

**JUDGMENT SHEET**  
**IN THE PESHAWAR HIGH COURT,**  
**BANNU BENCH.**

*(Judicial Department)*

**Cr.R No.27-B of 2017.**

**Kaleemullah**

**Vs.**

**The State etc.**

**JUDGMENT**

Date of hearing \_\_\_\_\_ 09.06.2017 \_\_\_\_\_.

Appellant-Petitioner: **By Mr. Yaqoob Khan Marwat,**  
**Advocate.**

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Respondent: **By Mr. Hujjat Ullah Khan, Advocate.**

**State by Shahid Hameed Qureshi, Addl AG.**

**ISHTIAQ IBRAHIM, J.---** Kaleemullah, the petitioner has

invoked the revisional jurisdiction of this Court, being

dissatisfied from order dated 22.04.2017 of learned Additional

Sessions Judge-I, Lakki Marwat, with the following prayer:

*“By accepting this revision petition,  
the impugned orders of the learned  
trial court dated 22.04.2017 may  
kindly be set-aside. it is further prayed  
that the learned trial Court may be  
directed to allow the defence counsel  
for further cross examination related  
to the questions which could not be*

***asked due to impugned orders of the learned trial Court.”***

2. Short and relevant facts of the case are that petitioner is an under trial prisoner in sessions case No.45 of 2017, vide F.I.R No.64 dated 24.02.2015 under sections 302/324/ P.P.C, Police Station Tajori.

3. Challan was submitted on 29.10.2015, thereafter petitioner was formally indicted on 20.11.2015. The prosecution produced and examined eleven (11) PWs. The controversy which is the subject matter of the present revision petition ensued during the cross-examination of PW-12, Mutabar Khan, Investigating Officer of case, when the following questions were asked from the said PW, which were objected by counsel for the complainant and the objections were sustained by the learned Trial Court, the above referred questions are reproduced below.

***“Question.*** *Can you tell that you have mentioned the fact of receiving a reference chit from the constable on first day of investigation in case diary No.1.*

***Objection by counsel for the complainant:***  
*The question with regard to contents of Zimmies cannot be put by defence unless and*

*until the same is referred by the witness himself.*

***Order of the Court:*** *Objection sustained.*

Again another question of defence also met the same fate,  
which is given below:

***Question;*** *did you write all the case diaries on the spot or in P.S?*

***Objection by counsel for the complainant:***

*The question with regard to preparation of Zimmies cannot be put by defense unless and until the same is referred by the witnesses himself.*

***Order of the Court:*** *Objection sustained.*

4. Before responding the controversy involved in the revision, this would be appropriate to quote the relevant provisions of the Criminal Procedure Code and Articles of the Qanun-e-Shahadat Order.

#### **172 of the Criminal Procedure Code.**

***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.*

**155,157 of the Qanun-e-Shahadat Order.**

**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 so 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 if he knew it to be correct.*

*(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 by 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 proceeding 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.*

5. Investigation officer of the case is not a formal witness, he is person who has collected the evidence and has placed the same before the Court. He has got a pivotal role under the criminal Justice system. Reliance is placed on case titled **“Abdul Sattar Vs The State through Advocate General NWFP” (2008 SCMR 684)**, wherein it is held that:

***“There is no cavil to the proposition that the Investigating Officer is not a formal witness and his evidence subject to the qualifying test to be believed is at par to that of any other prosecution witnesses”***

6. More so, collection of evidence does not mean collection of prosecution evidence it includes defence evidence as well. Reliance is placed on case titled **“Shad Mohammad Khan Vs the State and another” (2013 YLR 71 Peshawar)**, wherein it is held that:

***6. It is the duty of Investigating Officer to record the version of the accused party in every case if presented because the Investigating Officer is not only duty bound to collect evidence which favours the prosecution. Investigating Officer is obliged to conduct fair, impartial and honest investigation and to collect the evidence produced by the prosecution as well as on behalf of accused.***

7. Under section 172(2) Cr.PC a Police officer, the investigation officer of the case can refreshes his memory before recording his statement and then under Article 140 of Qanun-e-Shahadat Order (section 145 of the Evidence Act,) it is the inalienable right of the accused to cross-examine the witness to contradict or corroborate him as the case may be.

8. In the instant case, Motabar Khan, Investigation officer, was under examination as PW-12 before the Court and there is nothing on record to show that he was examined without consultation of police file, once he consulted police file then he is amenable to cross examination. The two questions which were disallowed by the Court, the former was specific to Zmini (daily diary) which in view of this Court was rightly disallowed instead of referring to Zimni (daily diary) the accused or his agent should have referred to the investigation of case, while in latter one the witness should have been allowed to answer the query of defence.

9. Be that as it may, once a witness refreshes his memory defence is entitled to see the particular portion of case diaries, at the same time cross-examiner is at liberty to ask questions with regard to the investigation of case because the ultimate is to arrive at a just and proper decision of the case otherwise the Court can look into the diaries and the deposition of witness recorded at the trial and shall form its own opinion without referring the daily diary in its order or judgment as the case may be .

10. In view of above observations, this revision petition is disposed of in the following terms that PW-12 Mutabar Khan be re-summoned as witness and defence be allowed to cross-examine him with regard to the investigation of case as provided by section 172(2) Cr.PC and 157 of the Qanun-e-Shahadat Ordinance, order accordingly.

**Announced.**

09.06.2017

\*Azam/P.S\*

**J U D G E**