RECORDING OF EVIDENCE

(Sections 353 To 365, Cr.P.C.)

Examination of witness in absence of accused. (Section 353). If the witnesses are examined in the absence of the accused, and there is nothing to show that his personal attendance has been dispensed with, the trial is invalid and the conviction will be set aside. The fact that the Mukhtar of accused was present and raised no objection and cross-examined the witnesses, cannot cure the illegality. 6 Pat. 691. Bigan v. Emp.

Recording of statements of eye-witnesses in absence of defence counsel with observation by Court that the appellant was informed that in case of non-availability of defence counsel engaged by the appellant counsel appointed by the Court at State expense will conduct the case. Appellant applied for setting aside the appointment of State Counsel and requesting permission to cross-examine the witnesses by the counsel of his own choice. Death sentence set aside in appeal. Retrial ordered. (DB) PLJ 1999 Cr.C. (Lah.) 367 Sher Muhammad.

Power to grant exemption to the accused. The reference in section 353 to the power of a trial Court to dispense with the personal attendance of an accused person clearly implies that the trial Court has such a power of granting exemptions. (FB) 1952 Cr.LJ 66. (All.) Sultan Singh.

Pardanashin lady's examination. A paradanashin lady should not be generally summoned to appear in Court to give evidence, but may be examined on commission. 12 All. 69 Basant Bibi. When a pardanashin lady was examined in a passage screened from direct view of the Court and her voice could be perfectly heard in the Court and by the accused, and he made no objection. Held, the evidence was virtually heard in the presence of the accused. 1887 PR No. 41. Hassan Khan.

Evidence not read to witness (Section 360, Cr.P.C.) Non-compliance with provision of Section 360, Cr.P.C. is curable under Section 537, Cr.P.C. if no prejudice of a witness to him so that it may be corrected by the witness if necessary and the accused or his pleader may be able to give his undivided attention to him. (PC) 54 I A 96 = 100 IC 227 = AIR 1927 PC 44. Abdul Rehman v. King Emp. 28 Cr.LJ 259.

Evidence not read to witness. The bare fact of such irregularity unaccompanied by any probable suggestion of any failure of justice having been there by occasioned, is not enough to warrant the quashing of a conviction which may be supported by the curative provisions of a section 537, Cr.P.C. (PC) 27 Cr.LJ 669. Abdul Rehman v. Emp. AIR 1927 Cal. 575. Fatiar Bap. PLD 1951 Bal. 14 (DB) = PLD 1960 Pesh. 141. Abdul Hamid. 1971 P.Cr.LJ 244 Zulfiqar. Overruled. 28 CWN 968. Hiralal v. Emp. 151 Lah. 407. Taj Mahmud.

How to read evidence to a witness. The evidence of each witness shall be read over to him as it is completed and this procedure should be strictly followed. It is not a sufficient compliance with this section to read out each sentence of the statement of a witness as it is being recorded. (DB) 22 Cr.LJ 669 (Lah.) Wadhawa v. Emp.

Deposition may be corrected. An honest witness who wishes to alter or correct a statement he has once made, should be allowed to do so and should not be deterred from doing so by a fear of Criminal charge. 10 Cal. 937. Habib Ullah v. Emp.

Statement under Section 164, Cr.P.C. can be recorded during the investigation or before the commencement of inquiry by a Magistrate at the instance of the witness, Police or aggrieved party. (DB) PLD 1953 Lah. 495. Muhammad Sarfaraz Khan v. Crown.

Memorandum not made. Magistrate did not comply with the provisions of Section 365. Did not write out the evidence himself nor made a memorandum nor recorded any reasons for not doing so. Proceedings set aside. Retrial ordered. PLD 1950 Lah. 274 Muhammad Sarwar v. Khuda Bakhsh PLD 1950 BJ 96. Abdur Rehman v. Allah Diwaya.

Section 356, failure of presiding officer to keep memorandum of depositions: Irregularity is curable under Section 537, Cr.P.C. (SC) PLD 1958 SC (Pak.) 392. Ali Haider. PLD 1958 SC 383 Hazrat Jamal.

Failure to make memorandum curable. Held failure to make a memorandum where the judge or magistrate does not record the evidence himself, the irregularity is curable under Section 537, Cr.P.C. (DB) PLD 1950 Lah. 134 Muhammad Aziz v. Crown (DB) PLD 1951 Lah. 228 Rehmat Khan v. Crown (SC) PLD 1958 SC 392 Ali Haider. PLD 1959 Lah. 186 Anwar Mahmud (SC) PLD 1958 SC 383 Hazrat Jamal.

Magistrate attending to other work; under Sections 355 and 356 a Magistrate is obliged to make a memorandum of the substance of evidence with his own hand, unless he records valid reasons for not doing so. A Magistrate is not entitled to attend to other work during the hearing of a case, and to plead that other work was the reason of his inability to comply with the requirements of the Cr.P.C. with regard to the recording of evidence. The irregularity is clearly of a much more than a technical nature and it vitiates the trial. 38 Cr.LJ 150 Jagmohan Singh v. Emperor.

Evidence not recorded fully. A Magistrate in proceedings under section 145, Cr.P.C. neither recorded the evidence fully in his own hand nor got it recorded fully by any one else, but simply made a memorandum of the evidence, purporting to act under Section 357 (3) held, the provisions of Sub-section (1) of section 357 not being complied with, the whole proceedings must be set aside. 42 Cal. 381 Sadanada v. Krishna Mandal. See also AIR 1932 Sindh 145 Natho Khan v. Emperor.

Statement to be recorded in full. The record of the deposition of each witness in the Sessions Court must be faithful record of what the witness states in that Court and it should be taken in full as the witness deposes. AIR 1944 Nag. 320 Annubeg v. Emperor.

