

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr. R No. 80-M/2023

(Zafar Khan Versus Saddam Hussain and others)

Present:

For petitioner: Mr. Altaf Hussain, Advocate.

For State: Khwaja Salahuddin, A.A.G.

For respondent No.1 Muhammad Mushtaq Khan, Advocate.

Date of hearing: **14.03.2024**

JUDGMENT

MUHAMMAD NAEEM ANWAR. J- Impugned through this Criminal revision u/s 439, Cr.P.C is the order of the learned Additional Sessions Judge-III/Izafi Zilla Qazi, Swat dated 28.09.2023 whereby the learned trial Court appointed local commission for spot inspection along with Tehsildar and Patwari Halqa and directed the complainant to pay Rs. 25000/- to local commission and Rs. 10000/- to Tehsildar.

2. Resume of the facts forming background of this petition are that petitioner Zafar Khan filed a complaint under Section 3 & 7 of the Illegal Dispossession Act, 2005 against respondent Saddam Hussain and 05 other unknown accused in respect of illegal construction on his land falling in Khata No. 294 Khasra No. 1276 of the revenue estate of Malam Jabba. According to petitioner, he along with his sons is residing in District Mardan and visits Swat of and on. He averred that he visited his land on 15.06.2021 at 16:30 hours

along with his sons and driver. He noticed the illegal construction over his land and objected the same, in response of which respondent Saddam Hussain and five unknown accused aimed their weapons at them. The learned trial Court, after conducting inquiry in the matter through local police, summoned the accused and framed formal charge against him to which he did not plead guilty and opted to face the trial. Petitioner produced his evidence as directed by learned trial Court whereafter statement of the accused u/s 342, Cr.P.C. was recorded. After hearing the final arguments, the learned trial Court through order dated 28.09.2023 appointed Mr. Saif-ul-Malook Advocate and Tehsildar concerned as local commission within the meaning of 539-B, Cr.P.C for spot inspection with directions to petitioner to deposit the fee of Rs.25,000/- for Local Commission and Rs.10,000/- for Tehsildar respectively. Patwari Halqa was directed to assist the local Commission with record.

3. Arguments heard and record perused.

4. Petitioner/complainant has averred in his complaint that he is owner in possession of the mentioned land along with his son Adnan Ali Zafar on which the accused respondent has made illegal construction in his absence. The learned trial Court observed in the impugned order that the stance of accused is unambiguous that he has no concern with

Khasra No. 1276 and 1277 and that his cousins are owners in khasra No. 1277 in which they have raised construction which has been attributed by complainant to him. The learned trial Court further observed that the petitioner, as per his statement, had purchased the land through registered deed of 1980 with specification of the boundaries. Learned Judge has held that the spot inspection is the sole option to determine as to whether or not the alleged construction has been made within the boundaries mentioned in the deed relied upon by the complainant. Local commission was directed to visit the spot and may record the statements of adjacent owners and if found construction within the boundaries mentioned in the deed then to report who has made construction. The question for this Court is whether the trial Court could appoint a local commission under section 539-B Criminal Procedure Code 1898 for spot inspection. For convenience, the provision is reproduced below.

539-B. Local inspection. (1) Any Judge or Magistrate may at any stage of any inquiry, trial or other proceeding, after due notice to the parties visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

2) Such memorandum shall form part of the record of the case. If the Public Prosecutor complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost.

The philosophy of empowering the Judge or a Magistrate of local inspection is to enable him to appreciate the evidence given at an inquiry or trial. Plain reading of the above provision shows that the powers of inspection of spot cannot be delegated by trial Court to any other officer even to a subordinate Judicial Officer rather the exercise shall be made by the by Presiding Officer itself. The power of local inspection may be exercised *suo-motu* or on the application of a party. A Judge or a Magistrate at any stage of the trial or inquiry or other proceedings, after due notice to the parties, is vested with the power to visit and inspect any place in which either an offence is alleged to have been committed or any other place having a nexus with the offence committed, which "as per his opinion" is essential to evaluate the evidence in its true perspective. In a case reported as *Tirkah vs. Nanak (AIR 1927 All. 350)*, it was observed that:

"If a Magistrate makes use of knowledge derived from a 'local inspection' without affording the accused an opportunity to cross-examine or to explain the points against him, he acts with material irregularity sufficient to vitiate the trial".

It was also observed that "*a local inspection of the Magistrate is permitted for the purpose of properly appreciating the evidence in this case and cannot take the place of evidence itself*".

5. In the case of **Bazal Ahmed Sowdagar vs. Nur Muhammad (PLD 1963 Dacca 852)** it was ruled by the Court that:

As is clear from the language of the section itself, a local inspection is only permitted for the purpose of properly appreciating the evidence in the case and cannot take the place of the evidence itself. That being so, the impugned order passed by the learned Magistrate is really based on no evidence at all.

