

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
PESHAWAR
(Judicial Department)

W.P.No.6535-P of 2019.

Date of hearing: 09.11.2021.

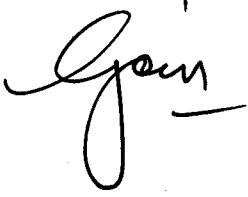
Barrister Syed Mudasser Ameer for the petitioner.

Mr.Riaz Mohmand, ADPG NAB for the respondents.

JUDGMENT

LAL JAN KHATTAK, J.- Through this judgment, we shall also decide the connected writ petition bearing No.7192-P of 2019 titled "Director General National Accountability Bureau Khyber Pakhtunkhwa Vs. Muhammad Saleem Arif etc" as both the petitions have been filed against the same order dated 26.11.2019 of the Judge Accountability Court-III, Peshawar.

2. Brief facts of the case are that pending adjudication of Reference No.3 of 2016 against the petitioners-accused, when prosecution produced PWs 1 to 6, 8 and 9 for recording their evidence, two type objections were raised on their examination by the defence (1) that in the list of witnesses attached with the Reference they



were not cited as witnesses by names rather by their designations and (2) that as their statements under sections 161 Cr.P.C. were not recorded during the investigation by the Investigation Officer, therefore, they could not depose for the prosecution. The learned trial court vide its order dated 26.11.2019 overruled the petitioners' objections but at the same time issued certain directions and guidelines for the NAB authorities for future application which are reproduced hereinbelow:-

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"5.7. The objection under consideration, in the light of foregoing, is disposed off with the following findings/directions for future application;

- i. The referring authority/ officer of NAB and/or the case I.O shall not place any individual, having not been formally examined u/s 161 Cr.P.C., in the light of witnesses only for production/verification of record at trial. It is because these individuals do not become witnesses by the mere fact of having produced certain document, as provided under Article 134 of Qanun-e-Shahadat Order 1984, nor should they be cross examined.

ii. The case I.O, if need be, may procure or seek attendance of such individuals with relevant record at the time he himself appears as witness in the case.

iii. List of prosecution witnesses, drawn and placed on the Reference, shall mention the witnesses by their human family names as well. Identifying a witness by way of merely inserting official designation shall not suffice.

iv. The prosecutor of NAB is obliged to carry out requisite scrutiny of the record to highlight such individuals having been cited as prosecution witnesses so that their names may be excluded from the said list. He should undertake such exercise in respect of other cases pending trial in the court as well.

The defence also remains at liberty to pinpoint any such individual so that incidence of his become witness may be averted timely.

v. Specific permission from the court shall be obtained by the prosecution, in accordance with law, if any one of such individuals is genuinely required for appearance as its witness".

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Both the parties i.e. the petitioners-accused and the NAB as well felt themselves aggrieved of the order dated 26.11.2019 and have assailed the same before this court through their respective petitions.

3. Arguments heard and record gone through.

4. The first of the two objections raised on behalf of the petitioners-accused on the status of PWs 1 to 6, 8 and 9 is whether a witness not cited by name rather by his official designation in the list of witnesses can be called to testify for the prosecution? Our answer to the above question is that it depends upon the facts of each case. If the person sought to be produced as a witness has actively participated in the case investigation by putting his own input therein and has led the case investigation to a particular point then, of course, he shall be listed by his family name in the calendar of witnesses attached with the challan or the Reference, as the case may be, but if he has simply produced certain record prepared earlier by someone else which



relates to the case then in that eventuality there is no need to cite him as a witness by name for the prosecution and it will serve the prosecution purpose if he is shown in the list of witnesses per his designation being custodian of the record he has produced to the Investigative Agency because he is not a witness of the basic events forming part of the offence the accused is charged with. In this respect, we are fortified by the practice in vogue in the civil courts for deciding the civil cases according to which the revenue officials and the staff working in other departments of the Government are cited witnesses only by their official designations for calling from them certain record lying in their custody necessary for decision of the case and they are never cited in the list of witnesses by their family names as personally they have not participated in the case.

