

Supreme Court: New Section 540 Witness Does Not Automatically Require De Novo Trial

The Supreme Court held that a witness may be summoned under Section 540 Cr.P.C. without a prior Section 161 statement, while disclosure, preparation and effective cross-examination must protect the accused.

Supreme Court of Pakistan judgment analysis
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Case: Criminal Petition No. 569-L of 2026

Court: Supreme Court of Pakistan | Heard 12 August 2026

Bench: Justice Muhammad Hashim Khan Kakar, Justice Salahuddin Panhwar and Justice Ishtiaq Ibrahim

Result: Leave refused; de novo trial denied; trial directed to proceed

The ruling in one sentence

The Supreme Court of Pakistan has held that a criminal court may summon an essential witness under Section 540 of the Code of Criminal Procedure, 1898 even if that person was not named in the original witness list and no statement under Section 161 Cr.P.C. was recorded, provided the accused receives all existing disclosable material, reasonable time to prepare and a full opportunity for cross-examination.

In *Shahzad Ahmad v The State*, Criminal Petition No. 569-L of 2026, a three-member bench refused leave and rejected the accused's demand that the murder trial be restarted merely because two additional witnesses were summoned after three prosecution witnesses had already testified. The judgment was approved for reporting.

How the dispute arose

FIR No. 794 of 2024 was registered on 22 May 2024 at Police Station Sarai Mughal, District Kasur, for offences under Sections 302, 324, 337-F(v), 201 and 34 of the Pakistan Penal Code. Shahzad Ahmad was arrested on 4 June 2024.

After submission of the challan, the accused received the copies required by Section 265-C Cr.P.C. on 7 October 2024. Charge was framed on 21 October 2024. A co-accused, Waseem Abbas, was later arrested, a supplementary challan followed, and the charge was amended on 1 March 2025. The prosecution then examined three witnesses.

On 13 September 2025, the prosecution applied under Section 540 Cr.P.C. to summon Muhammad Imran and Yasmeen Bibi. The trial court allowed the application on 20 September 2025. The accused sought the statements and other material relating to them and asked for the trial to recommence after disclosure.

The Additional Sessions Judge, Pattoki, dismissed that request on 29 October 2025. The Lahore High Court maintained the order on 15 April 2026 in Criminal Revision No. 71628 of 2025. The accused then approached the Supreme Court.

The two questions before the Court

The first question was whether the adversarial character of a Pakistani criminal trial prevents the judge from taking an active role in obtaining evidence required for a just decision.

The second was how Section 540 operates with Section 265-C when a person is called during trial, particularly where no Section 161 statement exists, and whether such summoning necessarily requires a de novo trial.

The accused argued that Muhammad Imran was absent from the calendar of witnesses and had no Section 161 statement. Yasmeen Bibi was said not to have been named in the FIR or original witness list. According to the

defence, their introduction impaired the fair-trial guarantee under Article 10-A of the Constitution.

The State answered that Section 540 confers an independent power to summon a material witness at any stage, the absence of a Section 161 statement is not an absolute bar, the available material had later been supplied, and no irremediable prejudice had been shown.

A criminal court is not a silent spectator

The Supreme Court reaffirmed that Pakistan's criminal process is ordinarily adversarial. The prosecution brings the charge and carries the legal burden of proving guilt. The accused enjoys the presumption of innocence, must know the case against him, may cross-examine prosecution witnesses and may lead defence evidence.

But the adversarial structure does not erase the truth-seeking powers expressly granted to the court. Section 94 Cr.P.C. permits the court to compel production of a document or thing necessary or desirable for an inquiry or trial. Article 161 of the Qanun-e-Shahadat Order, 1984 authorises the judge to ask questions and order production of material to discover or obtain proper proof of relevant facts, subject to its legal limits.

Section 540 permits the court at any stage to summon a person as a witness, examine a person present, or recall and re-examine someone already examined. These provisions are not decorative: they empower, and in defined circumstances require, a judge to obtain evidence needed for justice.

The Court nevertheless drew a firm boundary. A judge is neither a silent spectator nor a substitute prosecutor. The prosecution retains the burden of proof, and the court must remain impartial.

The discretionary and mandatory parts of Section 540

Section 540 contains two distinct parts. Under the first, the court may summon, examine, recall or re-examine a person. This is a discretionary power that must be exercised judicially.

Under the second, the court shall act where the evidence appears essential to the just decision of the case. Once the judge reaches that conclusion after applying a judicial mind, the duty becomes mandatory. The words essential and just decision are safeguards against indiscriminate use.

Relying on *Muhammad Azam v Muhammad Iqbal* (PLD 1984 SC 95) and *The State v Muhammad Yaqoob* (2001 SCMR 308), the Court held that evidence essential to justice cannot be excluded merely because it fills an omission. Carelessness, delay or failure by a party does not by itself exhaust the court's power.

Ansar Mehmood v Abdul Khaliq (2011 SCMR 713) confirms that the words at any stage mean what they say. The power may be exercised even after prosecution evidence closes, the accused is examined under Section 342 and the case reaches final arguments, if the evidence remains essential to a just decision.

Filling an omission is not always curing a lacuna

The judgment distinguishes an oversight from an inherent weakness in a party's case. A lacuna is a fundamental deficiency. Not every failure to produce relevant material is such a lacuna.

