

[Supreme Court of Pakistan]

Present: Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**MUHAMMAD IDREES and another---Petitioners****Versus****The STATE and others---Respondents**

Criminal Petition 742-L of 2019 and Criminal Petition 629-L of 2019, decided on 21st January, 2021.
(Against the judgment of Lahore High Court, Multan Bench, dated 13.03.2019, passed in CrI. A. No.908/2017)

(a) Criminal Procedure Code (V of 1898)---

----Ss. 172(1) & 172(2)---Police diary, contents of---Purpose and admissibility.

Section 172(1), Cr.P.C. mandates every Police Officer making investigation of a case to maintain a diary (commonly known as 'police dairy' or 'case dairy') of proceedings conducted by him in the course of that investigation, by requiring him to enter in that dairy: (i) the time at which any information relating to the offence under investigation reaches him on a particular day; (ii) the time at which he begins and closes his investigation on a particular day; (iii) the place or places visited by him on a particular day, concerning the investigation of the case; and (iv) a statement of the circumstances ascertained on a particular day through his investigation. The object to require recording of the said details in the police dairy appears to be to enable the courts to check the method and manner of investigation undertaken by the investigating officer. Until the honesty, the capacity, the discretion and the judgment of the Police can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law, and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for inquiry or for trial should have the means of ascertaining what was the information (true, false, or misleading) which was obtained from day to day by the Police Officer who was investigating the case, and what were the lines of investigation upon which such Police Officer acted. A properly kept police diary would afford such information, and such information would enable the Magistrate or Judge to determine whether persons referred to in the police diary, but not sent up as witnesses by the Police, should be summoned to give evidence in the interests of the prosecution or of the accused. It is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain the truth and to decide accordingly. It is axiomatic that a Police Officer who is investigating a criminal case, receives all sorts of information: true, false or misleading. The formulation of opinion on the basis of investigation by the Police Officer can also range from correct and fair opinion to a premature, biased, influenced or incorrect opinion. It is to check these infirmities that may creep into police investigation that it is essential that the Magistrate or the Judge, who is to hold the scales of justice evenly between the State and the accused, should have some means of ascertaining the quality of information obtained by the Police Officer during the course of investigation every day.

Queen v. Mannu, (1897) ILR 19 All 390 ref.

Section 172(2), Cr.P.C. empowers a Criminal Court to send for the police diaries of a case under inquiry or trial in that Court and permits use of such diaries to aid it in such inquiry or trial, but the provisions thereof expressly prohibit the use of such dairies as evidence in the case. The expression "to aid it in such inquiry or trial" indicates that it can be used by the Court for the purpose of enabling itself to have a better understanding of the evidence brought on the record of the case by the prosecution. Inspection of the police diaries can reveal sources of further inquiry, viz, the pointation of some important witnesses that the court can summon, or how the evidence produced was collected to better understand the links between the evidence on the record. The Court can thus use the police dairies in the course of inquiry or trial for resolving obscurities in evidence through questioning the relevant witnesses or for bringing relevant facts on record to secure the ends of justice through legally

admissible evidence, e.g., by summoning as witness those persons who are though referred to in the police diary but not sent up as witnesses by the investigating officer and whose testimony appears to be relevant in the inquiry or trial, or by calling production of some document that appears to be relevant to the matter under inquiry or trial. The Court, however, cannot take the facts and statements recorded in police dairies as material or evidence for reaching a finding of fact: these dairies by themselves cannot be used either as substantive or corroborative evidence. The police diary is itself not the evidence and therefore inadmissible for having no evidentiary value; it is, however, just a source to help understand the undiscovered or misunderstood aspects of the evidence existing on the record, if any, and introduce new dimensions to the case, leading to discovery and production of new evidence, if required to meet the ends of justice. Whatever the court infers from a police diary must translate into admissible evidence in accordance with law, and the court cannot simply rely on, and adjudicate upon the charge on the basis of, statements made in the police dairy.

