of the petitioner in relation to very serious charges brought against him and the refusal of the learned Additional Sessions Court to re-summon the Witnesses was in breach of the petitioner's right under Article 10-A of the Constitution.

3. Learned State Counsel submitted that the learned Additional Sessions Court had afforded repeated opportunities to the petitioner to cross-examine the Witnesses but the opportunities were not availed by the petitioner. The learned Additional Sessions Court offered the petitioner the services of a defense counsel but the petitioner refused to avail of such facility and consequently the right to cross-examine was closed by order dated 12.03.2022. The petitioner then moved an application under Section 540 of Cr.P.C., which was allowed and once again multiple opportunities were provided to the petitioner to have the Witnesses cross-examined. The learned Additional Sessions Court had twice imposed adjournment costs in the amount of Rs.10,000/- which had remained unpaid and finally after offering the petitioner the services of a State counsel and affording the petitioner an opportunity to cross-examine the Witnesses himself, his right of cross-examination was closed by order dated 15.10.2022. He submitted that the order sheet reflected an abuse of the process of the Court by the petitioner and his counsel and there was no infirmity in the impugned order dated 19.10.2022 refusing to grant further opportunity by allowing a second application under Section 540 of Cr.P.C. to re-summon the Witnesses. He further submitted that pursuant to the law laid down in ***Faisal Rafique Vs. Saeed***

Mumtaz Durrani and two others ***(2021 P.Cr.LJ 1558)*** and ***Zaheer Abbas Vs. The State*** ***(2008 YLR 1225)***, there was no right vested in the defence to re-cross-examine a witness. He submitted that the defense had a right to re-cross-examine a prosecution witness only after the prosecution had availed an opportunity to re-examine a witness.

4. The basic contention of the petitioner is that the Witnesses have never been cross-examined. And as the said Witnesses are eye-witnesses and are key to the determination of the guilt or innocence of the petitioner, the refusal to grant the petitioner a right to have such Witnesses cross-examined could undermine his right to a fair trial. The contention of the learned State Counsel that there is no right to seek re-cross-examine in view of the law in relation to Section 540 of Cr.P.C. read together with Articles 132 or 133 of the Qanun-e-Shahadat Order, 1984, is not on point. The petitioner has filed the instant petition on the basis that his right to cross-examine the Witnesses was closed without effectively affording him an opportunity and he is not seeking to re-cross-examine prosecution Witnesses who have already been cross-examined. The merit or lack thereof of the factual basis underlying such argument notwithstanding, the petitioner is seeking to cross-examine private witnesses produced by the prosecution that the defence has failed to cross-examine thus far. Hence, this is not a case of re-cross-examination.

5. However, the contention of the learned State Counsel that the manner in which the petitioner and the learned counsel for the petitioner have treated opportunities afforded to them for

purposes of cross-examining the Witnesses referred to above amounts to abuse of the process of the Court is not without merit. The record of the learned Additional Sessions Court reflects that the examination-in-chief of PW-11 and PW-15 was conducted on 17.11.2021 and 22.11.2021, respectively. The learned counsel for the petitioner then failed to avail opportunities to cross-examine the said witnesses despite the learned Additional Sessions Court repeatedly beseeching the learned defense counsel to do so after recording its disquiet with the manner in which the learned counsels were conducting the trial. The learned court took exception to repeated requests for adjournment and warned the parties that adjournment cost in the amount of Rs.10,000/- would be imposed on the learned counsel for the parties by order dated 07.03.2022, if they failed to proceed with the trial. On the subsequent date of hearing i.e. 09.03.2022 the learned defense counsel once again failed to appear before the learned Additional Sessions Court and consequently a cost in the amount of Rs.10,000/- was imposed on him by order dated 09.03.2022. On the next date of hearing, the defense counsel was absent once again. The learned Additional Sessions Court was irked by the conduct of the learned defense counsel and the delay in the administration of justice due to such conduct.

6. In view of the failure of the defense counsel to cross-examine the Witnesses, the learned Additional Sessions Court offered for bono services of a defense counsel to the petitioner who refused to avail such services. The petitioner was then asked to cross-examine the Witnesses himself after which the

