

Crl. Appeal No. 447 of 2025

Present

Mr. Justice Md. Khairul Alam
and
Mr. Justice K.M. Emrul Kayesh

Mr. Md. Mutasim Billah Masum, Advocate

....For the appellant

Ms. Shiuli Khanom, D.A.G

.....For the State

Order date: 12.02.2025

By filing the instant appeal under section 28 of the Nari-O-Shishu Nirjatan Daman Ain, 2000, the accused-appellant has challenged the legality and propriety of the impugned order dated 05.01.2025 passed by the learned judge of the Nari-O-Shishu Nirjatan Daman Tribunal No. 2, Cox's Bazar (shortly, the Tribunal) in Nari-O-Shishu Nirjatan Daman Case No. 702 of 2018 arising out of Kutubdia Police Station Case No. 04 dated 11.06.2014 corresponding to G.R. Case No. 64 of 2014 under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended on 2003) whereby the learned judge of the Tribunal rejected the application as filed by the petitioner under section 540 of the Code of Criminal Procedure, 1898 (shortly, the Code) praying for recalling the prosecution witnesses No. 1-6 for cross-examination.

The brief facts of the case are that the appellant is facing trial for an offence punishable under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000, and in the course of the trial, the prosecution to prove the charge, examined as many as six witnesses, however, the appellant made an application under section 540 of the Code praying for re-calling the P.Ws for cross-examination on the ground that in absence of proper instruction

from the chamber of the learned Advocate of the Trial Court, the appellant failed to give hajira after being obtained the bail, and thereby he failed to cross-examine the witnesses so, the appellant should be allowed to cross-examine the witnesses for proper adjudication of the case. The learned judge of the Tribunal after hearing both parties giving reasons was pleased to reject the said application by the order dated 05.01.2025.

Feeling aggrieved by the said order the appellant preferred this Criminal Appeal.

Mr. Md. Mutasim Billah Masum, the learned Advocate, appearing on behalf of the appellant, inter alia, contends that the impugned order is not sustainable being against the facts and law. He next submits that as per section 540 of the Code, the court has been vested with unbounded power to summon any person as a witness or recall and reexamine any person already examined, as is necessary in the case at hand. He further submits that the prosecution would not have been prejudiced if the application submitted by the appellant before the trial court had been allowed. He next submits that in the absence of proper instruction from the chamber of the learned Advocate of the Trial Court, the appellant failed to turn up by filing a hajira after obtaining the bail, and thereby failed to cross-examine the witnesses so, the appellant should be given an opportunity to cross-examine the witnesses already examined by the prosecution for proper adjudication of the case. Learned Advocate lastly submits that if the prayer for cross-examination of the said witnesses is not allowed after setting aside the impugned order, the appellant will suffer irreparable loss and injury.

Ms. Shiuli Khanom, the learned Deputy Attorney General, appearing on behalf of the State has opposed the contentions advanced by the learned Advocate for the appellant with the averments that the court has the power to summon any person as a witness or recall and reexamine any person already examined as enshrined in section 540 of the Code, but the power has to be exercised keeping in the mind that firstly, the said provision is not mandatory and secondly, the provision does not confer unfettered right to anybody to cross-examine a witness already examined. She further contended that the impugned order of the learned trial court was passed in accordance with the law on the subject. She lastly submits that the appellant is not entitled to cross-examine the witnesses as he was a fugitive from justice at the time when the witnesses were examined.

We have considered the arguments advanced by the learned Advocates for the contending parties and have gone through the record.

We have noted that the prosecution, to prove the charge against the appellant, examined as many as six witnesses, however, the appellant filed an application under section 540 of the Code praying for recalling the prosecution witness for cross-examination on the ground that in absence of proper instruction from the chamber of the learned Advocate of the Trial Court, the appellant failed to cross-examine the witnesses so, the appellant should be given an opportunity to cross-examine the witnesses for proper adjudication of the case, but the application as filed by the appellant was rejected.

Calling and examining the witnesses by any party is called 'examination-in-chief'. The examination of the same witnesses by

the opposite party is called 'cross-examination'. Subsequent examination of the same witnesses by the party calling it is called 're-examination'. The purpose of any trial is to discover the truth to arrive at a correct conclusion and to see that no innocent person is punished. Section 540 of the Code deals with the power of summoning and examining witnesses which is a basic tool to elicit relevant information to achieve the goal of discovering the truth. It would be advantageous to reproduce the section, which reads as under:-

"540. Power to summon material witness or examine persons 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 reexamine 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."

A close reading of the aforementioned provision indicates that the section consists of two parts. The power of the first part is discretionary and the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second part firmly establishes this difference. Under the said power, the court may act in one of 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 word 'shall' in the second part makes it obligatory and compels the Court to act in these three ways or any one of them, if the

evidence of any such person appears to the Court essential to the just decision of the case. In section 540 of the Code, the significant expression that occurs is "at any stage of inquiries or trials or other proceedings under this Code" which suggests that there is no limitation on the power of the Court arising from the stage to which the trial may have reached.

Thus, the object and purpose of the provision of section 540 of the Code is that there may not be a failure of justice on account of the 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 section is a general section that applies to all proceedings, inquiries, and trials under the Code and empowers the trial court to summon any person as a witness or recall and reexamine any person already examined at any stage of such proceedings, trials, or inquiries. However, it is to be borne in mind that though the section confers a very wide power on the Court to summon any person as a witness or recall and reexamine any person already examined, the power should be exercised judiciously.

Any justice system must have fair trial as a cornerstone and unveiling the truth before a verdict is a basic requirement of fair trial. To determine the truth, all the required provisions under the law, including the provision of section 540 of the Code, have to be applied. If needed, without any formal application from the prosecution or accused, the Court can 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.

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In the present case, the appellant contends that in the absence of proper instruction from the chamber of the learned Advocate before the Trial Court, the appellant failed to give hajira after obtaining the bail, and as a result he failed to cross-examine the witnesses which were beyond the control of the appellant so, the appellant ought to have allowed cross-examining the witnesses which are essential to the just decision of the case. The said contention appears to us reasonable, but we are of the view that justice would be best served if, without admitting the appeal, the appeal is disposed of, summarily, with the direction to the trial Court to summon the prosecution witnesses No. 1-6 for cross-examination by the appellant.

In view of the above discussion, this appeal is allowed summarily and the order dated 05.01.2025 passed by the learned judge of the Tribunal in Nari-O-Shishu Nirjatan Daman Case No. 702 of 2018 is set aside. It is further ordered that the learned judge of the Tribunal shall summon the prosecution witnesses No. 1-6 to provide the appellant an opportunity to cross-examine them.

Communicate the order at once.

Kashem, B.O