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Peshawar High Court

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Table of Contents

JUDGMENTS OF SUPREME COURT OF PAKISTAN

P L D 2020 Supreme Court 201
Present: Manzoor Ahmad Malik, Saradar Tariq Masood and Syed Mansoor Ali Shah, JJ
ALI AHMAD and another --- Appellant/Petitioner Versus the STATE and others --- Respondents
SYED MANSOOR ALI SHAH, J.

What is the Status of a statement under section 342, Cr.P.C for Conviction and what are the Principles Governing Sec 342 CrPc.

17. The words "taken into consideration" appearing in section 342(3), Cr.P.C are very wide. The statement of an accused recorded under section 342, Cr.P.C, has no less probative value than any other "matter" which may be taken into consideration against him within the contemplation of the definition of "proved" given in Article 2(4) of the QSO[21] (previously section 3 of the Evidence Act, 1872), which states that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Muhammad Munir, J., in Rahim Bakhsh[22], regarding statement under section 342, Cr.P.C. wrote: "I know of no law which says that an admission made by an accused person in or out of court unless it is vitiated by any such circumstances as are mentioned in the Indian Evidence Act, cannot be considered to be a matter which the court may take into consideration in coming to its conclusion." The circumstances which can vitiate an admission or confession, referred to by the learned Judge, may be of inducement, threat or promise under which a particular statement is made. A statement under section 342, Cr.P.C. having been made by an accused before court in presence of his counsel has little chance of suffering from such circumstances.[23] However, an admission or confession which is improbable or unbelievable, or is not consistent with the overall facts and circumstances of a case may not have any probative value and thus cannot be relied upon by the court for reaching to a conclusion.[24]

Conviction on the basis of the statement of the accused under section 342, Cr.P.C.

18. In Abdur Rehman, [25] Amin, [26] Mehrban,[27] Maqsood,[28] and Sattar, [29] the High Court disbelieved the prosecution evidence but convicted the accused persons for the offence punishable under section 302(c), P.P.C. or the erstwhile section 304-I, P.P.C. on the basis of the statements under section 342, Cr.P.C., of having committed the offences on account of grave and sudden provocation, without requiring them to prove their statements. This Court maintained the conviction recorded by the High Court, in those cases.

19. Hanif[30] and Ali Muhammad[31] may also be referred in this regard. In Hanif, this Court maintained the judgment of the trial court whereby the accused had been convicted for offence under section 302(c), P.P.C., after rejection of the prosecution evidence, on the basis of his plea of having committed the murder under the circumstances of grave and sudden provocation. In Ali Muhammad, this Court reversed the acquittal judgment of the High Court

and convicted the accused under section 302(c), P.P.C., despite rejection of the prosecution evidence, on the basis of version of the accused taken in statement under section 342, Cr.P.C. The version of the accused, in that case, was that he saw the deceased and his wife lying on the same bed in an objectionable position, and acted under sting of grave and sudden provocation. In Shamoon,[32] this Court while relying upon the plea of the accused narrated in statement under section 342, Cr.P.C, of having acted under grave and sudden provocation converted his sentence from section 302, P.P.C. to 304-II, P.P.C., as both the Courts below had disbelieved the ocular testimony of the prosecution witnesses. This Court, in Gul Nissa,[33] made an explicit and unequivocal statement of law that "accused can be convicted on his own statement even if the prosecution evidence is rejected".

Principles governing section 342, Cr.P.C.

20. The principles surrounding section 342, Cr.P.C have evolved for over a period of the last about two hundred years beginning with the case of Sarah Jones[34] (decided in 1827) and taking shape in Balmakund[35] as follows:

> "...where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible."

These principles have been refined and rearticulated by our own courts.

A. When prosecution fails to prove its case - the statement of the accused, under section 342 Cr.P.C. is to be considered in its entirety and accepted as a fact.