cross-examination of the Witnesses was closed by order dated 12.03.2022. The petitioner then filed an application under Section 540 of Cr.P.C. for summoning the Witnesses on 09.04.2022. The said application was allowed by order dated 24.05.2022, notwithstanding the abhorrent conduct of the learned defense counsel, and an opportunity to cross-examine the Witnesses was afforded to the petitioner once again on 30.05.2022. On the said date an adjournment was again sought by the learned defense counsel. The matter was once again adjourned on the request of the learned defense counsel on 03.06.2022. On the request of the learned defense counsel another adjournment was granted and the case was fixed on 09.06.2022, when the learned defense counsel did not appear before the Court up until 02:00 pm and partly examined PW-11 and the matter was adjourned to 20.06.2022 for the remaining cross-examination. There were a few other adjournments granted for various reasons and the matter was fixed for 06.07.2022. Once again the defense counsel did not appear and when the case was called for hearing, an opportunity was sought on his behalf to have the matter fixed for cross-examination at 02:00 pm on the same date. The request was granted, but he chose not to appear at 02:00 pm either, after which the learned Additional Sessions Court adjourned the matter while imposing adjournment cost in the amount of Rs.10,000/-. The case kept getting adjourned for cross-examination of the Witnesses and finally on 15.10.2022 the learned Additional Sessions Court after offering the accused the services of a State Counsel, which were refused, afforded the

accused an opportunity to cross-examine the Witnesses himself, after which his right to cross-examination was closed. The application under Section 540 of Cr.P.C., which was dismissed by the learned Additional Sessions Court through the impugned order, was therefore the second such application which was dismissed after the first application was allowed and the opportunity afforded to cross-examine the witnesses was not availed in the circumstances detailed above.

7. In view of the conduct of the learned defense counsel, who is also counsel for the petitioner in the instant matter, this Court by order dated 01.11.2022 had also issued a show cause notice to the learned counsel for the petitioner as to why proceedings for professional misconduct should not be initiated against him for obstruction of justice and causing delay in the conduct of the trial proceedings. The learned counsel for the petitioner has failed to satisfy the Court that his conduct has been justifiable. The only explanation furnished by him was that as a representative holding an office of Rawalpindi Bar Association, the learned counsel for the petitioner had various obligations which prevented him from attending to trial on some of the hearings and due to other professional commitments. And that the matter kept getting adjourned due to the illness of the learned counsel for the petitioner as well as due to adjournment sought by the learned counsel for the complainant and it was not the learned counsel for the petitioner alone who was responsible for the obstruction of trial proceedings.

8. Perusal of the record reflects that in the trial from which the instant petition has arisen, a total of 61 hearings have been

convened. The charge against the petitioner was framed on 07.07.2021. The adjournments that can be attributed to the complainant are six in number. The case had to be adjourned due to non-appearance of prosecution witnesses on ten hearings. The learned counsel for the petitioner sought 20 adjournments. There were at least 14 hearings on which the prosecution witnesses were in attendance but the learned counsel for the petitioner was not available. At least three times in orders dated 07.03.2022, 09.03.2022 and 12.10.2022, the learned Additional Sessions Court recorded its observations regarding non-cooperation of both, the learned counsel for the petitioner as well as the complainant's counsel.

9. In view of the above, this Court is not convinced that the impugned order suffers from any legal infirmity. The learned Additional Sessions Court did offer the petitioner as the accused person the services of learned State Counsel to conduct the cross-examination of the Witnesses, which services were refused by the petitioner. The learned Additional Sessions Court also allowed the first application under Section 540 of Cr.P.C for cross-examination of the Witnesses after the failure of the learned counsel for the petitioner to cross-examine them after being afforded multiple opportunities. The record of the learned Additional Sessions Court therefore reflects desperation on part of the learned Presiding Judge to make progress in the trial in face of continuing obduracy of the learned counsel for the petitioner (and also the learned counsel for the complainant).

10. Notwithstanding the fact that the impugned order suffers from no legal infirmity, this Court is mindful of the fact that the

petitioner has been charged with murder, which attracts the death penalty. This Court is mindful of the fact that the cross-examination of the eye witnesses may be the most significant aspect of the evidence adduced before the learned trial Court to determine the innocence or guilt of the petitioner. And consequently, in the interest of safe administration of justice, this Court finds that out of abundant caution one final opportunity be provided to the petitioner to cross-examine the Witnesses. In exercise of the powers of this Court under Section 435 and 439 of Cr.P.C. read together with Section 561-A of Cr.P.C., the impugned order is ***set-aside*** and the State is directed to ensure that the Witnesses appear before the learned Additional Sessions Court on **10.01.2023** to afford the petitioner an opportunity to cross-examine them. The cross-examination of the Witnesses will continue on a daily basis till such time that it is completed. In the event, that the learned counsel for the petitioner fails to cross-examine the Witnesses on 10.01.2023 the learned Additional Sessions Court will appoint a State Counsel on such date and afford such counsel an opportunity of a few days to prepare his brief for purposes of cross-examination and adjourn the matter to the week starting on 16th January, 2023, to provide such State Counsel an opportunity to cross-examine the prosecution witnesses. And once such cross-examination has begun, it will continue on a day to day basis till such time that it is completed.