Discrepancy between English and vernacular record. When there is discrepancy in a material part of the evidence of the principal prosecution witnesses between the record in Vernacular in which witness gave the evidence and the record in English the accused is entitled to the benefit of doubt created thereby. Generally speaking the evidence as recorded in vernacular in which the witnesses deposed is entitled to a great weight and is more reliable than the record made in English, but where the magistrate who made the English record was an experienced Magistrate fully conversant with the Vernacular in which the witness gave the evidence, the English record is also reliable, but all the same, the accused is entitled to benefit of any doubt caused by the discrepancy between the two records. 24 Cr.LJ 624 (Lah.) Sahu Singh v. Emp.

Order resummoning witness to get vernacular statement on record, set aside, when statements of witnesses recorded in English already formed part of evidence of the case. Irregularity if any curable. PLJ 1975 Cr.C. (Lah.) 434 (2) Ch. Khurshid Ahmad.

Necessity of maintaining English and Urdu record dispensed with by order No. 40 N.W.F.P. Gazette Notification No. 3147-LD, dated 26th January, 1937. (DB) PLD 1960 Pesh. 141 Abdul Hamid. Sessions Judge, vide above notification may record evidence in English at trials. (DB) PLD 1957 Pesh. 122 Fateh Khan. (SC) PLD 1958 SC 383 Hazrat Jamal.

Shorthand notes. Where the evidence taken down in open Court was a shorthand note of what the witnesses stated. What was taken down in open Court was not signed by the Judge and did not form part of the record: what was signed by the Judge and formed part of the record was a transcript of what was taken down in open Court and no reasons were recorded by the Sessions Judge as to why he was unable to take down the evidence in his own hand, held the procedure was open to the gravest objections and that the irregularity was so vital as to vitiate the trial. AIR 1934 Pesh. 21 Salim Baz Muhammad v. Emp.

Typewriter. Judge dictating the evidence which was being typed on the typewriter, held, preparation of memo of evidence in Judge's hand not necessary. (DB) PLD 1960 Lah. 520 Muhammad Sajjad.

Rush of work is a sufficient reason for dictating evidence instead of recording it in Judge's own hand. (DB) PLD 1957 Pesh. 122 Fateh Khan.

Recording of evidence by Ahlmad but neither on dictation of the Magistrate nor under his control or supervision. Irregularity not curable under section 537, Cr.P.C. PLD 1976 Lah. 1555. Ghulam Abbas v. Inayat Ullah.

Summoning of petitioners as accused illegal When in complaint u/Ss. 324, 337-A(1)(II)/148/149/109 PPC reader of the Court had recorded preliminary statements instead of the Magistrate. Proceedings quashed u/S. 561-A Cr.P.C. PLJ 1997 Cr.C. (Lah.) 1585, Muhammad Inayat etc. v. Aslam and another.

Statements of witnesses and complainant not recorded by Magistrate but by Magistrate's reader under his supervision. Held, irregularity not curable. Case remanded to Magistrate. NLR 1987 Cr. 768. Munshi Ahmed etc.

Proceedings under section 145, Cr.P.C. do not relate to any offence. Provisions of Section 355 not applicable. Recording of evidence in proceedings under section 145 in form of memorandum as permitted under section 355, irregularity not curable under Section 537. PLD 1967 Dac. 542. Anwarullah Meah v. Muhammad Nabi.

Questions disallowed. (Section 359) if the accused or prosecutor is dissatisfied, it is always open to him to put in an application to be placed on the record saying that such a question was put but not allowed. 42 Cr.LJ 284. Dewan Singh v. Emp.

Demeanour of a witness. (Section 363). The appellate Court should be guided by the remarks made under this section as to the demeanour of witnesses. Yet it is bound to consider independently, the facts of the case. 1898 PR 6. Maula Bakhsh.

Opinion of trial Court as to credibility. Where the evidence is all oral, and its credibility is a matter of opinion, the opinion of the Court which heard the witnesses and noticed their demeanour must be treated as almost conclusive. 15 Cr.LJ 203. Bishan Singh v. Emp.

Evidence recorded in one case treated as evidence in other case, held trial of both cases illegal. Case remanded for fresh trial according to law. 1975 P.Cr.LJ 437 = PLJ 1975 Cr. (Kar.) 507 Hassan Gul.

Evidence in one case treated as evidence in other two cases; which were being tried separately: by consent of the pleaders for both the parties, held the procedure was illegal but it did not vitiate the trials. 50 Bom. 174 Emp. v. Harjivan. 4 Lah. 376. Where evidence in one case copied out verbatim and placed on file of other two cases. Held trial illegal and vitiated. (DB) PLD 1953 Lah. 321 Muhammad Younis v. Crown.

Cross-cases. Two trials were held of two sets of accused who were the opposite parties in a fight; in each the accused wanted the evidence for the prosecution in the cross-case to be treated as defence evidence, and the Sessions Judge did so. Held that in such a case the defence evidence being one given by the prosecution in the other case, was obviously given in the absence of the accused. This was a violation of the provisions of the section and was not only irregular but illegal. 4 Lah. 376 Allu. v. Emp. 25 Cr.LJ. 551. Muhammad v. Emp.

Evidence recorded in another case cannot be read as evidence in the case in hand. Violation of the rule vitiates judgment. (SC) PLD 1966 SC 708 Nur Elahi.

Common witnesses in three cases. Evidence in one case simply copied out in other case. Trial illegal. (DB) PLD 1953 Lah. 321 Muhammad Younis v. Crown.

Statements recorded in one case treated as evidence in other case. Held trial of both cases illegal. Cases remanded for fresh trial. 1975 P.Cr.LJ 437 Hassan Gul.