Sir Abdul Rashid J., the then Chief Justice of Federal Court of Pakistan observed in Rahim Bakhsh[36] that if the conviction of an accused is to be based solely on his statement in Court then that statement should be taken into consideration in its entirety. In Mehrban[37] S.A. Rahman J. speaking for a five-member bench of this Court held that "it was not open to the learned Judges, after having rejected the prosecution evidence as unreliable, to dissect the accused's statement and accept it in part and reject the rest of it." In Najib Raza[38] this Court agreed with Mahajan J. who observed that "it is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him.[39]" In Faiz,[40] another five member Bench of this Court held that where the conviction is based entirely on the statement of the accused then the statement should be taken into consideration in its entirety as the reply or the narration of the accused "is not tested or completed either by cross-examining him or by putting him further questions. The state of his [accused's] mind is not prodded. His bare statement about it exists on record, for whatever its worth. In the absence of any other evidence, it has to be accepted as a fact"[41], and cannot be rejected by adopting a process of appraisement and analysis.[42] In Sultan,[43] Abdul Qadeer Chaudhry, J. spoke for the Court to hold that when the prosecution fails to setup a case against the accused and the entire evidence of the prosecution has been discarded and disbelieved the statement of the accused under section

342, Cr.P.C has to be taken into consideration in toto (in its entirety) and the Court cannot select a portion out of the statement that goes against the accused.

B. The inculpatory part of the statement of the accused cannot be used or construed to fill up gaps in the case of the prosecution as the prosecution has to prove the case on its own evidence.

P L D 2020 Supreme Court 401

Present: Umar Ata Bandial, Mazhar Alam Khan Miankhel and Munib Akhtar, JJ

Mrs. ZAKIA HUSSAIN and another---Appellants Versus Syed FAROOQ HUSSAIN---Respondent

MAZHAR ALAM KHAN MIANKHEL, J.-

The question before the court was whether a witness not fully conversant with the facts and circumstances of the case would be a competent witness within the meaning of Rules 1 and 2 of Order, III C.P.C?

7. The courts of civil judicature for their procedure are regulated by the Code of Civil Procedure (Act V 1908) (Code) but at the same time it does not affect any special or local law or any special jurisdiction or power conferred or any special forum of procedure prescribed by any other law. It provides the general procedure for trial and proceedings of the civil cases besides the inherent jurisdiction of the civil courts. Appearance of parties during the trial/proceedings in person or through recognized agent/attorney is provided in Order III of the Code. So, appearance of attorney on behalf of a party is not alien to the civil judicature. An attorney is competent to act on behalf of the party in the light of specific authority given to him. The question before us requiring determination is whether a witness not fully conversant with the facts and circumstances of the case would be a competent witness within the meaning of Rules 1 and 2 of Order, III C.P.C. The case law of the country so far developed regarding this question is based on the facts and circumstances of each case. Initially, it is the party itself to depose about the first hand and direct evidence of material facts of the transaction or the dispute and its attorney having no such information cannot be termed as a competent witness within the meaning of Order III, Rules 1 and 2 of C.P.C. Yes! The attorney can step-in as a witness if he possesses the first hand and direct information of the material facts of the case or the party had acted through the attorney from the very inception till the accrual of cause of action. Deposition of such an attorney under the law would be as good as that of the principal itself. Non-appearance of the party as a witness in such a situation would not be fatal. If facts and circumstances of the case reflect that a party intentionally did not appear before the court to depose in person just to avoid the test of cross examination or with an intention to suppress some material facts from the court, then it will be open for the court to presume adversely against said party as provided in Article 129(g) of Qanun-e-Shahadat Order 1984 (QSO, 1984).

P L D 2020 Supreme Court 334

Present: Qazi Faez Isa and Sardar Tariq Masood, JJ

MUHAMMAD BASHIR---Petitioner Versus RUKHSAR and others---Respondents

Qazi Faez Isa, J.

Concept of Joint Cross Examination whether permitted by law?