11. The allowing of this petition, however, does not purge the professional misconduct manifested by the learned counsel for the petitioner. Mr. Tanveer Iqbal, Advocate Supreme Court

appeared on behalf of the learned counsel for the petitioner, Mr. Tallat Mehmood Zaidi, Advocate, to justify his conduct and his delinquency in appearing before the learned trial Court in discharge of his professional obligations, but was unable to do so. The record of the learned trial Court reflects that not only did the learned Additional Sessions Court afford repeated opportunities to the learned counsel for the petitioner to proceed with the trial but indulged the learned counsel for the petitioner and granted adjournments whenever reasonable cause such as illness on part of the learned counsel for the petitioner was made out. However, despite warnings, strictures and imposition of adjournment cost the learned counsel for the petitioner failed to pay heed to the warnings of the learned Additional Sessions Court, which attempted to conduct trial proceedings professionally and diligently. This Court finds that the learned counsel for the petitioner is liable for delay in trial proceedings. And consequently in terms of Section 200(2) read together with Section 344 of Cr.P.C. this Court imposes costs on the learned counsel for the petitioner for failure to appear and comply with the orders of learned Additional Sessions Court in the amount of Rs.100,000/- which shall be payable to the prosecution to defray the cost of producing the Witnesses who are to be re-examined. The learned Additional Sessions Court will pass appropriate orders with regard to the distribution of cost proceeds.

12. What is apparent from the record is that there were 14 hearings on which prosecution witnesses were available but could not be cross-examined due to the absence of the learned

counsel for the petitioner. As already noted above, there have been 61 hearings before the learned Additional Sessions Court. The perusal of the record projects a very sorry picture of criminal justice system. While we as a society lament the fact that citizens refuse to discharge their civic duty of acting as witnesses in criminal trials, the picture presented by the instant matter explains the problem. Why should a private person agree to be associated with a criminal matter if he/she is going to be forced by the justice system to appear as a witness on an ongoing basis in discharge of his/her civic duty to record his/her truthful account of a sequence of events that form the subject matter of the trial, but the testimony will not be recorded and the witness will be subjected to the torture of repeatedly appearing before the Court with no end in sight. The practice of recording evidence of witnesses of a trial in a piecemeal fashion must also be addressed. There is no reason for the learned trial Court not to be able to schedule the proceedings of the trial in a manner that once the testimony of witnesses begins to be recorded, the learned trial Court records such testimony in continuing sessions without granting adjournments so that the witnesses are not required to repeatedly set aside their own personal and professional commitments to attend Court and trial proceedings do not drag along indefinitely. It should be possible for the learned trial Court to undertake a trial scheduling conference in consultation with State Counsel and the Defense Counsel and agree on a schedule which will be abided by the parties to proceed with the trial and concluded in continuing consecutive Court sessions. And in the event that the counsels

have competing professional commitments before other courts, the hearings and their timings can be managed such that the trial schedule is not disturbed.

12. This Court is also cognizant of Rule 161 of the Pakistan Legal Practitioners and Bar Council Rules, 1976 **("Rules")**, which imposes a duty on the Advocate "to appear in Court when a matter is called and if it is not so possible to make satisfactory or alternative arrangements". Despite being represented by a counsel and having been provided an opportunity to append relevant order sheets and other material to establish the cause of absence of the learned counsel for the petitioner on each and every day on which an adjournment was sought by him, he was unable to do so. A perusal of the record of the learned Additional Sessions Court, which has been discussed above, leads this Court to form a *prima-facie* view that the learned counsel for the petitioner is liable for professional misconduct within the meaning of Section 41 of the Legal Practitioners and Bar Councils Act, 1973 **("Act")**. This Court is also cognizant of its authority under Section 54 of the Act to suspend an Advocate from practice, if after hearing the Advocate the Court is of the opinion that he has committed an act of grave professional misconduct. But while this Court is of the view that the learned counsel for the petitioner might be liable for grave professional misconduct, it is exercising restraint in not making an order in terms of section 54 of the Act while referring the case of the learned counsel for the petitioner to the Punjab Bar Council in terms of Section 41(2) of the Act. This Court is also refraining itself from making further observations about the conduct of the

learned counsel for the petitioner in order not to prejudice his case or his right to fair process before the learned Punjab Bar Council guaranteed by Article 10-A of the Constitution.

14. Let a copy of this order be sent by the Office to the Punjab Bar Council to be treated as a reference under Section 41(2) of the Act.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 20.12.2022.

JUDGE

M.A. Raza