

[Supreme Court of Pakistan]

Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Ayesha A. Malik, JJ**The STATE---Petitioner****Versus****Chaudhry MUHAMMAD USMAN---Respondent**

Criminal Petition No. 112 of 2020, decided on 15th June, 2023.

(Against the judgment of the Islamabad High Court, dated 15.01.2020 passed in Criminal Revision No.84 of 2019)

Criminal Procedure Code (V of 1898)---

----Ss. 94 & 265-C---Summons to produce documents---Powers of Trial Court under section 94, Cr.P.C.---
 Scope--- Even before the commencement of the trial, an accused can apply to the Trial Court to exercise its power under section 94, Cr.P.C., and direct the prosecution or the complainant to produce a document, in its or his possession or power, which is not covered under section 265-C, Cr.P.C., if the production of that document is necessary or desirable for the purposes of the inquiry or trial---Even before entering on his defence, an accused can make an application for the production of a document under section 94, Cr.P.C. despite the provisions of section 265-F(7), Cr.P.C., which provides a similar opportunity to him at the stage of defence evidence.

A bare reading of section 94, Cr.P.C. shows that there is no limitation as to the stage of the inquiry or trial when a court can, in the exercise of its power under this Section, make an order for the production of any document. The only condition for the exercise of the power under section 94 is that the production of the document must be necessary or desirable for the purposes of the inquiry or trial before the court. The word 'whenever' in section 94 clearly indicates that a court can exercise the power of requiring the production of any document under this section at any stage of the inquiry or trial.

Further, section 94 does not restrict as to whose point of view, whether of the prosecution or the accused, the required document may be necessary or desirable for the purposes of the inquiry or trial. A court being a neutral arbiter does not act for either the prosecution or the accused but for the dispensation of justice. And for the dispensation of justice, the court is to ascertain the truth in respect of the matter under inquiry or trial before it. The production of a document that would facilitate the court in this regard is to be considered necessary or desirable for the purposes of the inquiry or trial. It is immaterial whether the production of such a document would support the prosecution case or the defence of the accused. Therefore, any party may at any stage of the inquiry or trial apply to the court, under section 94, for the production of a document and is entitled to its production if it satisfies the court that the production of that document is necessary or desirable for the purposes of such inquiry or trial.

Muhammad Rahim v. Emperor AIR 1935 Sindh 13 ref.

There may be cases in which owing to dishonesty, negligence or any other reason, the prosecution does not produce certain documents with the police report, which may establish that there is no probability of the accused being convicted of any offence or the charge against the accused is groundless, and the production thereof is thus necessary or desirable for the purposes of the inquiry or trial. But because such documents are not filed with the police report, the same will not be supplied to the accused under section 265-C, Cr.P.C. In such cases, it would not be just and fair to the accused to reject his application for the production of such documents and to let him undergo the ordeal of protracted trial proceedings and wait for the stage of defence evidence. Similarly, the documents which are not produced by the prosecution with the police report but are relevant to the matter under the inquiry or trial and to use them for his defence, the accused is legally required to confront the prosecution witnesses with those documents in their cross-examination. In such a circumstance also, it would be in the interest of justice that the application of the accused made under section 94 for their production is allowed. Otherwise, it would incur unnecessary delay, expense and inconvenience to recall the prosecution witnesses at the stage of defence evidence only for the purpose of confronting them with such documents.

The provision of subsection (7) of section 265-F, Cr.P.C., under which the accused, after entering on his defence, can apply to the trial court to issue any process for compelling the production of any document, does not in any way affect the power of the trial court under section 94(1), Cr.P.C. The provisions of section 94(1) have not been made subordinate by the legislature by the use of the expression, 'Subject to the other provisions of this Code', nor have the provisions of section 265-F(7) been given any overriding effect by using therein the expression, 'Notwithstanding anything contained in other provisions of this Code'. Section 265-F(7), therefore, neither controls nor limits the power of a court under section 94(1). In essence, the provisions of these two Sections differ from each other in their extent and scope. They are not opposed to each other. Section 94(1) affords both the parties to an inquiry or trial (not to the accused alone) the opportunity of causing the production of any document at any stage of such inquiry or trial, with the condition that the party applying for it must satisfy the court that the production of the required document is necessary or desirable for the purposes of the inquiry or trial. Section 265-F(7), on the other hand, only gives the accused another similar opportunity at the stage of his defence subject to a lesser condition, which is that his application should not be for the purpose of vexation or delay or defeating the ends of justice.

