High Court Division
(Criminal Revisional Jurisdiction)

Criminal Revision No. 1440 of 2016

Md. Abdul Mazed Vatt @ Md. Yousuf Vatt
…Petitioner

Versus

The State
…Opposite party

Mr. A.J. Mohammad Ali, with
Mr. Mohammad Ali, Advocates
…for the petitioner

Mr. Farhad Ahmed, DAG with
Mr. Bashir Ahmed, and
Mr. Kazi Md. Mahmudul Karim (Ratan), AAGs
…for the opposite party

Heard and Judgment on: 20.11.2016

Present:
Mr. Justice A.K.M. Asaduzzaman
And
Mr. Justice Zafar Ahmed

Code of Criminal Procedure, 1898
Section 540:

Section 540 aims to arm a Court with vast discretion to find out the truth in a given case. The entire purpose of this enabling provision is to arrive at the truth or otherwise of the fact under investigation. Thus the section confers a wide discretion to the Court to act as the exigencies of justice require. But the discretion cannot be allowed to be used to fill up the gaps in the evidence of a party who seeks recourse to the use of this provision. Power under the section can be exercised by the Court for judicial consideration only and not to advance the case of prosecution or that of the defence. The power can be exercised to know about something which is not present on the record already due to the failure of either party or due to the reasons beyond the control of any of the parties, or on account of something which has come to light during the trial. The party invoking the jurisdiction of the Court for exercising power in its favour shall satisfy the Court about the existence of lacuna or of the circumstances, which palpably justify such action. Mere quoting the words of section 540 in the application is not enough for exercising such powers. … (Para 17)

Code of Criminal Procedure, 1898
Section 540:

In the name of fair trial, the system cannot be held to ransom. The object of the section 540 for recall is to reserve the power with the Court to prevent any injustice in the conduct of the trial at any stage. The power available with the Court to prevent injustice

has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. … (Para 19)

Judgment

Zafar Ahmed, J:

1. In the instant application, the accused-petitioner namely Md. Abdul Mazed Vatt @ Md. Yousuf Vatt has challenged the legality of the order dated 22.03.2016 passed by the learned Judge of the Druto Bichar Tribunal No. 1, Dhaka in Druto Bichar Tribunal Case No. 29 of 2011 arising out of G.R. No. 798 of 2004 corresponding to Motijheel Police Station Case No. 97(8)04 under sections 120B/ 324/ 326/307/ 302/201/118/ 119/ 212/ 217/ 218/ 330/ 109/ 34 of the Penal Code rejecting the application of the petitioner to re-call prosecution witness nos. 1-61 for cross-examination.

2. In the instant case, the F.I.R. was lodged on 22.08.2004 against unknown accused persons under sections 326/ 324/ 307/ 302/34 of the Penal Code along with sections 3 and 4 of the Explosive Substances Act, 1908. The incident narrated in the F.I.R. is commonly known as '21st August Grenade attack'. In the evening of 21.08.2004, the then opposition party Bangladesh Awami League held a public meeting at Bangabandhu Avenue, Dhaka. The then leader of the opposition and President of Awami League Sheikh Hasina addressed the gathering from an open truck. At around 5.40 p.m. while she got down from the truck after finishing her speech, 7/8 grenades and bombs were hurled aiming at the truck. They exploded causing death of several persons and also caused grievous injuries to others.

3. Police investigated the case and submitted two separate charge sheets, one being no. 500 dated 09.06.2008 under sections 324/326/120B/109/307/ 302/34 of the Penal Code and another being no. 500 (Ka) dated 09.06.2008 under sections 3/4 of the Explosive Substances Act, 1908. The name of the present petitioner did not find place in any of the charge sheets.

4. Eventually, both the cases were transferred to the Druto Bichar Tribunal No. 1, Dhaka for disposal. The case under the Penal Code was registered and numbered as Druto Bichar Tribunal Case No. 03 of 2008. On 29.10.2008, charge was framed against 22 accused persons under sections 324/326/ 307/ 120B/ 109/302/34 of the Penal Code.

5. After examination of 61 prosecution witnesses, the Tribunal, upon an application of the prosecution, on 03.08.2009 passed an order for further investigation of the case. Consequently, police conducted a further investigation into the case and submitted two separate supplementary charge sheets; one being no. 462 dated 02.07.2011 under sections 120B/ 324/ 326/ 307/ 302/ 201/ 118/ 119/ 212/ 217/ 218/ 330/ 109/34 of the Penal Code and another being no. 462(Ka) dated 02.07.2011 under sections 3/4/6 of the Explosive Substances Act, 1908. The supplementary charge sheets were submitted against 30 accused persons including the present petitioner. The case was transferred to Druto Bichar Tribunal No. 1, Dhaka and re-numbered as Druto Bichar Tribunal Case No. 29 of 2011. On 18.03.2012, the Tribunal framed charge against those 30 accused persons under sections 120B/324/326/307/ 302/109/34 of the Penal Code.

