15. Prosecution is not bound to examine each and every witness shown in calendar, discretion lies with it to examine any number of witnesses and to drop anyone who does not support the prosecution case. (PLD 1986 Quetta 26). However, recording of statement of witnesses in one case and treating the same as evidence in other case is illegal and in clear violation of the procedure and rule laid down in the Qanun-e-Shahadat Order, 1984. (1975 P.Cr.L.J. 437; PLJ 1975 Cr.C. (Kar) 507).

It is well settled that the statement of an accused under section 342 Cr.P.C. has to be read in its entirety. It is to be accepted or rejected as a whole. It is not permissible to accept the exculpatory part to corroborate the prosecution evidence and reject the exculpatory passage. (PLD 1995 SC 343). This assumes importance where the accused makes his statement admitting the commission of the offence simultaneously raising a plea constituting his defence. In such a case, the court will not accept the inculpatory portion and reject the exculpatory one. (PLD 1995 SC 343).

16. **The accused enters on his defence.**

After the prosecution evidence has concluded, the accused is examined under section 342 Cr.P.C. with the object of providing him an opportunity to explain the circumstances appearing in the evidence against him. At the end of that examination the normal practice is to put two questions to the accused, first, whether he would give evidence on oath in disproof of the charges or allegations made against him and second, whether he would adduce evidence in defence. The accused may not himself enter into the witness box to give evidence on oath but that will not deprive him of the right to lead evidence in defence.

Section 340 Cr.P.C. by its sub-section (2) requires that an accused person shall, if he does not plead guilty, give evidence on oath in disproof of the charges or allegations made against him or any person charged or tried together with him at the

same trial. but the proviso to sub-section (2) says that the accused shall not be asked and if asked shall not be required to answer any question tending to show that he has committed or been convicted of any offence other than the offence with which he is charged or for which he is being tried, or is of bad character, unless the case falls in one of the categories mentioned in the proviso.

17. Accused's right to testify.

The question whether an accused has a right to testify as his own witness has a long history and it is not necessary to weary the reader with the narration. As was by Chief Justice Appleton in a case from American Jurisdiction. "the defendant in criminal cases is either innocent or guilty. if innocent he has every inducement to state the facts which would exonerate him. The truth would be his protection. But the defendant having the opportunity to contradict or explain the inculpative facts proved against him, may decline to avail himself of the opportunity thus afforded him by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. .....". (1992 P.Cr.L.J. 2059, 2077).

18. Where accused is deaf and dumb.

Where the accused is deaf and dumb and is unable to understand any language other than language of signs and gestures, attempt should be made to communicate evidence to him through gestures. (1987 MLD 1016). Guidance is to be taken from section 361, Cr.P.C. which provides to communicate the evidence to the accused in open court in a language understood by him. (Section 361 Cr.P.C.). It is obligatory on the part of the trial Court to record finding before proceeding with trial that accused being a deaf and dumb cannot be made to understand proceedings and then forward record to Distrcit Magistrate with a report of circumstances of case for onward transmission to High Court. (1984 P.Cr.L.J. 748; PLD 1964 SC 801). Reliable intermediary should interpret signs and gestures. Such function cannot be assigned to public prosecutor. (PLD 1966 Dacca 432).

Where the accused is deaf and dumb, mandatory provision of section 361 Cr.P.C. should be complied with. It is always necessary that only an expert or a close relation is capable of understanding those signs but keeping in view individual deficiencies it has to be observed that those who are close relations of deaf and dumb or those who have seen them growing up in that state can communicate with them in their own language or signs and not through ordinarily speech. It is also well known that the trial courts ordinarily do take adequate measures when such situation arises and no general presumption can be raised that unless found otherwise the provisions contained in section 361 Cr.P.C. read with section 364 Cr.P.C. regarding interpretation would be presumed to have been contravened.(PLD 1984 SC 54).