Tanveer Iqbal, Advocate Supreme Court, Raja Muhammad Shahfqat Abbasi, D.A.G., Hafiz Bilal Bin Akbar, Deputy Director, DRAP and Ms. Sidra Fatima Hashmi, Assistant Director, FIA for Petitioner.

Khawaja Muhammad Farooq Mehta, Senior Advocate Supreme Court for Respondent.

Date of hearing: 15th June, 2023.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---The petitioner seeks leave to appeal against a judgment of the Islamabad High Court, dated 15.01.2020, (impugned judgment) whereby the High Court has accepted the revision petition of the respondent filed against an order of the trial court, dated 14.05.2019. The trial court had, by its order, dismissed an application of the respondent filed under section 265-C read with section 94 of the Code of Criminal Procedure, 1898 (Cr.P.C.) for the production of certain documents. By the impugned judgment, the High Court has set aside the order of the trial court and allowed the said application of the respondent.

2. Briefly, the facts necessary to be stated for the decision of the present petition are that the respondent, along with other accused persons, was facing trial for certain offences punishable under the Drug Regulatory Authority of Pakistan Act, 2012 and the Drugs Act, 1976. The trial court delivered to the accused persons, including the respondent, the copies of the documents relied upon by the prosecution as mandated by section 265-C, Cr.P.C., and adjourned the hearing for framing of the charge. However, before the charge was framed, the respondent made an application under section 265-C read with section 94 of the Cr.P.C., for directing the Drug Regulatory Authority of Pakistan, on whose complaint the criminal proceedings had been initiated, to produce 23 documents mentioned in the application. The respondent asserted in the application that the Drug Regulatory Authority of Pakistan Act and the Drugs Act provided a legal mechanism for launching any prosecution thereunder, and that the said documents were necessary for the purpose of forming an opinion by the court as to whether the prosecution was lawful under the said Acts.

3. By its order dated 14.05.2019, the trial court dismissed the application of the respondent with the observation that in compliance with section 265-C, Cr.P.C., the copies of the documents relied upon by the prosecution had been supplied to all the accused persons and that it was the prosecution which had to lead its evidence at first and thereafter the accused persons would be provided an opportunity to adduce or summon the evidence required for their defence. The respondent challenged the order of the trial court in the High Court invoking its revisional jurisdiction. The High Court observed that the trial court had not given any valid justification for withholding the production of the documents mentioned in the application, which were necessary to enable the respondent to ask the relevant questions to the prosecution witnesses in their cross-examination. The High Court, thus, allowed the revision petition of the respondent and accepted his application for the production of the documents by the impugned judgment. Hence, the State, i.e., the prosecution, filed the present petition.

4. We have heard the learned counsel for the parties and examined the record of the case.

5. The questions of law that have fallen for our consideration are: (i) whether before the commencement of the trial, an accused can apply to the trial court to exercise its power under section 94, Cr.P.C., and direct the prosecution or the complainant to produce any document, in its or his possession or power, which is not covered under section 265-C, Cr.P.C. and (ii) whether before entering on his defence, an accused can make an application for the production of any document under section 94 despite the provisions of section 265-F(7), Cr.P.C., which provides a similar opportunity to him at the stage of defence evidence.

6. Before embarking upon the discussion on these questions, we find it appropriate to reproduce the relevant provisions of sections 94(1) and 265-F(7), Cr.P.C., for the convenience of reference:

94. Summons to produce document or other thing: (1) Whenever any Court, or, any officer incharge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the summons or order:

265-F. Evidence for prosecution:

(7) If the accused, or any one of several accused, after entering on his defence, applies to the Court to issue any process for compelling the attendance of any witness for examination or the production of any document or other thing, the Court shall issue such process unless it considers that the application is made for the purpose of vexation or delay or defeating the ends of justice, such ground shall be recorded by the Court in writing.

A bare reading of section 94 shows that there is no limitation as to the stage of the inquiry or trial when a court can, in the exercise of its power under this Section, make an order for the production of any document. The only condition for the exercise of the power under section 94 is that the production of the document must be necessary or desirable for the purposes of the inquiry or trial before the court. The word 'whenever' in section 94 clearly indicates that a court can exercise the power of requiring the production of any document under this Section at any stage of the inquiry or trial.

7. Further, section 94 does not restrict as to whose point of view, whether of the prosecution or the accused, the required document may be necessary or desirable for the purposes of the inquiry or trial. A court being a neutral arbiter does not act for either the prosecution or the accused but for the dispensation of justice. And for the dispensation of justice, the court is to ascertain the truth in respect of the matter under inquiry or trial before it. The production of a document that would facilitate the court in this regard is to be considered necessary or desirable for the purposes of the inquiry or trial. It is immaterial whether the production of such a document would support the prosecution case or the defence of the accused. Therefore, any party may at any stage of the inquiry or trial apply to the court, under section 94, for the production of a document and is entitled to its production if it satisfies the court that the production of that document is necessary or desirable for the purposes of such inquiry or trial.