6. It has already been noted that after examination of 61 prosecution witnesses, the present petitioner was put into trial being made an accused in the supplementary charge sheet. Thereafter, upon an application of the petitioner and other co-accused persons, PW1 was re-called and cross-examined in 2012. As on 22.03.2016, prosecution examined 223 witnesses. At this stage an application was made before the Tribunal at the behest of the petitioner to re-

call PW Nos. 1-61 for cross-examination. By the impugned order dated 22.03.2016, the said application was rejected.

7. Mr. A.J. Mohammad Ali, the learned Senior Counsel for the petitioner, submits that admittedly PW Nos. 1-61 were examined in the absence of the petitioner and thus, the refusal by the Tribunal to re-call those witnesses violates the mandatory provisions of section 353 of the Code of Criminal Procedure (in short 'Cr.P.C.'). The learned Senior Counsel next submits that the foundation of the prosecution case has been laid by PW nos. 1-61 by giving evidences as to facts and circumstances of the case. Therefore, to arrive at a just decision in respect of the accused-petitioner, the Tribunal ought to had exercised his power under section 540 of the Cr.P.C. by allowing the application to re-call PW Nos. 1-61.

8. Mr. Bashir Ahmed, the learned Assistant Attorney General, on the other hand submits that section 353 of the Cr.P.C. has no manner of application to the case in hand. He further submits that PW Nos. 1-61 did not mention the name of the petitioner. Moreover, PW1 has been cross-examined by the learned Advocate for the petitioner. In the circumstances, the learned Tribunal rightly rejected the application of the petitioner to re-call PW nos. 1-61.

9. We have heard the learned Advocates of both sides and perused the materials on record.

10. The first limb of argument advanced by the learned Senior Counsel for the petitioner relates to the alleged violation of section 353 of the Cr.P.C. Section 353 of the Cr.P.C. provides that,

> 353. Except as otherwise expressly provided, all evidence taken under Chapters XX, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

11. A plain reading of section 353 denotes that evidence must be taken in presence of the accused. The present petitioner was not an accused in the case while PW Nos. 1-61 were examined. He has been made an accused afterwards. In this particular situation, section 353 does not apply to the case of the petitioner.

12. Now, we turn to the second limb of argument advanced on behalf of the accused-petitioner which relates to section 540 of the Cr.P.C. Section 540 is quoted below for ready reference:

> 540. 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.

13. It is the case of the petitioner that in the facts and circumstances of the case, the refusal to exercise the power by the Tribunal vested upon it under section 540 as well as rejection of the petitioner's application are improper and call for interference by this Court.

14. Section 540 is divisible in two parts. There is a dichotomy in the section. While the exercise of the power under the first part of the section is discretionary, the same has been

made mandatory under the second part by using the word ‘shall’, but exercise of such power is permissible only when re-calling a witness appears to the Court essential to arrive at a just decision of the case. The test of ‘just decision’ is not limited to something necessary in the interest of the accused only, it equally applies to the case of the prosecution.

15. The power under section 540 can be exercised both at the behest of the accused as well as the prosecution. If the conditions of the section are satisfied, the Court can *suo motu* exercise the power.

16. The principles, which are relevant for disposal of the instant Rule, and have emerged through judicial interpretation of section 540 by our jurisdiction and also Indian and Pakistani jurisdiction are summarised as follows:

17. Section 540 aims to arm a Court with vast discretion to find out the truth in a given case. The entire purpose of this enabling provision is to arrive at the truth or otherwise of the fact under investigation. Thus the section confers a wide discretion to the Court to act as the exigencies of justice require. But the discretion cannot be allowed to be used to fill up the gaps in the evidence of a party who seeks recourse to the use of this provision. Power under the section can be exercised by the Court for judicial consideration only and not to advance the case of prosecution or that of the defence. The power can be exercised to know about something which is not present on the record already due to the failure of either party or due to the reasons beyond the control of any of the parties, or on account of something which has come to light during the trial. The party invoking the jurisdiction of the Court for exercising power in its favour shall satisfy the Court about the existence of lacuna or of the circumstances, which palpably justify such action. Mere quoting the words of section 540 in the application is not enough for exercising such powers.

18. Reverting to the case in hand, it appears that the present petitioner and others made separate applications for re-calling the witnesses. While rejecting the application of the petitioner and others, the Tribunal observed that, q¡Sa£ Bসামী আব্দুল মাজেদ ভাট পক্ষে বিজ্ঞ কৌসুলি HL¢V clM¡Ù c¡¢Mলক্রমে দরখাস্তে বর্ণিত কারণে রি-কলের আবেদনকৃত সাক্ষী পি.ডাব্লিউ-1-61 ®L ®Sl¡ Ll¡l fh fk¿ ¢f. X¡¢hE-২২৩ এর জেরা মুলতবী রাখার জন্য প্রার্থনা করিয়াছে।... clM¡ÙL¡l£ Bp¡j£ Bëল মাজেদ ভাট ও আব্দুল মালেকের দাখিলী অদ্যকার দরখাস্তে উল্লেখ করা হয় যে, আসামী আব্দুল মাজেদ ভাট ০৮.০৬.২০০৭ ইং তারিখে ও আব্দুল মালেক বিগত ০৩.০১.২০১০ ইং তারিখে গ্রেফতার হয়। তাদের গ্রেফতারের পূর্বে পি. ডাব্লিউ ১-61 এর সাক্ষ্য গ্রহণ করা হয়। আসামীদ্বয়ের পক্ষে উল্লেখিত পি. ডাব্লিউ ১-61 ®L জেরা করা সম্ভব হয় নাই। ন্যায় বিচারের স্বার্থে পি. ডাব্লিউ ১-61 ®L জেরা করা প্রয়োজন।...

