

IN THE HIGH COURT OF JAMMU & KASHMIR AND
AT SRINAGAR

Reserved on: 26.12.2022
Pronounced on:30.12.2022

CRM(M) No.158/2022

KHAZIR MOHAMMAD NAIKOO ... PETITIONER(S)

Through: - Mr. Bilal Ahmad Malla, Advocate.

Vs.

UT OF J&K ...RESPONDENT(S)

*Through: - Ms. Insha Haroon, GA-for R1.
Mr. Azim Pandith, Adv.-for R2.*

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged order dated 18.04.2022, passed by learned Additional Sessions Judge, Sopore, whereby application of the petitioner under Section 540 of J&K Cr. P. C has been partly allowed. Vide the impugned order, the learned trial court has allowed the examination of Fayaz Ahmad Naikoo as a prosecution witness whereas it has disallowed the examination of other witnesses, namely, Manzoor Ahmad Naikoo, , Rafiqa, Mst. Fazi and Superintendent of Police, Mr. Abdul Qayoom, whom the petitioner sought to produce before the trial court for their examination.

2) It appears that respondent No.2 is facing trial before the trial court in a case arising out of FIR No.95/2014 for offences under

Section 302, 307, 109 RPC and 7/25 Arms Act registered with Police Station, Sopore. During the trial of the case, the petitioner, who happens to be the complainant and a prosecution witness filed an application before the said Court under Section 540 of J&K Cr. P. C seeking permission to summon and examine five witnesses, namely, Manzoor Ahmad Naikoo, Fayaz Ahmad Naikoo, Rafiqa, Mst. Fazi and Superintendent of Police, Sopore, Mr. Abdul Qayoom. According to the petitioner, all these witnesses are acquainted with the facts of the case as the witnesses viz. Manzoor Ahmad Naikoo, Fayaz Ahmad Naikoo, Rafiqa and Mst. Fazi were present on spot when the occurrence took place whereas Superintendent of Police, Sopore, Mr. Abdul Qayoom had deposed about the occurrence in a press conference.

3) The learned trial court vide the impugned order, allowed the application to the extent of witness, namely, Fayaz Ahmad Naikoo but declined to summon and examine the other witnesses.

4) I have heard learned counsel for the parties and perused the record of the case including the trial court record.

5) Before coming to the merits of the petition and before testing the legality of the impugned order passed by the learned trial court, it would be apt to notice the provision contained in Section 540 of the J&K Criminal Procedure Code. It reads as under:

“540. Power to summon material witness, or examine person 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 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.

6) From a bare perusal of the aforesaid provision, it is clear that there is no limitation on the power of the Court at any stage to which the trial may have reached from summoning and examining any witness. The expressions used in the provision are “any person and “at any stage of any enquiry, trial or other proceedings” which means that the court has unfettered powers to exercise its jurisdiction under Section 540 of J&K Cr. P. C at any stage of the proceedings, even after the conclusion of the trial before passing of the final judgment. The proceedings come to an end only after the judgment is pronounced. The aforesaid provision is in two parts. The first part is discretionary in nature whereas the second part is mandatory in nature. Thus, a Court may, in its discretion, summon and examine any person as a witness who has not been summoned as a witness or recall/re-examine any person already examined and in case evidence of such person appears to the Court essential to the just decision of the case, it is the bounden duty of the Court to exercise its power under this provision. The object underlying Section 540 of Cr. P. C is that there should be no failure of justice due to mistake of either party in bringing the valuable evidence on record.

7) Now coming to the facts of the instant case, the petitioner contends that the witness, namely, Fayaz Ahmad Naikoo, Rafiq and

Mst. Fazi were also present on spot at the time of the occurrence and, as such, recording of their statements is necessary for just decision of the case.

8) If we have a look at the statements of prosecution witnesses PW (1) Khazir Mohammad Naikoo, has stated that at the time of the occurrence, he alongwith deceased Nazir Ahmad, deceased Shabir Ahmad and his son Mohammad Sultan as well as his other brother Mohammad Maqbool were sitting in the kitchen of his house. In the other room of his house, two daughters of his brother Mohammad Maqbool, namely, Mst. Rafiqah and Mst. Shahzada were ironing the clothes whereas his other son Manzoor Ahmad Naikoo was teaching his children on the upper floor. He has further stated that in the meantime, the door of the house was banged and the girls ran towards the kitchen. He has also stated that his brother and the two girls came down for rescuing the victims whereas his son Manzoor Ahmad Naikoo was fired upon by accused Mehraj-ud-din Khan when he tried to come down. On the similar lines is the statement of PW (2)-Mohammad Maqbool Naikoo.

9) The aforementioned two witnesses have deposed about the presence of Manzoor Ahmad Naikoo and Rafiqah, whom the petitioner seeks to produce as witnesses. Therefore, examination of these witnesses is essential to the just decision of the case. The learned trial court has not assigned any reason for declining the application to the extent of Manzoor Ahmad Naikoo and Mst. Rafiqah. So far as the

presence of Mst. Fazi on spot is concerned, the same has not been deposed to by any of the prosecution witnesses. The press conference given by Superintendent of Police, Sopore, Mr. Abdul Qayoom, is based upon the investigation of the case. Therefore, his statement is not necessary for the purpose of ascertaining the truth.

10) It has been contended by learned counsel for respondent No.2 that the petitioner, who is the complainant in the instant case, has no right to file an application or to intermeddle on behalf of the prosecution as it is only the Public Prosecutor who is vested with power to conduct the prosecution.

11) There cannot be any dispute with regard to the proposition of law urged by learned counsel for respondent No.2 but in the instant case, the application, which has been filed by the complainant, has been adopted by the prosecution, meaning thereby that the application has been virtually filed on behalf of the prosecution. Even during the present proceedings, nothing contrary has been urged by the prosecution. Therefore, contention of learned counsel for respondent No.2 does not hold much merit.

12) For what has been discussed hereinabove, the petition is allowed and the impugned order passed by the learned trial court to the extent of declining the prayer regarding summoning of witnesses, namely, Manzoor Ahmad Naikoo and Mst. Rafiqah, is set aside. The learned trial court is directed to summon and examine the above named two witnesses and conclude the trial of the case expeditiously, preferably

within a period of two months from the date a copy of this order is made available to the trial court. The prosecution is directed to extend all necessary cooperation to the trial court in this regard.

13) A copy of this order be sent to the learned trial court for information and compliance.

(Sanjay Dhar)
Judge

Srinagar
30.12.2022
"Bhat Altaf, PS"

<i>Whether the order is speaking:</i>	Yes/No
<i>Whether the order is reportable:</i>	Yes/No