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5. Though consequences for production and exhibition of record in the civil cases are quite different than the consequences of the criminal cases as if the exhibited document is proved to be true in the latter situation

same will then entail punishment for the accused which is not the situation in civil matters but it is worth to add that an indictment in a criminal case is not proved merely through the exhibition and production of a document by an official in whose custody it lies unless its contents are proved to be true. Meaning thereby that it is not the document which plays its role in a case but the linchpin to decide the case is always the legal and intrinsic value and worth of the contents of the document which are adjudged by the courts of law according to the Qanun-e-Shahadat Order, 1984. So, it is not necessary that the official, who has been called to produce a particular document in his custody, be cited in the calendar of witnesses by his family name and it would be sufficed if he is listed for the prosecution as its witness through his designation. Besides, custodians of the record come and go. They never have permanent postings at particular stations. If it is agreed with learned counsel for the petitioners-accused that the witness of record can be examined only if he is cited in the calendar of witnesses by his family name then it will have a very

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damaging consequences for the prosecution because on retirement the official normally leaves for his native place or he may opt for another city. He may also return to his Creator and if so happens before recording his evidence then in that situation the document brought on the record by him will be thrown into winds merely on the ground that its producer is not before the court for its tendering. Therefore, in our considered view, it is not necessary for the prosecution to cite the producer of an official document by name in the calendar of witnesses.

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6. Now we come to the second objection raised by learned counsel for the petitioners-accused that as statements of witnesses No.1 to 6, 8 and 9 under sections 161 Cr.P.C. were not recorded, therefore, they cannot appear for the prosecution to testify. On this objection too, we are not in agreement with the learned counsel because according to section 161 Cr.P.C., the Investigation Officer of a case during the investigation shall record the statement of a person who is well aware and acquainted with the facts of the case and in case he is

not aware of the facts of the case and only has produced certain official record which lies in his custody and is relevant one then there is no need to record either his 161 or 164 Cr.P.C. statement for his being not a witness to the ocular account of a case.

7. Notwithstanding the above, National Accountability Ordinance of 1999 is a special law and as per its section 19 (b), the Chairman NAB or any officer of the Bureau during the course of an inquiry or investigation may require any person to produce or deliver any document which is useful and relevant to the inquiry or investigation. So, according to section ibid, the Investigation Officer of a case initiated under the NAB Ordinance, may collect any document from any person if same has relevancy with the case and it is not necessary that statement under section 161 Cr.P.C. of producer of the document be recorded. It will not be out of worth to mention here that as per section 19 (c) of the Ordinance, the Investigation Officer may examine a person acquainted with the facts and circumstances of the case. Here a clear

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distinction has been drawn by the legislature in the two different situations i.e. the situation under section 19 (b) and the one under section 19 (c). In the first situation, there is no need to record statement of a person if he has any relevant official document only for its delivery to the Investigation Officer and in the second situation the Investigation Officer may record 161 or 164 Cr.P.C. statements of the person who is found acquainted with the facts of the case. Only in the latter situation, recording of statement under section 161 Cr.P.C. is necessary while in the former situation no legal obligation lies on the Investigation Officer to resort to the legal provision under section 161 Cr.P.C.

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8. For what has been discussed above, we found no merit in the writ petition bearing No. 6535-P/2019, hence, same is hereby dismissed. So far as the petition filed by NAB is concerned, as the learned trial court has not been mandated to issue any guidelines to NAB authorities to deal with any future situation, therefore, writ petition No.7192-P of 2019 is allowed and the

impugned findings/directions are hereby
declared illegal, without any lawful authority
and of no legal effect.


JUDGE


JUDGE

Announced.

14.12.2021

Sadiq Shah CS (DB) (Hon'ble Mr. Justice Lal Jan Khattak & Hon'ble Justice Musarrat Hilali)