5. The Constitution of the Islamic Republic of Pakistan prescribes important safeguards against depriving a person of his "life or liberty"[1] and with regard to arrest and detention[2], which includes "the right to consult and be defended by a legal practitioner of his choice"[3]. The Constitution also mandates a "fair trial and due process"[4]. A person arrested for an offence (1) must be informed of the grounds of his arrest; (2) must be permitted to consult with and be defended by a lawyer; (3) must be provided with the information of the offence he is charged for; (4) must be provided with an opportunity to cross-examine witnesses who depose against him; (5) must be given an opportunity to explain the circumstances disclosed in evidence against him; and (6) must also be provided an opportunity to produce evidence in his defense. These are also necessary ingredients to ensure the fairness of a trial.

6. Chapter X of the Qanun-e-Shahadat Order, 1984 sets out the methodology for the examination of witnesses. Examination of witness by the party calling him is the "examination-in-chief"[5] which is followed by "cross-examination"[6] by the defense and then such witness' "re-examination"[7] may take place. The right to cross-examine is the right of "the adverse party"[8] which right he/she may forego but one which he/she cannot be deprived of. Since the accused Rukhsar was not granted an opportunity to cross-examine the petitioner who had deposed against him he submitted an application under section 540 of the Code to summon the petitioner-witness and to permit him to cross-examine the petitioner-witness. The application allowed by the Additional Sessions Judge and his decision was upheld by the High Court. Rukhsar was deprived of a valuable right to cross-examine the petitioner-witness therefore allowing him to be summoned and cross-examined fully accorded with the law. A criminal trial of an accused must "be conducted with utmost fairness[9]. The Fundamental Right of fair trial which the Constitution guarantees is violated if an accused is deprived of the opportunity to cross-examine a witness deposing against him.

7. The learned counsel stresses that the petitioner-witness had already been subjected to joint cross-examination. However, this concept of joint cross-examination is one which is not recognized by the law. We may observe that courts and counsel should not resort to methodologies which are not sanctioned by the law as in doing so they may inadvertently create unnecessary complications. They must also realize that resort to novel concepts may undermine the prosecution case and benefit the accused.

8. We take this opportunity to state that, in cases where there is more than one accused, the presiding officer while recording the cross-examination of a witness should mention the name of the accused and/or his lawyer who is cross-examining the witness.

P L D 2020 Supreme Court 293

Present: Faisal Arab and Qazi Muhammad Amin Ahmed, JJ

GHULAM FAROOQ CHANNA---Petitioner Versus SPECIAL JUDGE ACE (CENRAL-I) KARACHI and another---Respondents

QAZI MUHAMMAD AMIN AHMED, J.

Grant of bail prior to arrest, concept Elaborated

4. Grant of bail to an accused required in a cognizable and non-bail offence prior to his arrest is an extraordinary judicial intervention in an ongoing or imminent investigative process. It clogs the very mechanics of State authority to investigate and prosecute violations of law designated as crimes. To prevent arrest of an accused where it is so required by law is a measure with far reaching consequences that may include loss or disappearance of evidence. The Statute does not contemplate such a remedy and it was judicially advented way back in the year 1949 in the case of Hidayat Ullah Khan v. The Crown (PLD 1949 Lahore 21) with purposes sacrosanct and noble, essentially to provide judicial refuge to the innocent and the vulnerable from the rigors of abuse of process of law; to protect human dignity and honour from the humiliation of arrest intended for designs sinister and oblique. The remedy oriented in equity cannot be invoked in every run of the mill criminal case, prima facie supported by material and evidence, constituting a non-bailable/cognizable offence, warranting arrest, an inherent attribute of the dynamics of Criminal Justice System with a deterrent impact; it is certainly not a substitute for post arrest bail.

JUDGMENTS OF PESHAWAR HIGH COURT, PESHAWAR

P L D 2020 Peshawar 105

Before Waqar Ahmad Seth, C.J. and Muhammad Nasir Mahfooz, J

ALI AZIM AFRIDI, ADVOCATE HIGH COURT, PESHAWAR---Petitioner Versus FEDERATION OF PAKISTAN through Secretary, Ministry of Law and Justice, Islamabad and 3 others---Respondents

MUHAMMAD NASIR MAHFOOZ, J

West Pakistan land Revenue Act law provides for executive to be considerably part of judiciary which by a long chalk is undurable, impinging upon Article 175(3) of the Constitution of Islamic Republic of Pakistan and Independence of Judiciary.

