

IN THE FEDERAL SHARIAT COURT  
(Revisional Jurisdiction)

PRESENT

MR.JUSTICE CH.EJAZ YOUSAF.

CRIMINAL REVISION No.16/Q OF 1997.  
CRIMINAL REVISION NO.17/Q OF 1997.

1. Muhammad Qasim son of Alam  
resident of Meconghy Road,  
Quetta and
2. Haji Amanullah son of Habibullah  
resident of Nichari Road, Quetta.

... Petitioners.

Versus

The State ... Respondent

For the petitioners ... Mr.Zahid Muqem Ansari,  
Advocate.

For the State ... Mr.Noor Muhammad Achakzai,  
Addl:Advocate General.

Date of judgment ... 26.8.1997 and 3.9.1997.  
of the trial court

Date of Institution ... 18.10.1997

Date of hearing ... 25.3.1999.  
and decision of  
both the petitions.

JUDGMENT

CH.EJAZ YOUSAF, J.- I intend to dispose of criminal revision No.16/Q of 1997 filed by Muhammad Qasim son of Alam and criminal revision No.17/Q of 1997 filed by Haji Amanullah son of Haji Habibullah by this judgment as both have arisen out of the judgment dated 26.8.1997 and 3.9.1997 passed by Judicial Magistrate-III Quetta and Additional Sessions Judge-III Quetta, respectively. The petitioners namely Muhammad Qasim and Haji Amanullah stood trial before Judicial Magistrate-III/MFC Quetta under Article 4 of the Prohibition(Enforcement of Hadd) Order, 1979. The prosecution, at the trial, initially produced three witnesses namely P.W.1 Syed Abdul Jabbar, P.W.2 Muhammad Sharif and P.W.3 Abdul Rauf whereafter, the prosecution evidence was closed by the trial court vide order dated 15.3.1997. Thereafter, the petitioners were examined under section 342 as well as 340(2) Cr.P.C. They also produced three witnesses namely D.W.1 Muhammad Sadiq, D.W.2 Ghulam Muhammad and D.W.3 Saifullah, in their defence. Record reveals that in the meantime on 28.1.1997 an application under section 540 Cr.P.C was moved by Prosecuting Inspector on behalf of the State whereby permission was sought to examine

Ashrafullah Kakar, AC/SDM, though his name was not mentioned in column No.6 of the challan Ex.P/3-A. The aforementioned application was allowed on the same day but he could not appear thus the prosecution evidence was closed vide order dated 15.3.1997. Thereafter, the case was adjourned to 20.3.1997 for recording the statement of the petitioners. Record reveals that after recording the statements of the petitioners as well as the defence witnesses, case was adjourned to 28.3.1997 for arguments of the learned counsels for the parties but it could not be heard due to some other reason. On 24.5.1997, however, another application under section 540 Cr.P.C. was moved by the Prosecuting Inspector before the trial court on behalf of the State wherein it was prayed that since Mr. Ashrafullah Kakar, AC/SDM was a material witness and he had recorded the confessional statement of petitioner Muhammad Qasim, therefore, he may be re-summoned. The application was allowed vide order dated 27.5.1997 and statement of the said witness was recorded on 7.8.1997 whereafter, the learned trial court, after taking on record the written arguments of the learned counsel for the petitioners pronounced the impugned judgment. Appeals filed against the same by the petitioners were also

dismissed by the learned Additional Sessions Judge-III

Quetta vide order dated 3.9.1997.

2. I have heard Mr.Zahid Muqem Ansari, Advocate, learned counsel for the petitioners and Mr.Noor Muhammad-Achakzai, Additional Advocate General Baluchistan appearing for the State and have also perused the entire record with their help.

3. It has been inter alia, contended by Mr.Zahid Muqem Ansari Advocate, learned counsel for the petitioners, that P.W.4 Ashrafullah Kakar AC/SDM who had produced the confessional statement of petitioner Muhammad Qasim, was examined on the closure of prosecution as well as defence evidence, as an additional witness. Thus it was imperative for the trial court to question the petitioners about the incriminating circumstances brought on record by him, especially regarding the confessional statement. He has vehemently contended that since the learned trial court, in recording conviction against the petitioners has primarily relied upon the confessional statement in question, therefore, under the law, it was obligatory for the trial court to question the petitioners enabling them to explain the circumstances, brought on

record against them by P.W.4. He maintains that omission so made by the trial court had materially prejudiced the petitioners in their defence rather misled them in thinking that the confessional statement in question, having been brought on record at a belated stage, may not be read in evidence against them, and that is why, no explanation was offered by them, in that regard.

