

JUDGEMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH

(Judicial Department)

Cr.R No. 62-B of 2017.

Kaleemullah

VERSUS

The State Etc:

JUDGEMENT

Date of hearing: **12.4.2018.**

Appellant-petitioner: **By Muhammad Yaqoob Khan**

Marwat, Advocate.

Respondent: **State By Shahid Hameed Qureshi, Addl: AG,**

Others By Hujjat Ullah Khan Marwat, Advocate

SHAKEEL AHMAD, J.--- This Criminal Revision petition has arisen out of the order dated 28.11.2017, passed by the learned Additional Sessions Judge-I, Lakki Marwat, whereby request of the accused / petitioner to confront the PW-12 Mutabar Khan SI with the case diaries was declined.

2. The facts in brief are that petitioner is facing trial in case FIR No. 64 dated 24.02.2015 registered U/Ss. 302/34 PPC at

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PS Tajori District Lakki Marwat. After commencement of trial prosecution produced 11 witnesses. The controversy, which is the subject matter of the present revision petition, arose during cross-examination of PW-12 Mutabar Khan who is Investigating Officer of the case, when the following questions were put to him.

"Q-3 Did you write all the proceedings conducted by you during investigation in case diary No.1?

Ans I have written all the proceedings conducted by me in case diary NO.1.

Q-4 Did you write the name of PW Saif-ur-Rehan ASI, Anwar Kamal constable & MHC Asmatullah of PS Tajori in your case diary No.1 about his proceeding?

Ans Yes."

3. After receiving the answer of question No.4, the learned counsel representing the petitioner intended to confront the I.O / PW-12 from the case diaries, which was seriously objected by the learned counsel appearing on behalf of the complainant / respondent and declined by the learned trial Court.

4. Before resolving the controversy involved in the revision petition, it will be advantageous to reproduce Section. 172 of the Cr.P.C and articles NO. 140, 155, 157 of Qanun-e-Shahdat Order, 1984, as under:-

172. Diary of proceedings in investigation. (1) Every police-officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court, may send for the police-diaries of a case under inquiry or trial in such Court, and may use such diaries not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the police-officer who made them, to refresh his memory, if the Court uses them for the purpose of contradicting such police-officer the provisions of the Evidence Act, 1872 section 161 section 145 as the case may be, shall apply.

140. Cross-examination as to previous statements to writing. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, writing - or reduced into writing, and relevant to matters in question without such writing being shown to him, or being proved; but, if it is intended to contract him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used or the purpose of contradicting him.

155. Refreshing memory. (1) A witness may, while under examination, fresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

(2) 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.

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(3) 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 be satisfied that there is sufficient reason for the non-production of the original.

(4) An expert may refresh his memory be reference to professional treatises. ,

157. Right of adverse party as to writing used to refresh memory. Any writing referred to under the provisions of the two last preceding Articles muff, be produced and shown to the adverse party if he requires it, such party, may, if he pleases, cross-examine the witness thereupon.

5. Section. 172 Cr.P.C makes it mandatory to investigating officer to enter day to day proceedings of the investigation in a special diary, setting forth the time at which the information reached him, the time at which he begun and closed his investigation, the place or the places visited by him and statement of the circumstances ascertained through his investigation. Such special diary may be used at the trial or inquiry not as evidence in the case, but to aid the Court in such inquiry or trial. The object of Section 192(2) Cr.P.C is to enable the Court to direct police officer who is giving his evidence to refresh his memory from notes made by him in course of his investigation of the case or to question him as to contradiction

which may appear between statement so recorded and evidence he was giving in Court. Court may also use diaries in course of trial for purpose of clearing up obscurities in evidence or bringing out relevant facts which Court thought are material in interest of fair trial. According to this section, the diary can be used for suggestion of questions to witness when the Court considers that there is reasonable ground for so doing or to suggest means for further clarity by legal evidence, points that need clarification.

6. I.O not only occupies a key role in the criminal justice system, but, also the most important witness, he is a person who collects evidence and places the same before the Court. In this behalf reference may be made to the case reported as ***Abdul Sultan V The State through AG NWFP (2008 SCMR 684)***

7. As discussed above, a police officer / I.O of the case can refresh his memory before deposing before the Court and then Article-140 of Qanun-e-Shahdat Order, 1984, confers a right upon the accused to cross-examine the witness as to his previous statement made by him in writing or reduced into writing.

8. In the instant case, Mutabar Khan I.O, was under cross-examination as PW-12 before the learned trial Court, there is nothing on the record to show that he was examined without consultation of police file, he himself admitted in the cross-examination that “I have gone through the police file, and refresh my memory and by now the police file is closed before me”.

9. It is now settled that once the I.O consulted the police file he is amenable to cross-examination. If the diary is used by the police officer to refresh his memory, the Provision of Article - 140 (Section. 161 of the Evidence Act) will apply and the adverse party must be shown the entry and he may cross-examine the witnesses on it, because the alternate object is to arrive at just and proper decision of the case, even other-wise, there is no prohibition against the Court permitting in its discretion, the defence counsel to see the portion of the police diary, which the Court considers fit in the interest of justice he should see and use in the defence of the case. In this behalf reliance may be made on the case reported in *AIR 1953 Mad 179*.

10. In view of the observations made hereinabove, this revision petition is disposed off with direction to the learned trial Court to allow the learned defence counsel to cross-examine the PW-12 (I.O) of the case as provided by Section. 172 (2) Cr.P.C and Article-157 of the Qanun-e-Shahdat Order, 1984, accordingly.

Announced.
12.4.2018

JUDGE