8. There may be cases in which owing to dishonesty, negligence or any other reason, the prosecution does not produce certain documents with the police report, which may establish that there is no probability of the accused being convicted of any offence or the charge against the accused is groundless, and the production thereof is thus necessary or desirable for the purposes of the inquiry or trial. But because such documents are not filed with the police report, the same will not be supplied to the accused under section 265-C, Cr.P.C. In such cases, it would not be just and fair to the accused to reject his application for the production of such documents and to let him undergo the ordeal of protracted trial proceedings and wait for the stage of defence evidence. Similarly, the documents which are not produced by the prosecution with the police report but are relevant to the matter under the inquiry or trial and to use them for his defence, the accused is legally required to confront the prosecution witnesses with those documents in their cross-examination. In such a circumstance also, it would be in the interest of justice that the application of the accused made under section 94 for their production is allowed. Otherwise, it would incur unnecessary delay, expense and inconvenience to

recall the prosecution witnesses at the stage of defence evidence only for the purpose of confronting them with such documents.

9. The provision of subsection (7) of section 265-F, Cr.P.C., under which the accused, after entering on his defence, can apply to the trial court to issue any process for compelling the production of any document, does not in any way affect the power of the trial court under section 94(1), Cr.P.C. The provisions of section 94(1) have not been made subordinate by the legislature by the use of the expression, 'Subject to the other provisions of this Code', nor have the provisions of section 265-F(7) been given any overriding effect by using therein the expression, 'Notwithstanding anything contained in other provisions of this Code'. Section 265-F(7), therefore, neither controls nor limits the power of a court under section 94(1). In essence, the provisions of these two Sections differ from each other in their extent and scope. They are not opposed to each other. Section 94(1) affords both the parties to an inquiry or trial (not to the accused alone) the opportunity of causing the production of any document at any stage of such inquiry or trial, with the condition that the party applying for it must satisfy the court that the production of the required document is necessary or desirable for the purposes of the inquiry or trial. Section 265-F(7), on the other hand, only gives the accused another similar opportunity at the stage of his defence subject to a lesser condition, which is that his application should not be for the purpose of vexation or delay or defeating the ends of justice.

10. We thus answer both the questions in affirmative and conclude on question (i) that even before the commencement of the trial, an accused can apply to the trial court to exercise its power under section 94, Cr.P.C., and direct the prosecution or the complainant to produce a document, in its or his possession or power, which is not covered under section 265-C, Cr.P.C., if the production of that document is necessary or desirable for the purposes of the inquiry or trial and on question (ii) that even before entering on his defence, an accused can make an application for the production of a document under section 94 despite the provisions of section 265-F(7), Cr.P.C., which provides a similar opportunity to him at the stage of defence evidence.

11. When we examine the order of the trial court and the judgment of the High Court in the light of the above legal position, we find that the trial court erred in principle in dismissing the application of the respondent without correctly understanding the scope of the provisions of section 94, Cr.P.C., whereas the High Court though correctly understood the scope of these provisions but fell into an error in applying the same to the facts of the case by allowing the application of the respondent without first determining how the production of each of the 23 documents mentioned in the application was necessary or desirable for the purposes of the inquiry or trial. The respondent has asserted in the application that the Drug Regulatory Authority of Pakistan Act and the Drugs Act provide a legal mechanism for launching any prosecution thereunder, and that the said documents are necessary for the purpose of forming an opinion by the court as to whether the prosecution was launched lawfully under the said Acts. The order allowing or dismissing the application of the respondent, either in part or in toto, must address these assertions of the respondent in respect of each of the documents sought to be produced with reference to the relevant provisions of the said Acts. As this has not been done in the impugned judgment, the same is not legally sustainable. Further, we find that after explaining the scope of the provisions of section 94, Cr.P.C. and pointing out the error in the approach of the trial court, the High Court should have directed the trial court to decide the application of the respondent afresh instead of proceeding to decide the same by itself as there was no finding of the trial court whether or not the production of the documents, or any of them, sought to be produced is necessary or desirable for the purposes of the inquiry or trial.

12. For the above reasons, we convert this petition into an appeal and partly allow the same. The impugned judgment of the High Court is partly maintained and partly set aside: the part whereby it set aside the order of the trial court is maintained while the part allowing the application of the respondent is set aside, and the trial court is directed to decide the application of the respondent afresh.