

IN THE FEDERAL SHARIAT COURT

(Original Jurisdiction)

PRESENT

**MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE MUHAMMAD JEHANGIR ARSHAD
MR. JUSTICE SHEIKH AHMAD FAROOQ**

SHARIAT PETITION NO. 3/I OF 2004

Fazal-ur-Rehman Rana
R/o Plat No.16, Malik Plaza, B-11,
F-8, Markaz, Islamabad

.... Petitioner

Versus

Federation of Islamic Republic of Pakistan
Through Secretary, Ministry of Law and Parliamentary Affairs,
Islamabad.

.... Respondent

For the petitioner ... Nil.

For Federal Government ... Mr. Muhammad Nazir Abbasi,
Standing Counsel

Date of Institution ... 27.03.2004

Date of hearing ... 26.04.2013

Date of decision ... 26.04.2013

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JUDGMENT

DR. FIDA MUHAMMAD KHAN, Judge.- Through this petition, Fazal-ur-Rehman Rana has challenged Section 172(2) of the Code of Criminal Procedure on the ground that it is against the Injunctions of Islam. He has prayed that the impugned section of the Criminal Procedure Code in question, be amended and altered to bring it in conformity with Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (B.B.U.H), allowing the accused to have a right access to the Police Diary and Ziminies, before submissions of the challan in the Court concerned. The impugned section reads as follows:-

“Any Criminal Court may send for the police diaries of a case under enquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry 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 or if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply.”

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2. This petition was fixed on a number of dates but got adjourned for one reason or another. It came for final hearing before us but the petitioner who is also a counsel in this petition is absent.

3. We have thoroughly examined the contents of petitions wherein his contentions have been elaborately discussed. The main grievance of the petitioner is that Islamic Shariah not only ordains equality but professes and practices it. It contains the principles of complete equality ab-initio and enforces it in a form perfect in all its bearings, with no string attached and no exemption allowed. It guarantees unqualified equality between individuals, groups, communities, races, the ruler and the ruled. It admits of no superiority of one individual over another, of the white over black and of the Arab over non Arab. Allah Says: "O Mankind: we have created you from a male and female and made you tribes and families that you may know each other. Surely the noblest of you with Allah is the most dutiful of you" as has been clearly emphasized in Verses 13 of Surah Hujrat. Islamic Shariah enjoins fair play and forbids injustice and oppression. He has placed reliance on the following Verses of the Holy Quran:-

- * Equality of human beings (13:49)
- * One is innocent unless proved guilty: (27:34)
- * No offence without intention. (51:33)

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- * Concealment of testimony is grave sin. (248:2)
- * No crime under compulsion. ((106:16
- * No one can be held responsible for the acts of others. (18:35)
- * Punishment in proportion to the crime. (17:45)
- * Evidence must be conclusive and based on justice.(20:28).

4. In compliance of our Order dated 5.6.2007 and 21.10.2008, the Federal Government and I.G Police Punjab have submitted their written comments. The comments of Federal Government interalia, emphasizes that the petition is not maintainable under article 203B(c) of the Constitution of Pakistan as the provision challenged is not in respect of evidence to be used against the accused but relates to procedure. Moreover, the comments add that, there is no injunction of Islam which is violated by the section 172 of Criminal Procedure Code and the diaries do not fall with in the category of evidence and no prejudice is caused to the accused by not showing the same to him.

5. Comments on behalf of I.G. Police Punjab are also in line with those submitted by the Federal Government. These comments also mention the fact that these diaries are only meant for in - house use but are not to be used against the accused as evidence and the courts have a right to see and examine the same.

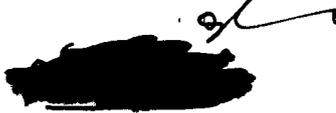
6. We have given our anxious consideration to the points raised by the petitioner in his petition. We have also noted that the Verses relied upon by him do not at all refer to the issue under consideration. These citations are very general in nature and pertain to the administration of justice based on sound unimpeachable evidence which in no case is to be concealed or distorted. It is also an admitted fact that no person accused of an offence can ever be considered guilty unless proved so by reliable evidence. There is absolutely no cavil to this preposition as well. The question is whether any information obtained under Section 172 Cr.P.C, impugned before us, can ever be treated as evidence or considered even at par with statement made under Section 161 Cr.P.C. or whether such information is admissible in evidence. The answer is a big "no". Section 172(2) pertains only to a diary of investigational procedure wherein the Investigating Police Officer records his day to day proceedings, as and when he receives any relevant information from any place. However, the said diary does not assume the status of an evidence and can not be used against the accused which may prejudice his case in any manner. Moreover, according to sub-section (2) of 172 Cr. P.C, any Criminal Court may call for such police diaries of a case under enquiry or trial in such Court, and may use such diaries, not as evidence in the case, but just as elucidation of certain facts to aid the court in such enquiry or trial. In

addition to this, it is notable that if these are used ~~by the police officer~~ who made them, it is only for refreshing his memory. If the Court uses them for the purpose of contradicting such police-officer, the provisions of the Evidence Act, 1872, Section 161 or Section 145, as the case may be, shall apply. In any case however, even if these diaries are consulted by the Court for elucidation of certain fact, no judgment can be passed on the basis of information contained in such diaries. In its legal effect, such information is even less than a statement made under Section 161 Cr. P.C. by a witness because during trial it can be used for contradiction/confrontation only and that too for the benefit of an accused and can not be used against him in any case. The information thus obtained under Section 172(2) Cr.P.C. is just procedural in nature and has no material or evidentiary value to cause prejudice to the case of an accused.

7. In this view of the matter, we consider this petition misconceived and, therefore, dismiss it accordingly. *sdh*


JUSTICE DR. FIDA MUHAMMAD KHAN


JUSTICE MUHAMMAD JEHANGIR ARSHAD


JUSTICE SHEIKH AHMAD FAROOQ

Fit for reporting
Muhammad

Islamabad the 26th April, 2013
Mujeeb-ur-Rehman/*