আমি নথী পর্যালোচনা করলাম। নথী পর্যালোচনাক্রমে দেখা যায় বিগত ২৮.০৩.২০১২ ইং তারিখে আস¡j£... গণদের নিযুক্ত বিজ্ঞ কৌসুলিগণ ৬টি fbL দরখাস্ত দাখিলক্রমে ইতোপূর্বে গৃহীত সাক্ষী তথা বাদী সহ ৬১ জন সাক্ষীদের তলব পূর্বক জেরা করার প্রার্থনা করে আবেদন করেন। অত্রাদালত বিগত ২৮.০৩.২০১২ ইং তারিখের ৩৭ নম্বর আদেশে উল্লেখ করেছিলেন সম্পুরক চার্জশীটের কিছু সাক্ষীর সাক্ষ্য গ্রহনের পর fËÐÉ তথ্যের উপর ভিত্তি করে কোন আসামীর কোন বিষয়ে কোন সাক্ষীকে জেরা করা £য়োজন সেই বিষয়ে সুনির্দিষ্ট ভাবে উল্লেখের পর আদালত পরবর্তীতে বিষয়টি বিবেচনা করবেন। তবে আদালত ন্যায় বিচারের স্বার্থে উল্লেখিত আদেশে পি. ডাব্লিউ-1 এজাহারকারীকে দরখাস্তকারী আসামীগণ কর্তৃL ®Sl¡ Lরার সুযোগ প্রদান করে দরখাস্ত সমূহ নথীভূক্ত রাখেন। অত্রাদালত প্রসিকিউশন পক্ষের সাক্ষীদের জবানবন্দী জেরা পর্যালোচনা করেছেন।...

আসামী আব্দুল মাজেদ ভাট ও আব্দুল মালেকের বিরুদ্ধে পি. ডাব্লিউ 1-৬১ কোন বক্তব্য রাখেন। উপরন্ত পি. X¡¢hE-১ কে পুনতলব করে জেরা করেছেন আসামী আব্দুল মাজেদ ভাটের নিযুš² ¢h‘ ®L±p¢m ¢hNa 25.04.2012

ইং তারিখে। এহেন অবস্থায় দরখাস্তকারী আসামী আব্দুল মাজেদ ভাট ও আব্দুল মালেকের দাখিলী পি. ডাব্লিউ 1-61 ®L fe amh করে ®Sl¡ Ll¡l f¤Ø¨na বিবেচনা করার কোন কারন ®cM e¡z

19. It appears from the above that PW Nos. 1-61 did not mention the name of the petitioner. PW1 was re-called and cross-examined by the Counsel for the petitioner. Moreover, the examination of the prosecution witnesses is not completed yet. In the circumstances, the view taken by the Tribunal is neither arbitrary nor whimsical and the order, in our view, is just and proper. In the name of fair trial, the system cannot be held to ransom. The object of the section 540 for recall is to reserve the power with the Court to prevent any injustice in the conduct of the trial at any stage. The power available with the Court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. This view is supported by the Indian Supreme Court in the case of ***State (NCT of Delhi) vs. Shiv Kumar Yadav and another*** (2016) 2SCC 402 which has been referred to us by the learned Assistant Attorney General.

20. At this juncture, it would not be out of context to refer an unreported judgment and order dated 08.09.2016 (Criminal Petition for Leave to Appeal Nos. 420-421 of 2016; Begum Khaleda Zia being the petitioner) passed by our Apex Court which has been relied upon by Mr. A.J. Mohammad Ali, the learned Senior Counsel for the petitioner. In that case an application was made on behalf of the petitioner before the trial Court to recall PW32 by pin pointing the questions to be put in for cross-examination. The query no. 3 was "Ae¢¡e¢ f¤ÊÀ শুনানীর সময় বলা হবে". The Apex Court observed, *"On perusal of the queries we notice that the query no. 3 is vague and indefinite and if we allow to cross examine PW32 on this point then it will tantamount to re-cross examination of the witness afresh to fill up the lacuna which cannot be allowed. Accordingly, we reject the proposed cross examination in respect of query no.3... The other queries are trifling matters. Accordingly, the application for recalling the witness is allowed with modification excluding the proposed query to be made in respect of the serial no. 3..."*

21. In the case in hand, the petitioner has simply prayed for recalling PW Nos. 1-61 without pin pointing the queries. The unreported judgment, in our view, does not support the case of the petitioner, rather justifies the order passed by the Tribunal.

22. In view of the facts, circumstances and laws discussed above, we do not find merit in the Rule.

23. In the result, the Rule is discharged. However, there is no order as to cost.