Queen v. Mannu, (1897) ILR 19 All 390; Dal Singh v. Emperor, AIR 1917 PC 25; Mohammad v. Emperor, AIR 1926 Lah. 54; Emperor v. Dharam Vir, AIR 1933 Lah 498; Habeeb Mohammad v. State of Hyderabad, AIR 1954 SC 51; Imam Bux v. Crown PLD 1956 Sind 262; Subhanuddin v. State 1976 SCMR 506; Allah Yar v. State 1984 PCr.LJ 2934; Tordi Khan v. State, 2005 PCr.LJ 1970 and Fazal-Ur-Rehman v. Federation PLD 2014 FSC 15 ref.

(b) Criminal Procedure Code (V of 1898)---

---Ss. 4(1)(l), 169, 170, 173(3), 204(1) & Chapt. XIV---Qanun-e-Shahadat (10 of 1984), Art. 59---Investigating Officer, opinion of---Admissibility in evidence.

The opinion of a Police Officer who has investigated the case as to the guilt or innocence of an accused person is not a relevant fact, and is therefore not admissible, under the Qanun-e-Shahadat, 1984; as he is not an "expert" within the meaning of that term as used in Article 59 of the Qanun-e-Shahadat, 1984. Even the Criminal Procedure Code (Cr.P.C.) does not authorize him to form such an opinion. To determine guilt or innocence of an accused person alleged to be involved in the commission of an offence is a judicial function that can only be performed by a court of law. This judicial function cannot be delegated to the Police Officer investigating the case. The Police Officers are empowered under the provisions of Chapter XIV of the Cr.P.C., only to investigate the non-cognizable offence with the order of a Magistrate and the cognizable offence without such order. This power of investigation, in no way, includes the power to determine guilt or innocence of the accused persons. An investigation, as defined in section 4(1)(l) of the Cr.P.C., includes all proceedings under the Cr.P.C. for the collection of evidence conducted by a Police Officer or by any other person authorized by a Magistrate. This definition makes it clear that the assignment of a Police Officer conducting an investigation is limited to the collection of evidence, and the evidence when collected has to be placed by him before the competent court of law. Only the court has the power and duty to form an opinion about the guilt or innocence of an accused person and to adjudicate accordingly on the basis of evidence produced before it. An opinion formed by the investigating officer as to the non-existence or existence of sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused person to a Magistrate under sections 169 and 170 of the Cr.P.C. does not tantamount to opinion as to the guilt or innocence of the accused person. And despite such opinion of the investigating officer, the final determination even as to the existence or non-existence of sufficient ground for further proceeding against the accused person is to be made by the Magistrate under sections 173(3) and 204(1) of the Cr.P.C. on examining the material available on record, and not on the basis of that opinion of the investigating officer.

Muhammad Ahmed v. State PLD 2006 SC 316; Muhammad Ahmad v. State 2010 SCMR 660 and Muhammad Arshad v. State PLD 2011 SC 350 ref.

(c) Penal Code (XLV of 1860)---

---S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Statement of doctor, who was an independent witness, regarding shifting of deceased from one hospital to another, which was also confirmed by the post-mortem report, was in contradiction to the statements given by the two purported eye-witnesses--Such contradiction shook credibility of the two eyewitnesses leading to the conclusion that they were not present at the scene of the crime---Ocular account of the two eye-witnesses had been rightly disbelieved by the High Court, against the acquitted co-accused, who was alleged to have played a similar role in the occurrence---In such circumstances the same evidence could not be relied upon to convict the accused, unless there was an independent corroboration of it to the extent of his involvement in commission of the offence---Recovery being inconsequential there was no corroborative evidence to distinguish the case of the accused from that of the acquitted co-accused---Ocular account and the contents of the crime report were also inconsistent with the medical evidence on the record with respect to number of fire shots received on the thighs of the deceased---Prosecution had failed to establish its case against the accused beyond reasonable doubt---Petition for leave to appeal was converted into appeal and allowed, the conviction and sentence of the accused was set aside and he was acquitted of the charge.

Mazhar Iqbal Sidhu, Advocate Supreme Court for Petitioners (in Criminal Petition No. 742-L of 2019).

Umar Hayat Bhatti, Advocate Supreme Court for Petitioners (in Criminal Petition No. 629-L of 2019).

Umar Hayat Bhatti, Advocate Supreme Court for the Complainant (in Criminal Petition No. 742-L of 2019).

