2019 Y L R Note 93

[Sindh]

Before Salahuddin Panhwar andZulfiqar Ahmed Khan, JJ

Agha ZUBAIR and others---Applicants

Versus

The STATE through Chairman NAB and others---Respondents

Criminal Revision Application No. 134 of 2017, decided on 22nd November, 2017.

(a) Constitution of Pakistan---

----Arts. 10 & 10-A---Right of fair trail---Scope---Party's choice of counsel---Scope---Proper representation of a party including an accused through a counsel of choice is also one of the requirements to fulfill the term 'fair trial'.

(b) National Accountability Ordinance (XVIII of 1999)---

----Ss. 9(a) & 17---Qanun-e-Shahadat (10 of 1984), Art. 133---Constitution of Pakistan, Art.10-A---Right to cross-examine---Fair trial---Trial Court disallowed accused persons to put certain questions to prosecution witness during cross-examine---Validity---Held, in the name of fair trial one could not seek what was not permitted in law itself---Equally, Trial Court was to keep in view that a witness once administered oath was not to be forced/asked to re-administer oath during his examination in the name of vitality/importance of question because presumption would be that witness remained under oath---Court and counsel must keep in view that answer of choice was not to be expected---Right of proper and complete cross-examination was undeniably right of counsel---High Court allowed accused persons to cross-examine witness in question and directed both ends to ensure good atmosphere and witness would be allowed to answer legal questions in the manner he wished because law had also provided mechanism for prosecution (party examining witness) to challenge his credibility---Revision was allowed accordingly.

Director of Criminal and Penal Prosecutions v. Robert Jodoin 2017 SCMR 1444 (SC of Canada) rel.

Altaf Ahmed Sahar for Applicants.

Munsif Jan, Special Prosecutor NAB along with A. Fateh Dy. Director/SIO, NAB for Respondents.

ORDER

At the very outset, learned Counsel for the applicants contends that he had moved an application for permission of three questions to be asked from the witness but learned trial Judge failed to decide the fate of the application on merits rather it was dismissed on 14.06.2017 with findings that:--

> "Perused contents of the application. Advocate conduct is adamant, who blackmail the court though on several occasions ample chances given to him

and his clients even the cross-examination of PW-6 Abdul Khaliq was reserved on their request. Application stands dismissed."

Further counsel was warned stately in future.

2. It is argued that attitude of learned trial Judge was not up-to-mark and witness was pressurized that he shall speak complete truth and even was given Oath second time on same question and answer as recorded by the learned trial Judge, was in fact not the narration of that witness; that learned trial Judge dismissed that application without referring contents of the application which otherwise were based on factual and legal aspects; besides certain observations were made against learned Counsel for applicants which (observations) are contrary to the law and learned Presiding Officer neither maintained decorum of the Court nor provided opportunity of fair trial, which otherwise is enshrined in Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973.

At this juncture it would be conducive to refer the application filed by applicant before trial Court:-

"It is prayed on behalf of accused Agha Zarar and Agha Zubair that this Hon'ble Court may be pleased to allow the following questions in addition to oral cross, because on yesterday my Associate Mr. Altaf Ahmed and my above named clients informed me that the Hon'ble Presiding Officer has shown her partialness towards prosecution side as she created pressure upon PW Abdul Khalique in league with learned prosecutor, and gave oath twice , at the first instant she gave oath before starting the evidence and when PW did not support the prosecution version of above named PW, she again gave oath to PW Abdul Khaliq with intention to pressurize him. My associate also informed me that on his request for recording evidence as per verbatim of above named PW, the learned Presiding Officer loosed her temper in open court and in presence of many persons and uttered some words as under:-

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He lasted while saying that the above attitude of Hon'ble Presiding officer was against spirit of justice and fair trial, therefore, following questions, sought to be put through application, may kindly be allowed in addition to oral cross.

1- It is correct to suggest that on 13.06.2017 after taking oath you started to give evidence before this Hon'ble Court?