Court held that

14. Though special courts and tribunals are formed under Article 212 of the Constitution but they have to exercise powers within their allotted spheres and could not intrude beyond that. Similar powers are exercised by a Rent Controller when only relationship of landlord and tenant exists but he as the Judicial Officer presides over the hearing and in case of denial, he can frame a preliminary issue in this regard. A Family Court is also presided over by a Judicial Officer in cases of matrimonial dispute between spouses interse. Every special court is presided over by a Judge but not in the ibid Act. It is a remnant of olden colonial times.

This is not the sole reason, we note that in view of the term implied in subsection (1) or he may himself proceed to determine the question as though he were such a court and in subsection (5)(b) of section 141 if the revenue officer continues to proceed with the trial despite dispute of title his order is to be treated as order of Civil Judge and a decree of civil court, made appealable before the District Judge. By inserting such clause legislature was certainly not oblivious that the jurisdiction of revenue officer ceases to exist but fell short of applying the trichotomy of powers principle from the initial stage when question of title was

raised in written reply. Just by their own figment of imagination the revenue hierarchy exercise their authority without following due process of law. While enacting this provision legislature is not oblivious that the powers of revenue hierarchy ceases from that point forward but still it authorizes a revenue officer to deliver judgment as a civil court by adopting procedure of the Civil Procedure Code. The stage from where jurisdiction of revenue officer ends is where the jurisdiction of the civil court begins. If the law allows him to continue to exercise such jurisdiction it overlaps and it is not a step-in aid of justice as it empowers an officer of the executive branch to exercise powers of judicial organ of the State.

15. Parting with the discussion a fortiori we hold and declare as under: -

I. All those provisions wherein revenue officer functions as a revenue court are declared to be against Article 175 of the constitution, thus non est in law and so be amended accordingly within reasonable time.

II. All the applications for partition of agricultural property only, filed under section 135 of the Act now pending with the revenue officers wherein co-shareship is admitted by parties shall continue to be heard and tried by the revenue officers concerned.

III. In any such application for partition before Assistant Collector, wherein written reply is filed and a dispute of title is raised it shall be entrusted to the court of concerned District Judge who shall further entrust the same to the court of Civil Judges for trial in accordance with the Code of Civil Procedure as if these are civil suits.

IV. Where any such dispute of title is involved as raised in the written reply but not adverted to by revenue officer and now subject-matter of appeal before collector, it shall be entrusted to concerned District Judge who shall either hear it himself or be entrusted to any other Additional District judge and shall be treated as an appeal.

V. Similarly, any first revision before Additional Commissioners and second revisions before the board of revenue wherein dispute of title is involved and not attended to by revenue officers shall be entrusted to the High Court where it shall be heard and decided treating it as writ petition.

VI. All cases that falls within the purview of sections 27, 80, 81, 82, 141 and 172 as discussed above shall stand transferred to the court of Civil Judge and judicial magistrates concerned and shall be entrusted to the Court of learned District judge. In the circumstances when such new occasion arises resort is to be had to section 195 of Criminal Procedure Code before a criminal court.

We allow the instant petition in the above terms. Respondents are expected to implement the judgment according to the terms mentioned above.

MH/171/P

Petition allowed.

2020 Y L R 734 [Peshawar]

Before Qaiser Rashid Khan and Qalandar Ali Khan, JJ

SEEMA KHAN---Petitioner Versus VICE-CHANCELLOR, KHYBER MEDICAL UNIVERSITY, PESHAWAR and 4 others---Respondents

QAISER RASHID KHAN, J

Re-arguing a petition/case can be made ground for review of order/ Judgment?

