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Before Tassaduq Hussain Jilani, Khawaja Muhammad Sharif and Asif Saeed Khan Khosa, JJ

MUHAMMAD RIAZ and another---Petitioners

Versus

THE STATE---Respondent

Criminal Revision No.363 of 2002, heard on 12th November, 2002.

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

---Ss. 161 & 265-C(1)(c)---Penal Code (XLV of 1860), Ss.302/324/34--Supply of statements and documents to the accused---Accused is entitled, as of right, to get copies of the statements of all witnesses recorded under S.161, Cr. P. C. in terms of S.265-C(1)(c), Cr. P. C. irrespective of the fact whether they have been cited as witnesses in the calendar attached to the challan or not, seven days before the commencement of the trial--- "Witness" as used in S.265-C, Cr.P.C.---Concept---Principles---[Ahmad Hassan and others v. The State 2002 PCr.LJ 629 overruled].

Report of Law Reforms Commission made in years 1967-70; Nasrullah v. The State 1980 PCr.LJ 5 and PLD 1992 Lah. 336 ref.

PLD 1966 (W.P.) BJ 30; Nasrullah v. The State 1980 PCr.LJ 5; 1985 PCr.LJ 388; PLD 1979 SC 53; PLD 1987 Lah. 245; 1999 PCr.LJ 46; 1998 PCr.LJ 1795; 1998 PCr.LJ 508; AIR 1957 Mad. 508 and AIR 1960 Bom. 476 mentioned.

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

---S. 265-C(1)(c)---Qanun-e-Shahadat (10 of 1984), Arts. 3 & 71--"Witness" appearing in S.265-C(1)(c), Cr. P.C. has not been used to convey restricted meanings---Term "person" occurring in the said section covers all witnesses who fall in the category of Arts-3 & 71, Qanun-e-Shahadat, 1984---Investigation Officer, during the course of investigation examines all such persons who, from the information given to them or otherwise, appear to be acquainted with the circumstances of the case and if the examination of such persons discloses that they had direct or indirect knowledge of the fact regarding which they are being examined, they are to be treated as "witnesses" because their testimony is operational---Tetra "person", therefore, covers all those persons who are acquainted with the circumstances of the case including all persons who had been examined and were not acquainted with the circumstances of the case, that is, whose testimony is not operational---Persons who are acquainted with the circumstances of the case are to be termed as "witnesses" ---Only such persons whose testimony is operational are to be termed as witnesses and not those whom the prosecution calls for evidence.

(c) Criminal Procedure Code (V of 1898)---

---Ss. 161 & 172---Qanun-e-Shahadat (10 of 1984), Arts. 15, 49, 155, 156 & 157---Examination of witnesses by police---Diary of proceedings in investigation---Relevancy of public record made in performance of duty---Nature---Refreshing of memory---Procedure---Provision of S.161, Cr. P.C. is independent of S.172, Cr.P.C.---Only the case diaries are meant to be treated as "privileged" and shall not be made accessible to the accused---Court, in terms of Art. 15, Qanun-e-Shahadat, 1984 can force the Investigating Officer to look into the case diaries. to answer correctly the question put to him in cross-examination---Case diaries can also be used by the Court to trace out the various stages of investigation--Statements recorded under S.161, Cr.P.C. are not privileged even if recorded in the body of the case diaries--Such statements are public documents within meaning of Art.49, Qanun-e-Shahadat, 1984 and are per se relevant under the said Article---Privilege stated in S.172, Cr.P.C. is not of absolute nature and provisions of Qanun-e-Shahadat, 1984 are independent of the Criminal Procedure Code, 1898--Principles.

