Chapter X

OF THE EXAMINATION OF WITNESS

130. Order of production and examination of witnesses.--The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure, respectively and, in the absence of any such law, by the discretion of the Court.

COMMENTS

Scope.--This Article deals with the order in which witnesses are to be examined; and not with the quantity or quality of the proof.

In civil proceedings the order is to be regulated by the provisions of the Civil Procedure Code; and in criminal proceedings, by those of the Criminal Procedure Code. Failing these, the order is to be determined by the discretion of the Court. In practice, however, it is left largely to the option of the party calling witnesses to examine them in any order he chooses.

Civil proceedings.--In civil suits, it is the plaintiff who generally has the right to begin (*Civil Procedure Code, O. XVIII, R. 1*). The other party has then to state his case. (*O. XXVIII, R. 2*). If the defendant admits the facts alleged by the plaintiff and relies on a defence, it is for him to establish that defence. The plaintiff may then prove his case in rebuttal, if any, (*O. XVIII, R. 3*). Where a party is taken by surprise by a point made against him at the hearing, the Judge may, if he thinks right, at any stage of the trial, allow him to produce rebutting evidence. Such evidence must be that which goes to cut down the defence, without being confirmation of the original case.

In civil appeals, the appellant is heard first in support of his appeal. If the Court does not dismiss the appeal at once, the respondent is heard against the appeal; and in such case the appellant is entitled to reply. *(O.XLI, R. 16)*.

Criminal proceedings.--In criminal proceedings, the complainant or the prosecutor, as the case may be, has the right to begin; and, if necessary, the accused is asked to adduce his evidence in defence. The trial before a Magistrate may be (a) in summons cases (*Criminal Procedure Code, S. 224);* or (b) in warrant cases (*Ss. 225, 254, 257),* or (c) summary (*S. 262).* A Magistrate may also inquire into cases triable by the Court of Session or High Court. (*S. 208).* Where a trial takes place before a Court of Session, or High Court, the procedure as laid down in Sections 271, 276, 289, 290, 291 and 292 of the Criminal Procedure Code is followed. In hearing appeals, the appellant begins and if necessary the other side is heard next.

Commission.--In both civil and criminal proceedings witnesses may be examined on commission, where evidently the same rules will apply respectively (*see*

witnesses as it likes.[10] Where the principal defendant in a case was examined before the plaintiff's case was opened or the evidence of his witnesses given, it was observed that the procedure adopted was most unsatisfactory.[11]

Examination-in-chief.--Where the prosecution witnesses are present for examination-in-chief, the prosecution has the discretion to produce them in any order it lies. Therefore where witnesses are not summoned at the instance of the accused for cross-examination but are summoned for examination in a *de novo* trial, the order in which the witnesses are to be examined-in-chief rests in the discretion of the prosecution.[12]

Cross-examination of prosecution witnesses.--Where the defence wants to cross-examine prosecution witnesses in a particular order by being allowed to postpone the cross-examination of the complainant on the ground that the cross-examination before some other witnesses will embarrass and prejudice the defence case, the mere fact that the complainant, a sickly man, is present in Court and may not come on some other day to his bad health, is not sufficient to justify the Court in refusing to accede to the request of the defence. If the Court has any discretion it should use it in favour of the defence.[13]

131. Judge to decide as to admissibility of evidence.--(1) When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

(2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

(3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under Article 46.

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10. AIR 1936 PC 289 = 37 Cr.LJ 963.
11. AIR 1923 PC 73.
12. AIR 1934 Nag. 209 = 36 Cr. LJ 41.
13. AIR 1933 Cal. 189 = 34 Cr. LJ 347 (DB).

132. Examination-in-chief, etc.--(1) The examination of a witness by the party who calls him shall be called his examination-in-chief.

(2) The examination of a witness by the adverse party shall be called his cross-examination.

(3) The examination of a witness subsequent to the cross-examination by the party who called him, shall be called his re-examination.

COMMENTS

Cross-examination **of a witness.** If a witness was not cross-examined on a fact and his statement went un-rebutted and un-questioned, such statement, as a matter of law and principle, could be taken to be correct.[1]

Fact not cross-examined--Presumption. If any piece of evidence led in examination-in-chief is not denied or controverted in cross-examination then it is presumed to be accepted by other side.[2]

Closing right of adverse party. Date on which evidence had been recorded was fixed for such purpose, about which adverse party had knowledge. Time had been granted to adverse party to fetch his counsel or engage a new counsel, for which purpose case had been kept pending from 8.00 a.m. to 3.00 p.m. Statements of witnesses had been recorded in presence of newly appointed counsel, who had not availed opportunity provided to him to cross-examine witnesses. One witness had been summoned from Karachi. Adjournment could not be claimed as of right. Adverse party had availed 35 adjournments on one pretext or the other. High Court rightly dismissed Constitutional petition in circumstances.[3]