19. **Assessment--- appreciation and reappraisal of evidence.**

Where the evidence is entirely oral and of interested witnesses and there is no circumstantial evidence against the accused, he cannot be convicted. In cases where there is reason to believe that certain accused on the ground of enmity or otherwise may have been falsely charged, then the evidence of those witnesses who have reasons falsely to implicate the particular accused should not be relied on as against that particular accused; on the other hand, the same witnesses might be relied upon against other accused where there is no reason to suspect enmity on the part of the witnesses. Where, however, perjury has definitely been brought home to a witness, it would be extremely dangerous to rely on his evidence against any one. (AIR 1934 All 514).

False evidence must inevitably damage the whole fabric of the prosecution case. Honest or circumstantial evidence cannot be used to support or corroborate a perjured witness. Such evidence must be itself sufficient to justify a finding of guilty. (AIR 1933 All 401).

22. Expert evidence.

There is considerable danger of a miscarriage of justice when a criminal court relies on its own comparison of a disputed signature with another signature for the purpose of determining its authenticity. It is usually desirable to obtain the opinion of an expert with regard to this. It is not desirable that a judge should take upon himself the task of comparing signatures in order to find out whether there has been a forgery in a case. At the same time the Magistrate, who has to deal with the evidence of an expert witness, should take the pains to have the expert explain in court the reasons for his opinion. It is only after hearing those reasons in detail that a Magistrate would be in a position to express a sound opinion whether or not the expert's opinion is satisfactory. A Court is not to surrender its own opinion to that of experts who are called before it, but with such help as the experts can afford, the court must form its own opinion on the subject in hand. (AIR 1935 Rang 178).

The expert's evidence is only a piece of evidence. A Judge of fact will have to consider that evidence along with other pieces of evidence. It is the duty of the trial court to come to a conclusion on a question of fact on a consideration of the entire evidence including that of the expert. The experts opinion does not take away the common mans judgment. They have the right to think and judge things from day-to-day experience. Expert evidence is nearly always a weak type of evidence much more so in the case of an expert who has not sufficient knowledge on the subject. The court is not bound by the expert opinion which is merely an evidence in the case and that should be considered along with the other evidence and circumstances appearing in a particular case. In the circumstances of a case the court can refuse to place any reliance on the opinion of an expert, which is not supported by any reason. (AIR 1959 SC 488).

23. Finger print expert.

Although the evidence of a handwriting expert is frequently found to be faulty, the evidence of a thumb

impression expert is more reliable, because with regard to fingerprints it has never been found that two fingerprints are identical in all respects. The court, however, cannot delegate its authority to the expert but has to satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself as to the value of any other evidence. (AIR 1950 Cal 66).

24. Medical expert.

Medical evidence can only be used as corroborative of the charge. The absence of an early medical examination in the case of a crime of violence must be regarded as a very unsatisfactory feature of the prosecution case. A certificate of a Civil Surgeon unless deposed to by that officer is inadmissible in evidence. (AIR 1953 Hyd 209).

Where there is no direct evidence one way or the other and the whole case turns on circumstantial evidence, the circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. In a case depending on the conclusions drawn from circumstances, it is well settled that the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offences home to him beyond any reasonable doubt. (AIR 1954 SC 621).

25. Evidence recorded by reader of the court.

Reader of the court is not competent to record evidence. Justice has to be administrated by the Presiding Officer of the court. Reader of the court in whole of the scheme of the criminal procedure has not been directly empowered to record the statements of the prosecutions witnesses or to write/announce the judgment etc. (1998 P.Cr.L.J. 344). Evidence recorded by Reader of Magistrate trying case while Magistrate sat in retiring room, practice thoroughly illegal, proceedings quashed. (9182 P.Cr.L.J. 949). Evidence recorded by Reader on the dictation of the Magistrate in open court when the Magistrate was suffering from a spine trouble, the irregularity if any held curable. (1971 P.Cr.L.J. 753). Rush of work may be a sufficient reason for

recording evidence through the Reader of the Court. However, this should be done under the supervision and dictation of the Presiding Officer. (PLD 1957 Pesh 12).