The court cannot use Section 540 simply to improve the prosecution case or rescue evidence that remains legally deficient. But evidence does not become inadmissible merely because its production may repair an omission. The controlling questions are relevance, necessity, fairness and judicial neutrality.

This approach preserves both sides of the rule. Technical objections cannot suppress evidence indispensable to a lawful decision, while the judge cannot become a second prosecutor or defence counsel.

Section 265-C requires disclosure of material that exists

Section 265-C protects the accused from unfair surprise by requiring timely supply of the police report, FIR, statements recorded under Sections 161 and 164, inspection notes and other statutory material before trial.

The Supreme Court held that the provision requires disclosure of statements and documents that were actually recorded or prepared and are legally disclosable. It does not create a fictional Section 161 statement for every person who may later become competent or necessary to testify.

This is the judgment's central practical distinction. If no Section 161 statement of Muhammad Imran was ever recorded, the court cannot order supply of a document that does not exist. Its absence may affect the weight of his evidence, the fairness of the procedure and the assessment of any demonstrated prejudice, but it does not extinguish jurisdiction under Section 540.

The Court relied on *Sajid Mehmood v The State* (2022 SCMR 1882), which held that neither Section 265-F nor

Section 540 confines examination to witnesses whose Section 161 statements were recorded during investigation.

A missing name in the FIR or witness list is not an absolute bar

Muhammad Imran's absence from the witness calendar and Yasmeen Bibi's absence from the FIR or original witness list required careful scrutiny, but did not create jurisdictional prohibitions.

Those circumstances remain relevant to whether the proposed evidence is genuinely necessary, whether the application is bona fide and whether the accused will face unfair surprise. If the evidence is not essential, Section 540 must not be used merely to strengthen the prosecution. If it is essential, omission from the original list cannot by itself defeat the statutory power.

The Supreme Court also noted that the accused did not challenge the trial court's order dated 20 September 2025 that actually summoned the two witnesses. His later application concerned disclosure and recommencement. The live controversy therefore concerned the procedural consequences of summoning, rather than the basic existence of Section 540 jurisdiction.

Fair trial requires safeguards, not automatic exclusion

Article 10-A requires that the accused know and answer the case, receive legally disclosable material and enjoy effective cross-examination. The truth-seeking function cannot be pursued by sacrificing these guarantees.

At the same time, fair trial does not require suppression of otherwise essential evidence merely because its need becomes apparent after proceedings begin. The two interests must be reconciled through practical safeguards.

Before examining the newly summoned witnesses, the trial court must:

- confirm that all existing material required by law has been supplied;
- allow reasonable preparation time where required;
- ensure full and effective cross-examination; and
- address any specific prejudice shown during evidence through an appropriate lawful order.

Why a de novo trial was refused

The Supreme Court rejected the proposition that every mid-trial use of Section 540 automatically requires the case to restart. Such a rule would contradict the phrase at any stage and routinely erase proceedings that were lawfully conducted.

The remedy must correspond to actual prejudice. Relying on *Muhammad Jee v Muhammad Ibrahim Shauq* (1988 SCMR 1691), the Court treated retrial as an exceptional curative step. Relevant considerations include the nature of the error, risk of miscarriage of justice, extent of prejudice and the consequences and expense of starting again.

Here, the accused did not show that the evidence already recorded was unlawful, that the trial court lacked jurisdiction, that cross-examination of earlier witnesses had been denied, or that any disadvantage from the two new witnesses could not be cured through disclosure, preparation and cross-examination.

The seven principles stated by the Supreme Court

The judgment consolidated the law into seven propositions:

- Pakistan's criminal trial is adversarial, but Sections 94 and 540 Cr.P.C. and Article 161 QSO confer limited inquisitorial powers on the court.
- The first part of Section 540 is discretionary; the second becomes mandatory when evidence is essential to a just decision.
- Absence from the witness calendar or absence of a prior Section 161 statement is not, by itself, an absolute bar.
- Section 265-C requires supply of existing disclosable material; it cannot require production of a statement never recorded.
- Section 540 cannot be used merely to strengthen a party's case or cure an inherent evidentiary deficiency.

- Additional evidence requires protection against unfair surprise through disclosure, preparation and cross-examination.
- The remedy depends upon actual prejudice; a de novo trial is not an automatic consequence of every mid-trial exercise of Section 540.

The final order

The Supreme Court refused leave and dismissed the petition. It maintained the Lahore High Court judgment dated 15 April 2026 and the Additional Sessions Judge's order dated 29 October 2025. The trial court was directed to continue the trial expeditiously and strictly according to law.

The supplied judgment records the hearing on 12 August 2026 and leaves the precise announcement day blank in its September 2026 announcement line. It is marked approved for reporting.

Practical effect for criminal trials

Defence counsel should identify actual prejudice rather than demand an automatic retrial. The relevant questions are what new material exists, when it was disclosed, how much preparation is reasonably required, whether earlier cross-examination is affected and what targeted remedy can cure the disadvantage.

Prosecutors seeking an additional witness should explain why the evidence is essential, why the person was not included earlier, what material exists, and how timely disclosure will protect the accused.

Trial courts should record their own satisfaction on necessity, maintain neutrality and tailor safeguards to the proven risk. The judgment authorises active judicial truth-seeking, but rejects unprincipled intervention designed to repair a party's inherently weak case.

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