2- Is it correct to suggest that when you did not support the prosecution's version and after recording some words of your version, the Hon'ble Presiding Officer again gave you oath in order to pressurize you?

3- Is it correct to suggest that on yesterday you felt very uncomfortable and under pressure due to second time oath and attitude of learned Prosecutor?"

3. Learned Special Prosecutor, NAB while referring to diary of the learned trial Court, contends that attitude of Counsel was in fact not proper rather learned Counsel for respective parties tried to delay the matter, hence this untoward situation happened and there is no fault of learned trial Judge.

4. Before going into merits of the case, the situation, so emerged, makes us to say that proper representation of a party, including an accused, through a counsel of choice is also one of requirements to fulfill the term 'fair-trial'. The lawyer may put any questions from a witness but those only which are permitted / recognized by the Evidence Act. The questions must always be confined to test the credibility of witness and veracity of his spoken words in proof or disproof of a fact. In name of 'fair-trial' one cannot seek what is not permitted by law itself. Equally, the Court must keep it in view that a witness, once administered Oath, would not be forced / asked to re-administer the Oath during his examination in name of vitality/ importance of question because it shall be presumed that he (witness) is continuing under the Oath. The courts and counsel must keep in view that the answer of choice should not be expected because the Court or counsel may lead a horse to water but cannot make it drink.

It would also be relevant to add that roles of Judges and lawyers in administration of justice are inevitable however a difference must always be kept in view that an advocate is to assist the Court (Judge) in reaching to a just decision while the Court (Judge) has to ensure just decision which (duty) is not open to an excuse of improper assistance by counsel even. Assistance is always meant to help and it would never include controlling power. The lawyers being officers of the Court for helping it (Court) to reach a just decision are under an obligation rather duty to respect the Court's authority and if they fail to act in a manner consistent with their status, the Court is not debarred from exercising powers necessary to manage and control proceedings before it. Here, it would be advantageous to refer relevant portion of the case of Director of Criminal and Penal Prosecutions v. Robert Jodoin (SC of Canada) (2017 SCMR 1444) wherein it is observed as:-

> "(22) As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public (s.23 of the Professional Code, CQLR, c. C-26). However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:-
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> The court's authority is preventative---to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court."

Thus, we would not hesitate in saying that when roles of both court and lawyer are inevitable for administration of justice hence both the ends are expected rather believed to maintain a balance by respecting each other as well limitations of their respective duties (roles) which shall always fail unless a good atmosphere is assured by both ends. The integrity of a Court and Lawyer is attached with their status unless otherwise proved. The administration of justice should always be given its due weight and the lawyers should avoid such like questions before the Court which may bring its integrity under any cloud. Equally, the Court should avoid passing any remarks against the Lawyer unnecessarily.

5. When confronted with the above, the learned counsel for the applicants very categorically contends that they would not press the contents of the application with regard to learned Presiding Officer and only would seek dismissal with regard to three questions as mentioned in second paragraph of that application. Considering such contention, we, without going into the controversy raised in the application, hereby set aside the impugned order as well expunge the remarks of learned Presiding Officer against learned Counsel for applicants. Since, a right of proper and complete cross-examination is undeniably right of counsel therefore, we allow cross-examination of the witness PW Abdul Khalique with direction that both ends shall ensure good atmosphere and witness would be allowed to answer the legal questions in the manner he wishes because law also provides mechanism for prosecution (party examining witness) to challenge his credibility.

6. Here, it is also contended that there are 86 witnesses, but investigating Officer present, contends that there are only 14 witnesses out of them 6 witnesses have been examined and NAB authorities will examine remaining 8 witnesses i.e. Zia-ul-Islam, Syed Ayob Mohsin, Navid Vohra, Muhammad Shahid, Kamran Abdullah, Ismi Qureshi, Shahzad and Mr. Imtiaz Hussain.

The instant Revision Application is disposed of in the above terms along with listed application.

MH/Z-13/Sindh Revision allowed.

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