Mere fact that Magistrate omitted to record reasons for not writing statements himself, by itself would not invalidate prosecution evidence. (2000 P.Cr.L.J. 1525). Where statements of witnesses contained signatures of the trial Magistrate showing his presence at the time of recording, in addition observation read over and accepted, presumption would be that the witnesses were recorded in the presence, hearing and personal direction and supervision of Magistrate.(2003 YLR 1045).

26. Kinds of evidence and their value.

Direct evidence is that which goes expressly to the very point in question and which, if believed, proves the point in question without aid from inference or reasoning. For example, the testimony of an eye-witness of a murder is direct evidence. Circumstantial evidence, on the other hand, does not prove the point in question directly but establishes it only by inference. Thus if A is tried for the murder of B, evidence of the fact that A had a motive to murder B and at the time B was murdered, A, with a drawn sword, was seen going towards the place where B was murdered and shortly afterwards was seen returning from the place with his clothes stained with blood would be circumstantial evidence. (1995 SCMR 635).

"Direct evidence" as used here, that is as opposed to circumstantial evidence, is not the same as "direct evidence" as used in Article 71 of the 1984 Order. In Article 71, to which we shall presently advert, the term direct evidence is used as opposed to hearsay evidence and not as opposed to circumstantial evidence. Therefore, in the sense in which this term is used in Article 71, circumstantial evidence must always be direct i.e. the facts from which the existence of the fact in issue is to be inferred must be proved by direct and not by hear-say evidence.

'Circumstantial evidence' is evidence of facts from which, taken with all other evidence, a reasonable inference is a fact directly in issue. It works by cumulatively, in geometrical progression, eliminating other possibilities. (1973 AC 729, 752). As evidence of a fact in issue, it is produced when direct evidence is not available. An example is an un-witnessed crime.

Circumstances, strong cannot substitute proof in a criminal case. (2001 P.Cr.L.J. 262). If circumstantial evidence led is capable of a reasonable alternative theory, the Court shall lean in favour of the said alternative theory and grant benefit of doubt to the accused. (PLD 2002 Lah 369).

27. Recovery evidence.

Section 103, Cr.P.C. provides that before making search under Chapter VII thereof in which this section occurs, the police officer shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them to do so. The search will be made in their presence and a list of things seized in the course of such search and of the places in which they were found, shall be prepared by the police officer and shall be signed by the witnesses. (PLD 1978 SC 298).

28. Motive evidence.

Motive has two distinct but related meanings. In the first sense, it means an emption prompting as act. The second sense is intention or purpose. It is in the first sense that it is used in criminal cases. Motive is the emotion that gives rise to the intention. For example, motive for murder may be jealously, fear, hatred, desire for money, perverted lust or even, as in so called mercy killings, compassion or love. (1975 AC 55, 73 H.L).

29. Documentary evidence.

The expression "document" is defined in Article 2 (1) (b) of the 1984 Order. All documents produced for the inspection of the court are called documentary evidence. (Article 2 (1) (c) (iii).

The contents of a document may be proved by primary or secondary evidence. (Article 72 of the 1984 Order). Primary evidence means the document itself produced for the inspection of the court(Article 73 of the 1984 Order); secondary evidence is defined in Article 74 of that Order. Documents must ordinarily be proved by primary evidence. Cases in which document may be proved by secondary evidence are enumerated in Article 76 of the Order. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that persons hand-writing must be proved to be in his hand-writing. (Article 78).

30. **Opinion evidence.**

It has been seen that under article 71 of the 1984 Order, oral evidence must, in all cases, be direct; that Article provides further that if oral evidence refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. opinion of experts expressed in any treatise commonly offered for sale and the ground on which such opinions are held are an exception to this rule; such opinion may be proved by the production of such a treatise if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as un-reasonable. (PLD 1968 SC 140).