8. Accordingly, given the limited scope of review, re-arguing the petition afresh is an exercise which cannot be undertaken in review jurisdiction at this stage. While reviewing the judgment, only clerical or arithmetical error or any mistake floating on the face of record can be corrected. In exercise of review jurisdiction, the court cannot sit as a court of appeal against its own judgment and consequently form a different opinion as is sought by the petitioner in the instant case. As such no such circumstances exist which could warrant the review of the judgment. Reliance placed on Lt.-Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty, Government of Pakistan, Karachi and others (PLD 1962 Supreme Court 335) wherein the review jurisdiction of the court has been exhaustively discussed.

9. In view of the above discussion, this review petition being without any substance stands dismissed. MH/316/P

Petition dismissed.

Muhammad Israr son of Siraj alias Wali Muhammad, R/o Marghuz, District Swabi VERSUS The State etc

Date of hearing: 11.03.2020

JUDGMENT:

ROOH-UL-AMIN KHAN, J:-

Evidence / Hearing through virtual Courts

Except Pakistan and Australia, in all the developed countries of the world no endeavor is made to provide a specific provision for recording evidence via video link or modern electronic devices. The International Law provides certain provisions, according to which a witness not able to appear before the court, is allowed to record his statement through video link. Instance of the International Criminal Court (ICC) may be quoted here, which allows a witness, who is absent from the courtroom, to record testimony through video link subject to submission of application with reason of inability to personally appear before the court and the rules and regulations are to be followed.

2020 Y L R 1917 [Peshawar]

Before Waqar Ahmad Seth, C.J. and Ijaz Anwar, J

STATE through Regional Director ANF, Peshawar and others --- Appellants Versus JAMSHED and others---Respondents

Ijaz Anwar, J

Writing of consolidated Judgments is not a material irregularity which can vitiate the whole trial

7. The crux of our above discussion and conclusion is that by writing consolidated judgment by the trial court in two separate trials was not a material irregularity which could have vitiated the whole trial, as such, the same can be cured by re-writing two separate judgments in the said trials because the trials were independently held.

8. Consequently, this and the connected Appeal No. 368-P/2015 are allowed. The order of acquittal of respondents is set aside and the matter

is remanded back to the learned trial court with direction to re-write separate judgments of each trial in accordance with law after hearing the parties while relying upon the same charge sheets, evidence of the parties in each trial and on the same statement of accused under section 342 Cr.P.C. We further direct that respondents shall remain on bai land they shall submit surety bond to the tune of Rs.200,000/- each, with two sureties before the trial Court.

9. The Writ Petition No. 2414-P of 2015 having become infructuous stands dismissed accordingly.

JK/133/P

Case remanded.

2020 C L C 1648

[Peshawar (Abbottabad Bench)]

Before Shakeel Ahmad, J

NOYESER KHAN JADOON----Petitioner Versus KHAN AFSAR JADOON----Respondent

Civil Revision No.82-A of 2018, decided on 24th February, 2020

Second suit not barred if permission sought for filinga fresh but court could not consider it at the time of order.

Plaintiff got recorded statement that his grievance had been redressed by the revenue hierarchy and he prayed for withdrawal of suit with permission to file a fresh one. Trial Court dismissed suit as withdrawn. Revenue officer having brought changes in the revenue record. After getting knowledge of the said rectification in the revenue record the petitioner moved an application before the Revenue officer for reversal of previous position. Application was accepted, the respondent brought a fresh suit. Petitioner moved application for rejection of plaint on the ground that earlier suit had been dismissed as withdrawn unconditionally and fresh suit on same cause of action was not maintainable, Trial Court rejected the plaint but Appellate Court remanded the matter for decision afresh after recording of evidence

Where suit was withdrawn seeking permission to file a fresh one and Court had simply dismissed the same as withdrawn without adverting to the statement or contents of application and without recording any reason then it should be presumed that permission for filing afresh suit had been granted. Fresh cause of action had been accrued to the plaintiff on reversal of previous position in the revenue record. Second suit was competent, in circumstances. Present suit was maintainable and it was not hit by O.XXIII, R.1 of C.P.C. Trial Court had rejected the plaint without appreciating the law applicable to the case. Appellate Court had rightly set aside the findings recorded by the Trial Court and remanded the case for decision on merits.

Revision dismissed.