Examination-in-Chief.--Cross-examination. If a fact was asserted in examination-in-Chief and was not impeached by way of cross-examination that assertion would be deemed to have been admitted by defaulting party.[4]

Evidence of witnesses examined in defence on behalf of one accused and cross-examination on behalf of another accused is admissible as against the latter. It may be otherwise where that other accused had no opportunity of cross-examining them or where he has not been given an opportunity by the Magistrate or the Judge to explain the circumstances appearing in such evidence.[5]

Cross-examination is an important right which could not be denied merely by deduction.[6]

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1. PLD 2008 Pesh. 3.
2. 2008 MLD 62.
3. 2008 SCMR 322.
4. 1999 CLC 671.
5. AIR 1951 Nag. 173.
6. 1985 PLC 563.

Cross-examination. Pleadings. Proof.--Witness was recalled for cross-examination. Witness was not confronted with previous statement or pleadings. Witness stated "yes" to every question. Witness had stated what had not been pleaded. Something not pleaded could not be allowed to be proved. Evidence inconsistent with the pleadings was to be ignored. Answers contrary to previous statement were ignored in circumstances.[1]

Right to cross-examine.--Right to cross-examine is not an empty formality but a valuable right and best method to reach the truth. Opportunity to cross-examine must be fair, real and reasonable.[2]

Omission to cross-examine.--Where points relating to an issue were disposed of in evidence and opposite-party did not cross-examine that witness on those points, such portions of statement of witness would be deemed to have been admitted by opposite side.[3]

133. Order of examination.--(1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

(2) The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examinations and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine that matter.

COMMENTS

The examination of witnesses is *viva voce. (O. XVIII, r. 4)*. It is always in the form of questions and answers. The deposition is usually taken down in the form of a narrative formed out of the answers. (*O.XVIII, r. 5)*. Where a question is objected to and yet allowed by the Court to be put, the question and its answer are taken down *verbatim*. (*O.XVIII, r. 10)*. At the end of the deposition, it is read out to the witness and signed by the presiding officer. (*O.XVIII, r. 5)*.

The *viva voce* examination consists generally of three stages; first of all, the witness is examined by the party who calls him; this is called examination-in-chief. (*Article 132)*. He is next examined by the adverse party; this is called cross-examination. (*Article 132)*. Finally he is examined again by the party who called him; this is called re-examination. (*Article 132)*.

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1. 2005 YLR 1995 (b).
2. 1997 MLD 1358.
3. 1999 CLC 454.

by Trial Court as affirmed by Courts below was in consonance with provisions of O.XVIII, R. 3, C.P.C. Leave to appeal was refused in circumstances.[1]

Non-questioning of deposition of witness.--Evidence or statement of witness which would go against interests of a particular party and that party did not question the correctness of that assertion or deposition of witness, would be deemed to have been admitted.[2]

134. Cross-examination of person called to produce a document.--A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.

COMMENTS

Principle.--A witness summoned merely to produce a document does not become a witness for the purposes of cross-examination, since he may either attend the Court personally or may depute any person to produce the document in the Court. *(C.P.C. O. XVI, R. 6; C.P.C., Sec. 94).* If he intentionally omits to produce the document, he commits the offence punishable under Section 175 of the Pakistan Penal Code, or Section 480 of the Criminal Procedure Code.

The respondent after conclusion of evidence of the parties was allowed on his request to produce document by way of additional evidence to which the petitioner insisted for cross-examination of the respondent. The respondent with a view to avoid delay stated that he had no objection if the petitioner was allowed to cross-examine him. The petitioner, in view of statement of the respondent was allowed by the High Court, one opportunity to cross-examine the respondent.[3]

Where the statement of defendant on vital aspect had neither been cross-examined nor was he confronted with the documents for the purpose of identifying his signatures, such failure would lead to drawing adverse inference against the plaintiff.[4]

Where an assertion made in examination-in-chief was not subjected to cross-examination that assertion would be admitted to be true. Land owner's witness having stated specific amount as the market value of acquired land, failure to cross-examine him by opposite-party would amount to admission of his assertion with regard to market value.[5]

Reconstruction of premises. Cross-examination. Right of.--Landlord seeking ejectment of tenant on ground of reconstruction of premises had produced sanction plan for reconstruction duly approved by Competent Authority. Validity of such sanction plan having been objected to by tenant, Rent Controller on request of landlord

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1. 1996 SCMR 351.
2. 1999 CLC 1358.
3. 1989 ALD 125(2).
4. 1989 CLC 2287.
5. (1902) 14 How St. Tr. 559.