Video cassette is a matter expressed through figures or marks, thus falls within the purview of expression "document" as defined in section 29, PPC. Article 2(1)(b) of Qanun-e-Shahadat and section 391(6) of General Clauses Act, 1897. Video cassette being the most important piece of evidence produced by prosecution forming part of the record, it is an inalienable right of the accused to receive certified copy thereof which they are entitled to get by virtue of the provisions contained in section 548 Cr.P.C. (2002 P.Cr.L.J. 1765).

37. **Inculpatory and Exculpatory statements.**

In case of Haq Nawaz Vs. State (2000 SCMR 785) the Hon'ble Supreme Court has laid certain principle for the confessional statement to be admitted in evidence some or which are

(i) That it should not be exculpatory;

(ii) The same should be voluntary; and

(iii) It should be true if not the confessional statement is to be kept out of consideration.

Self-exculpatory statement of the accused cannot be treated as confession. (PLD 1965 Dacca 108).

An inculpatory confessional statement can lawfully and validly be used not only against its maker but also against other accused persons. (1992 P.Cr.L.J. 1304).

A retracted confession is a piece of tainted evidence, which cannot be utilized to corroborate other tainted evidence such as that of accomplice or of the extra-judicial confession. (1968 SCMR 685). Evidentiary value of a retracted confession against co-accused is considerably less and such a retracted confession statement requires full corroboration. (1990 P.Cr.L.J. 1937). Accused making confession of their on free will corroborated by factum of recoveries, can be taken into consideration by Court though retracted. (1984 P.Cr.L.J. 122, PLD 1964 SC 813).

38. **Statement on oath.**

Sub section (4) of section 342 does not require oath to be administered while recording statement under this section. However, while recording statement u/s 340(2), administration of oath is necessary. Violation of such imperative and mandatory provision of law amounts to illegality. (1978 PLC 322; PLD 1956 SC 420).

Placing reliance on Qasam/Nian and taking evidence on Holy Quran by police is absolutely forbidden under Cr.P.C. to the extent that no person who gives evidence shall sign the statement under section 161, Cr.P.C. because this short circuit route creates hurdle in dispensation of justice. (PLJ 1996 Lah 680). There is no provision in the Criminal Procedure Code that a person would be declared as accused or he would be considered as an innocent in case adverse party would not state on special oath. (PLJ 1996 Crl. Lah 827; 1997 MLD 1242).

39. Statement u/s 342 Cr.P.C.

section 342,Cr.P.C. provides that an opportunity must be given to the accused to explain circumstance, fact or any incriminative evidence sought to be used against him. Such questions be put to the accused, as the court considers necessary at any stage of an inquiry or the trial without previous warning. Question under this section are generally put after the prosecution witness are examined and before the accused is called on for his defence. This right conferred by section 342 is a basic right of the accused. (PLD 1961 Dacca 96). Section 342 Cr.P.C. is based on the priciple involved in the maximum "audi alteram partem" namely that no one should be condemned unheard. (1994 P.Cr.L.J. 181).

It is the requirement of law that statement of accused recorded u/s 342 Cr.P.C. should be got signed/thumb marked by the accused. This mandatory provisions of section 364 if not complied with amounts to an illegality and not irregularity curable u/s 537 Cr.P.C. (1989 P.Cr.L.J. 1591; 1991 P.Cr.L.J. 617). Omission to get the statement of accused recorded u/s 342 signed by him is an illegality not curable u/s 537 (2001 P.Cr.L.J. 1300).

Examination of accused under section 342 Cr.P.C. is not a mere formality but a mandate to enable the accused to explain any circumstances appearing against him in the prosecution evidence. (2001 P.Cr.L.J. 72; PLD 2001 SC 568(p.596)). Main object of this provision is to

afford an opportunity to the accused to explain his position on each aspect of the case. (1999 MLD 2168; 1997 P.Cr.L.J. 307).

