

**2007 S C M R 1631**

**[Supreme Court of Pakistan]**

**Present: Rana Bhagwandas, Actg. C.J., Tassaduq Hussain Jillani and Ghulam Rabbani, JJ**

**SHAHBAZ MASIH----Appellant**

**Versus**

**THE STATE----Respondent**

Criminal Appeal No.279 of 2002, decided on 7th May, 2007.

(On appeal against the judgment, dated 25-10-2001 passed by the Lahore High Court, Lahore, in Criminal Appeal No.81/J of 1999 and Murder Reference No.294/T of 1999).

**(a) Criminal Procedure Code (V of 1898)---**

---S. 540---Additional evidence---Powers of court---Object and scope---Court enjoys full powers to summon and examine any person as witness at any stage of trial and it is imperative for the court within the terms of S.540, Cr.P.C. to summon and examine a person when evidence of such person appears to the court essential to come to just decision of the case---Court can also examine any person in attendance though not called as witness---Underlying object always is to reach the truth.

**(b) Criminal Procedure Code (V of 1898)---**

---Ss. 265-C & 265-F---Criminal trial---Supply of copies---Summoning of witnesses---Recording of prosecution evidence---Object. and scope---Object of S. 265-F, Cr.P.C. appears to be that where accused does not plead guilty or he is not convicted on his plea, the court has to issue summons to those persons whom public prosecutor or complainant considers to be acquainted with the facts of the case and able to give evidence for prosecution, so that their evidence is taken by the court---Nothing is provided in S.265-F, Cr. P. C. that it should be at the discretion of public prosecutor or the complainant, as the case may be, to name any such person whose Statement under S.161 Cr.P.C. or 164 Cr.P.C. has not been recorded and whose name does not appear in calendar of witnesses, had the position been so, the very purpose of S.265-C, Cr.P.C. would have been frustrated---Obligatory supply of documents mentioned therein well in advance, apparently was with no purpose other than to enable the accused to know the prosecution case and meet the charges if framed otherwise it would lapse into unconscionable consequences.

Muhammad Hussain v. The State 1990 PCr.LJ 1102 and Waris Khan and others v. The State and others 2004 MLD 1982 distinguished.

**(c) Penal Code (XLV of 1860)---**

---S. 302---Criminal Procedure Code (V of 1898), S.265-F---Murder trial---Injured witness, evidence of---Witness not named in calendar of witnesses---Plea raised by accused was that evidence of injured witness could not have been recorded as neither copy of statement under S.161 Cr.P.C. of the witness was supplied to accused nor name of witness was shown in calendar of witnesses---Validity---Injured persons having been named in F.I.R. which fact, appeared in evidence as well, such witness was examined by court as a witness during the course of trial, therefore, no violation of law had taken place---Defence did not raise any objection at the time of recording testimony of that witness rather he was subjected to lengthy cross-examination---Accused, held, was not prejudiced in his defence.

**(d) Penal Code (XLV of 1860)---**

---Ss. 302, 324, 353, 392 & 34---Anti-Terrorism Act (XXVII of 1997), S.7---Qanun-e-Shahadat (10 of 1984), Art.129(g)---Reappraisal of evidence---Benefit of doubt---Material contradictions in evidence---Withholding of evidence---Presumption---During police encounter at night time,

one police official died while the other was injured---Accused was convicted by Special Court and sentenced to death---Conviction and sentence, of the accused was maintained by High Court--Validity---Huge number of police personnel was available at the place of incident, who were armed with a variety of weapons but none of them was stated to have returned fires of assailants--Such conduct of police party was against normal human behaviour, moreso, of well trained men conscious of the fact that two of them were gunned down by assailants taking away their service rifles---Assailants were not visible in darkness and there was remote possibility for prosecution witness to have identified- the assailants, muchless disclosing their names to his companions---One private person was present at the spot at the time of incident, who was the only person other than police party available at material time---By not examining the private person as witness, presumption was that prosecution was fearful that the witness would not have supported its case, if examined---Prosecution failed to .prove the case against accused beyond any shadow of doubt---Conviction and sentence awarded by High Court as well by Trial Court was set aside---Appeal was allowed.

Javed Aziz Sindhu, Advocate Supreme Court for Appellant.

Ch. Munir Sadiq, Deputy Prosecutor-General, Punjab for the State.