summoned officials from Competent Authority to produce sanctioned plan and the relevant documents. Officials from Competent Authority appeared before Rent Controller and produced duly approved sanction plan and other documents. Officials only produced documents and testified that sanction for reconstruction was accorded by Competent Authority to landlord and sanctioned plan was duly approved. Tenant contended that as he was not permitted to cross-examine officials who were summoned to produce document on request of landlord, documents produced by landlord could not be considered to be as evidence in the eye of law and in absence of legal, valid sanction of reconstruction of premises ejectment application of landlord would be incompetent. Contention of tenant was repelled in view of fact that officials of Competent Authority were not summoned as witnesses of landlord and were not administered any oath, but had appeared only to produce documents issued by them as representative of Competent Authority. Provisions of Section 19(4) of Sindh Rented Premises Ordinance, 1979 not being attracted in case, no right to cross-examine the said officials thus could be given to tenant.[6]

Person summoned by Trial Court to produce documents.--Nature of statement of such person. Person summoned to produce documents under Art. 134, Qanun-e-Shahadat Order, 1984, would not become witness. Statement of such person should not be recorded as deposition of witness nor should same be on oath. Documents produced by person who was summoned to produce the same should not be marked with exhibit numbers but should be given identification number/mark.[7]

Constitutional petition. Competency.--Irregularities committed, by Trial Court while recording statement of witness. Remedy. Constitutional petition was not proper remedy to challenge irregular order of Court and same would merit dismissal.[8]

135. Witnesses to character.--The witnesses to character may be cross-examined and re-examined.

COMMENTS

This Article must be read with Article 67. In most cases, witnesses to character not only may but must be cross-examined. The use of character evidence is to assist the Court in estimating the value of the evidence brought against the accused. Holt, C. J., observed in a case that "a man is not born a knave; there must be time to make him so; nor is he presently discovered after he becomes one. A man may be reputed an able man this year, and yet be a beggar the next; it is a misfortune that happens to many men, and his former reputation will signify nothing to him upon this occasion."

136. Leading questions.--Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

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6. PLD 1996 Kar. 225.
7. 1997 MLD 2282.
8. 1997 MLD 2282.

137. When leading questions must not be asked.--(1) Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

(2) The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

138. When leading questions may be asked.--The leading questions may be asked in cross-examination.

COMMENTS

Leading question.--A 'leading question' is one which suggests to the witness the answer which it is desired he should give. But if it merely suggests a subject, without suggesting an answer or a specific thing, it is not leading. Leading questions cannot ordinarily be asked in examination-in-chief or re-examination. The witness is presumed to be biased in favour of the party examining him and might thus be prompted. The reason for excluding leading questions is quite obvious; it would enable a party to prepare his story and evolve it in his very words from the mouth of his witnesses in the Court. It would tend to diminish chances of detection of a concocted story. If a witness is allowed to give his narrative in his own words, he is likely, if the story is made up, to leave some loopholes, to which the cross-examiner will scarcely fail to direct his attack.

Leading questions can only be asked in examination-in-chief when they refer to matters which are :

(1) introductory;

(2) undisputed; or

(3) sufficiently proved.

For, if it were not allowed to approach the points-at-issue by such questions, the examination would be most inconveniently protracted. To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, counsel may lead him on to that length, and may re-capitulate to him the acknowledged facts of the case which have been already established.[1]

Rule authorising Court to permit leading questions as to matters introductory or undisputed or already sufficiently proved is subject to number of exceptions. One of such exceptions is where witness is called to contradict another as to expressions used by latter; former may be asked, not merely what he said, but whether particular expression was used.[2]

Leading questions can be freely asked in cross-examination ;

1. Taylor, 12th Edn., p. 890.
2. PLD 1978 Kar. 342.

Firstly, and principally, on the supposition that the witness has a bias in favour of the party bringing him forward, and hostile to his opponent.

Secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole.[3]

Confession be Investigation Agency.--Confession of applicants before the Investigation Agency, according to Art. 38, Qanun-e-Shahadat, 1984, was inadmissible in evidence. Big quantity of Charas could have its importance only if the applicants were connected with it by cogent evidence. Prosecution had not been able to find out and record statements of the Captain of the shop and other members of the crew despite passage of more than two years. Applicants could not be kept in custody indefinitely simply to wait collection of evidence against them. Applicants, in circumstances, were entitled to grant of bail.[4]

139. Evidence as to matters in writing.--Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.--A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustrations

The question is, whether A assaulted B.

C deposes that he heard A say to D--"B wrote a letter accusing me of theft, and I will be revenged on him". This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

COMMENTS

This Article is meant to enable parties to carry out the provisions of Articles 102 and 103. It should be read along with those sections. It refers both to the examination-in-chief and cross-examination. A party can compel the opposite-party to produce a document (or to make out a case for letting in its secondary evidence)--

3. Beot, 12th Edn. p. 561.
4. 2006 PCr. LJ 1251.