Law requires that every part of incriminative evidence, circumstance, fact, weapon of crime, motive, plea of self defence etc. sought to be used against him, should be put to the accused u/s 342 Cr.P.C. for having his explanation. (1980 P.Cr.L.J. 771). Only those circumstances appearing in evidence be put to accused, which are likely to turn scale in favour of prosecution. (PLD 1960 Lah 822). Unless a circumstance sought to be used against an accused is put to him under this section, it cannot be used against him. (1995 SCMR 1373, 1203; 1997 P.Cr.L.J. 1416).

Trial court is required to append a certificate under his hand after recording of statement of the accused under section 342 Cr.P.C. Non compliance of the mandatory provisions of section 364(2), Cr.P.C. by the trial Court is not appending its certificate amounts to an illegality, which is not curable. (1997 P.Cr.L.J. 559; 1997 MLD 1632).

40. Use of affidavits.

The High Court would not go into merits of the case at bail stage and would therefore refuse to look at affidavits filed to show that the petitioner or other co-accused were falsely implicated. (NLR 1980 Cr. 701).

41. Admixture of true and false evidence.

The principle embodied in the Latin maxim-Falsus in uno falsus in omnibus -- which means false in one thing, false in everything, was at one time applied to criminal cases. (PLD 1959 PC 24). But this principle has not been followed in Pakistan. The rule that has been applied since the case of Ghulam Muhammad V. Crown (PLD 1951 Lah 66) is that where it is found that a witness has falsely implicated one accused person ordinarily he would not be relied upon with regard to the other accused. But if the testimony of such a witness is corroborated by very strong and independent circumstances regarding others, then reliance might be placed on the witness for convicting the other accused. What the courts do now is to separate the grain from the chaff. It

43. Form of statement u/s 161 Cr.P.C.

Section 161, Cr.P.C. does not lay down the form in which the Investigating Officer has to record the statement of the person acquainted with the circumstances of the case. Such statement may be in the form of narrative or in the shape of questions and answers, but sub section (3) of section 161 Cr.P.C. casts a mandatory duty upon the police officer to make a separate record o such statements and including them in the police diaries prepared under section 172, Cr.P.C, is despicable and cannot be legally supported as it deprives the accused of his valuable right conferred upon him under first proviso of section 162(1), Cr.P.C. (1995 P.Cr.L.J.1124).

44. Statement u/s 340 Cr.P.C.

To begin with section 340 Cr.P.C. as substituted by the Code of Criminal Procedure (Amendment) Act (XVIII of 1923) conferred an option on an accused person to offer himself as a witness in certain class of cases mentioned in sub section (2) thereof. Sub section (2) of section 340, Cr.P.C. was subsequently substituted by Law Reforms Ordinance, 1972. Bt the said amendment, restriction of class of cases was wiped out an scope of option of an accused person to give evidence on oath in disproof of charges was enlarged and extended to all delicts.

He could, however, not be called as a witness except on his own request and his failure to give evidence would not raise any adverse presumption not be made subject of any comment by the prosecution against him. A further alteration was recently made in the aforesaid provision on 21.2.1985 by (Amendment) Ordinance (XII of 1985) which, inter alia made it imperative for an accused person to given evidence on oath in disproof of the charges or allegations made against him and also made him liable to cross-examination within the limits laid down in the proviso to the sub section. (PLD 1987 Pesh 31).

Where accused while appearing u/s 340(2), Cr.P.C. as his own witness in defence given his statement on oath and at such stage his position was that of witness, accusd in circumstances

should have been allowed by the trial court to be confronted with his earlier version which should have come on record for just decision of the case. First proviso to section 162 of the Code and Art. 140 of the Qaunu-e-Shahadat are relevant in the matter (2001 P.Cr.L.J. 698). Accused appearing as his own witness in exercise of his right u/s 340(2). Complainant has right to confront accused at his trial with first version before police (NLR 2001 Cr. (Lah). 361).