Section 161 of the Cr.P.C. is independent of its section 172. Section 161 requires an Investigating Officer to record statement of a person who is acquainted with the facts of the case separately and section 172 which is independent, relates to maintenance of case diaries as record of the various stages through which the investigation has passed. It is only the case diaries which are meant to be treated as "privileged" and shall not be made accessible to the accused. It means clearly that the statements recorded under section 161 of the Cr.P.C. are not privileged even if recorded in the body of the case diaries. Those are public documents within the meaning of Article 49 of the Qanun-e-Shahadat, 1984 and are per se relevant under its Article 49. Moreover, the privilege stated in section 172 of the Cr.P.C. is not of absolute nature. The provisions of the Qanun-e-Shahadat, 1984 are independent of the Cr.P.C. An Investigating Officer has to refresh his memory by looking into the case diaries at the time he makes a statement in Court. Article 155 of the Qanun-e-Shahadat, 1984 provides that a witness, may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards as the Court considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid, if when he read it, he knew it to be correct. Whenever a witness may refresh his memory by reference to any document he may with the permission of the Court, refer to a copy of such document provided the Court is satisfied that there is sufficient reason for the non-production of the original. An expert may refresh his memory by reference to professional treatises. Article 156 of the Qanun-e-Shahadat, 1984 is to the effect that a witness may also testify to facts mentioned in any such document as is mentioned in Article 155, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document. Article 157 of the Qanun-e-Shahadat, 1984 is to the effect that any writing referred to under the provisions of the two last preceding Articles must be produced and shown to the adverse party, if he requires it. Such party may if he pleases, cross-examine the witness thereupon. It is abundantly clear that the privilege referred to in section 172 of the Cr.P.C. is not of absolute nature and allows the accused to have access to the case diaries to contradict cross-examination through the Investigating Officer. Investigating Officer is bound to look into the case diaries recorded by him during the investigation of a case. In terms of Article 15 of the Qanun-e-Shahadat, 1984 the Court can force him to look into case diaries to answer correctly the questions put to him in cross-examination: The case diaries can be used by the Court to trace out the various stages of investigation.

PLD 1992 Lah. 336 ref.

(d) Criminal Procedure Code (V of 1898)----

---S. 161---Qanun-e-Shahadat (10 of 1984), Art.3---Examination of witnesses by Police---Attestation of witness---Admissibility or inadmissibility of evidence and impeachment of credit of a witness--Procedure---Provisions of Qanun-e-Shahadat, 1984 are independent of the provisions of Criminal Procedure Code, 1898---Admissibility or inadmissibility of evidence, production of documents, impeaching the credit of the witnesses, the order in which the witnesses are to be produced, the manner of cross-examination etc. are the circumstances governed by the Qanun-e-Shahadat, 1984---Credit of a witness can be impeached by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit---Accused can, if he is in possession of statements of all witnesses, examined by the police under S.161, Cr.P.C., select persons from amongst them to appear and depose to discredit the witnesses examined by the prosecution; similarly the situation may arise where one accused examines a witness in his defence affecting his co-accused.

(e) Criminal Procedure Code (V of 1898)----

---Ss. 162 & 265-C(1)(c)---Evidence Act (I of 1872), 5.145---Qanun-e-Shahadat (10 of 1984), Art.140---Use of statement to police in evidence--Supply of copies of statements of witnesses and documents to the accused--Provision of S.265-C(1)(c), Cr.P.C. has impliedly repealed S.162, Cr.P.C. to the extent that provisions of making an application by the accused to get copies of statements of witnesses recorded under S.161, Cr. P.C. at a time when the witnesses have been called by the prosecution to make statements in Court and to make use of such copies only to contradict the witnesses within the meaning of S.145 of the Evidence Act, 1872 (Art. 140 of the Qanun-e-Shahadat, 1984)---Provision of S.162, Cr.P.C. having become ineffective and

inoperative, no more existed on the statute book, now only the provision of S.265-C(1)(c), Cr.P.C. controls the supply of copies of statements to the accused---Principles.

Section 265-C(1)(c) of the Cr.P.C. has impliedly repealed its section 162 to the extent that provisions of making an application by the accused to get copies of statements of witnesses recorded under section 161. of the Cr.P.C. at a time when the witnesses have been called by the prosecution to make statements in Court and to make use of such copies only to contradict the witnesses within the meaning of section 145 of the Evidence Act, is unrebuttable. No corresponding amendment has been made in section 162 of the Cr.P.C. so as to bring it in conformity with the provisions of its section 265-C(1)(c). Since the Evidence Act has been repealed by the same Ordinance, that is, Law Reforms Ordinance, 1972 by which section 265-C(1)(c) was introduced in the Cr.P.C. the provisions of section 162 of the Cr.P.C., so far as they are inconsistent with the provisions of section 265-C(1)(c), become ineffective and inoperative and are no more existing on the statute, book. It is now only section 265-C(1)(c), Cr. P.C. which controls the supply of copies of statements to the accused.

Mian Muzaffar Ahmad for Petitioners.

M. Bilal Khan, Addl. A.-G. with Tanvir Ahmad Hanjra for the State.

M. Akram Qureshi for the Complainant.

Kh. Sultan Ahmad and S.M. Latif Khosa as Amicus Curiae.

Dates of hearing: 18th, 24th, 25th, 30th September; 7th October and 12th November, 2002.