4. Mr. Noor Muhammad Achakzai, Additional Advocate-General Baluchistan having been confronted with the proposition candidly conceded that since P.W.4 was examined by the prosecution after the close of defence evidence therefore, in all fairness, the learned trial court ought to have re-examined the petitioners under section 342 Cr.P.C, thereby affording them an opportunity to explain their position especially with regard to the recording of the confessional statement.

5. Notwithstanding the fact that the learned Additional Advocate General has not controverted the contention raised by the learned counsel for the petitioners, I have given my anxious consideration to the argument, advanced on their behalf.

It has been repeatedly laid down by the superior courts that compliance with section 342 of the Code of

Criminal Procedure is essential in accordance with its terms and departure therefrom is not permissible in law, if some prejudice appears to have been caused to the accused. The use of word "shall" in latter part of sub-section (I) of section 342 implies that the provision in question is not permissive but imperative. Perusal of section 342(I) Cr.P.C further leads to the inference that the object of the examination of the accused is, to give him an opportunity of explaining the circumstances which may tend to criminate him or likely to influence mind of the judge in arriving at a conclusion adverse to him. Likewise, the addition of the words "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him" in section 342 (i) further suggests that examination of the accused under the section is not a mere formality but a must to enable the accused to explain any circumstances appearing against him in the prosecution evidence. To my mind, these words have been thoughtfully inserted therein to ensure that the principal contained in Judicial Maxim "Audi Alteram Partem" is fully complied with.

Though in some cases it has been held that an error or omission which falls within the category of

"curable irregularities" within the ambit of section 537 Cr.P.C does not necessarily vitiate the trial, yet in certain cases where, the accused is not questioned at all, or his explanation is not sought for with regard to an important piece of evidence, which otherwise implicates him and contributes towards his conviction, the omission so made would be prejudicial to him.

6. Since in the instant case, the learned trial Judge in recording conviction against the petitioners has basically relied upon the confessional statement of the petitioner Muhammad Qasim which has been brought on record through the statement of P.W.4, therefore, the omission to question the petitioners with regard to the confession in question, in my opinion, cannot be termed to be a curable defect. In this view I am fortified by the observations made in the following reported judgments:-

- i) PLD 1952 PC-1 (Rahim Bakshi Vs. The Crown)
- ii) 1969 SCMR-777 (Dib Muhammad Vs. The Crown)

The upshot of above discussion is that there is no escape from remand of the case firstly, because after recording the statement of P.W.4 the petitioners were not questioned under section 342 Cr.P.C and secondly, if at all the exercise would have been done still it would have been of

no use because examination of the accused under section 342 Cr.P.C must precede the stage when the accused is required to adduce evidence in his defence.

Consequently both the revision petitions are allowed. The impugned judgments dated 26.8.1997 and 3.9.1997 passed by Learned Judicial Magistrate-III Quetta as well as the learned Additional Sessions Judge-III Quetta are set aside. With consent of the parties, the case is remanded to the trial court for decision afresh, in accordance with law, with the direction to examine the accused persons again under section 342 Cr.P.C. They shall be confronted with all the incriminating circumstances/evidence which have/has come on record through the statement of P.W.4 Ashrafullah. Thereafter they, if desire, may also be permitted to lead evidence in their defence or to appear themselves as their own witnesses in terms of section 340(2) Cr.P.C.

Parties are directed to appear before the trial court on 23.4.1999. The accused persons were released on bail



by this Court, which shall remain intact, till the decision of the case by the trial court. Whereafter, they shall be dealt with in accordance with law.

  
(CH. EJAZ YOUSAF)  
JUDGE

Quetta, 25.3.1999.  
M.Akram/

(APPROVED FOR REPORTING)

JUDGE