Under section 340(1) of the Code an accused person has a right to be defended by a pleader in his trial before any criminal court. This right is of paramount importance and has to be jealously guarded in order to protect life and liberty of the citizens. Special Court is under its legal obligation to provide defence counsel to each accused separately if there are more than one. Further the advocates so appointed at State expenses should have occasion to come into contact with the accused and they ought to have been given two days time to prepare the case. Violation of rule laid down u/s 340(1), Cr.P.C. would amount to a gross illegality vitiating the whole trial. (1999 P.Cr.L.J. 1758 (DB); PLD 1983 SC 291; 1973 Lah 365; 1977 P.Cr.L.J. 1047 ref.).

In a joint trial one accused was examined u/s 340(2) Cr.P.C. other was not given such opportunity while the third accused stated that he owned statement of co-accused and did not wish to add anything. Procedure adopted being novel neither warranted nor supported by or under any law or procedure, rendered entire trial incomplete.

45. Distinction between section 340(2) and 342 Cr.P.C.

It is the duty of the prosecution to prove its case against the accused beyond any doubt and this burden remains unshifted on the prosecution. (1989 P.Cr.L.J. 574).

Under section 342 the accused has been provided a chance to explain any circumstances appearing in the evidence against him and the court is made legally bound not to use any incriminative evidence against the accused unless he is

confronted with the same. The statement recorded u/s 340(2), Cr.P.C. is on oath whereas u/s 342 Cr.P.C. the statement so made is not on oath. Provision of section 342, Cr.P.C. provides that such statement of the accused should be recorded wherein he shall put in the allegation against him and asked to explain the same. Sub section (4) specifically provide that no oath is to be administered to the accused u/s 342 Cr.P.C.The statements of the accused recorded on oath u/s 340(2) Cr.P.C. cannot be equated with the statement required to be recorded u/s 342 Cr.P.C. wherein the accused is given an opportunity by the court putting the allegation to him and asking for his explanation. (PLD 1995 Kar 105). If accused persons declined to be examined on oath, that does not leave it open to presume that they are guilty for, it is the duty of the prosecution to prove the case against accused beyond doubt and burden is not reduced by the amended provision of section 340 Cr.P.C. which gives option to the accused to appear for himself as witness and give statement on oath or not. (PLD 1994 SC 679).

46. Leading case Laws.

1976 SCMR 236	PLD 1962 SC 269	PLD 1994 SC 501	1992 P.Cr.L.J. 92
PLD 1964 SC 26	PLD 1988 SC 99	1998 SCMR 1847	PLJ 1996 Cr.C. 597
PLD 1979 Lah 263	1983 P.Cr.L.J. 2590	PLD 1985 SC 23	PLD 1995 SC 343
PLD 1975 Sc 187	1987 SCMR 468	1984 SCMR 190	1997 P.Cr.L.J. 1416
PLD 1972 SC 363	1989 P.Cr.L.J. 8	1993 SCMR 550	PLD 1997 FSC 1
PLD 1957 Pesh 122	NLR 1980 Cr. 426	PLJ 1994 Cr.C. 473	1998 P.Cr.L.J. 344
AIR 1952 SC 214	PLD 1984 SC 54	1995 P.Cr.L.J. 248	1996 P.Cr.L.J. 1264
PLD 1963 SC 51	PLD 1983 FSC 173	PLD 1996 Lah 680	PLD 1998 SC 1445
PLD 1965 SC 151	1981 P.Cr.L.J. 194	1996 SCMR 1553	1991 SCMR 2220
PLD 1958 SC 290	PLD 1983 Lah 612	PLD 1993 Pesh 160	1997 SCMR 412
PLD 1970 SC 13	1984 P.Cr.L.J. 934	1990 SCMR 40	2001 SCMR 1474
PLD 1973 SC 418	PLD 1984 SC 123	NLR 1993 Cr. Sindh 92	
PLD 1960 SC 387	PLD 2001 SC 458		

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