Adverting to the question that weather the local commission could be directed to visit the spot? Hon'ble Shariat Court in the case of **Abdul Rashid vs. The State and others (1999 YLR 1298)** ruled that:

In order to ascertain as to whether there is substance in the respective contentions raised by the learned counsel, for the parties, I have myself carefully gone through record of the case. Though while seeking relief, no provision of law was cited in the application, dated 3-12-1997, yet the relief sought for therein, apparently falls under section 539-B, Cr.P.C. It appears that the learned trial Court without bothering to go through the relevant provision and without ascertaining scope thereof had casually passed order, dated 8-12-1997 for inspection of the site through Local Commissioner. Had the learned trial Judge been a little bit vigilant he could have avoided the situation which had arisen subsequently. A glance at section 539-B, Cr.P.C. would reveal that a Judge or Magistrate, at any stage of inquiry, trial or other proceedings, after due notice to the parties may visit and inspect any place which in his opinion, would be necessary for the purpose of properly appreciating the evidence, yet there appears to be no provision

in the Code for appointment of a Commissioner to make a local inspection.

A similar issue arose before the apex Court in the case of **"Asfandyar and another Vs. Kamran and another" (2016 SCMR 2084)**. In the mentioned case, the trial Court appointed a Magistrate under Section 539B, Cr.P.C. to visit the spot for ascertaining the authenticity of the site plan. The Hon'ble Supreme Court took notice of the aforesaid illegality and observed that:

Section 539-B, Cr.P.C. gives power to a Judge or a Magistrate to visit and inspect the place of occurrence or any other place after due notice to the parties, if necessary, in the opinion of the trial Court, for properly appreciating the evidence given during the trial. He was also required to record a memorandum without unnecessary delay regarding his observation at such inspection but this power cannot be delegated by the trial judge to any other subordinate or even a subordinate judicial officer. Under section 539-B, Cr.P.C., the trial Judge had no power to appoint another person to visit the place of occurrence as a Commission because the report submitted by a local Commission cannot be equated with the memorandum mentioned in sub-section (1) of section 539-B, Cr.P.C. The trial Judge can inspect the place of occurrence but alone and he cannot delegate his powers under section 539-B, Cr.P.C. and it is exclusive domain of trial Court under said section. Judicial power has its own sanctity and the same cannot be entrusted to anyone. The act of the trial Court is not curable under section 537, Cr.P.C. as it is not an irregularity rather was an illegality. It is quite astonishing that the learned trial Judge, while

appointing a Commission under section 539-B, Cr.P.C., did not go through the said provision and acted mechanically upon the request of defence. The High Court has rightly observed that such an act of the trial Court was not only prejudicial to the other party but also detrimental to the fairness of the procedure provided under the Code, apart from being without jurisdiction.

6. Main theme of the above-referred dictum is that power under section 539-B, Cr.P.C. could not be a substitute for collection of evidence nor the Court could assume the status of an investigating officer. There is no cavil with the proposition that in criminal cases the burden is always on prosecution to prove the guilt of accused beyond shadow of doubt while in civil matters there is preponderance of evidence according to which a plaintiff must show in a civil lawsuit that his explanation of events is more likely true than the defendant. It is well settled by now that the prosecution is bound to prove its case against the accused beyond any shadow of reasonable doubt, but no such duty is casted upon the accused to prove his innocence. It has also been held by the Superior Courts that the conviction must be based and founded on unimpeachable evidence and certainty of guilt, and any doubt arising in the prosecution case must be resolved in favour of the accused. In the case of Wazir Mohammad vs. The State (1992 SCMR 1134), it was held by the Supreme Court that *"In the criminal trial it is the duty of prosecution to prove its case*

against the accused to the hilt, but no such duty is casted upon the accused, he has only to create doubt in the case of prosecution." The Supreme Court in another case of **Shamoon alias Shamma vs. The State (1995 SCMR 1377)**, held that "The prosecution must prove its case against the accused beyond reasonable doubts irrespective of any plea raised by the accused in his defence. Failure of prosecution to prove the case against accused, entitles him/them to an acquittal. The prosecution cannot fall back on the plea of an accused to prove its case. Before, the case is established against the accused by prosecution, the question of burden of proof on the accused to establish his plea in defence does not arise". Reliance is also placed on the case of **Naveed Asghar and 2 others v. The State (PLD 2021 SC 600)**. Section 539-B, Cr.P.C. envisages that in case spot inspection is deemed necessary, the trial Court shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection. This object cannot be achieved through appointment of a local commission because the report submitted by a local Commission could not be equated with the memorandum mentioned in section 539-B (1), Cr.P.C. The learned trial Court instead of deciding the case in light of the evidence produced by petitioner has committed an irregularity by appointing a local commission for the purpose of collecting evidence,

therefore, the impugned order cannot legally sustain in light of the above-referred dicta.

7. Thus, in light of what has been discussed above, instant petition is allowed, the impugned order is set aside and the learned trial Court is directed to decide the case in light of the evidence brought on record during inquiry and trial.

Announced.
14.03.2024.


JUDGE

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