M. Amjad Rafiq, Additional P.G. for the State.

Date of hearing: 21st January, 2021.

JUDGMENT

Criminal Petition No.742-L of 2019:-

SYED MANSOOR ALI SHAH, J.---Three alleged assailants, Muhammad Asif, Muhammad Idrees and Muhammad Saleem, were booked in FIR No.263/2015 dated 12.08.2015 for committing the murder of Saif Ullah, under sections 302, 109 and 34, P.P.C. Later on, the name of Rasheed Ahmed was also added as having abetted the crime, hence these four accused were sent up for trial. Rasheed Ahmed was acquitted by the trial court, Muhammad Asif was declared a proclaimed offender (PO); however, Muhammad Saleem and Muhammad Idrees were convicted under section 302(b), P.P.C. and sentenced to imprisonment for life and directed to pay compensation of Rs.100,000/- each under section 544-A, Cr.P.C. to the legal heirs of deceased and in case of default to undergo six months simple imprisonment. The benefit of section 382-B, Cr.P.C. was also extended to the accused. On appeal before the High Court by Muhammad Saleem and Muhammad Idrees, the High Court vide impugned judgment dated 13.03.2019 acquitted Muhammad Saleem and maintained the conviction and sentence of Muhammad Idrees (Petitioner in CrI. P. No.742-L of 2019).

2. We have heard the learned counsel for the parties and have examined the record of the case with their able assistance. While going through the impugned judgment of the Lahore High Court we have noticed that it has placed reliance on the contents of the police diary and the opinion of the investigating Police Officer while deciding upon the guilt of the accused. The relevant portions of the High Court judgment are reproduced hereunder:

Para 13:---I have gone through the police file for my moral satisfaction in order to sift the grain from the chaff, have reached the conclusion of the case and found that the appellant Muhammed Saleem has been implicated in this case falsely due to a trend in our society of implicating all the near and dear of the actual culprit. (emphasis supplied)

Para 15:---He [Muhammed Idress] was found guilty by the investigating officer to be fully connected with the commission of offence. Although the opinion of the police is inadmissible

in evidence, however, under Police Rules, it is duty of the police to found [sic] out the truth while investigate the matter, therefore, the conclusion of the investigating officer cannot be discarded slightly [sic] because he is the person who while discharging his official obligations, has the opportunity of inquiring having the first visual touch not only with the place of the occurrence but also had an opportunity of inquiring/questioning the persons available to him during the course of investigation for drawing his inference from their statements, their body language and his own observations which are made by him on the strength of his efforts for tracing the criminals.

Therefore, before examining the merits of the case, it would be useful to discuss the scope and extent of section 172, Cr.P.C, especially, the meaning of phrase, "and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial."

Police diary, its purpose and admissibility

3. Section 172(1), Cr.P.C. mandates every Police Officer making investigation of a case to maintain a diary (commonly known as 'police dairy' or 'case dairy') of proceedings conducted by him in the course of that investigation, by requiring him to enter in that dairy: (i) the time at which any information relating to the offence under investigation reaches him on a particular day; (ii) the time at which he begins and closes his investigation on a particular day; (iii) the place or places visited by him on a particular day, concerning the investigation of the case; and (iv) a statement of the circumstances ascertained on a particular day through his investigation. The object to require recording of the said details in the police dairy appears to be to enable the courts to check the method and manner of investigation undertaken by the investigating officer. Until the honesty, the capacity, the discretion and the judgment of the Police can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law, and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for inquiry or for trial should have the means of ascertaining what was the information (true, false, or misleading) which was obtained from day to day by the Police Officer who was investigating the case, and what were the lines of investigation upon which such Police Officer acted. A properly kept police diary would afford such information, and such information would enable the Magistrate or Judge to determine whether persons referred to in the police diary, but not sent up as witnesses by the Police, should be summoned to give evidence in the interests of the prosecution or of the accused. It is important to remember that it is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain the truth and to decide accordingly. It is axiomatic that a Police Officer who is investigating a criminal case, receives all sorts of information: true, false or misleading. The formulation of opinion on the basis of investigation by the Police Officer can also range from correct and fair opinion to a premature, biased, influenced or incorrect opinion. It is to check these infirmities that may creep into police investigation that it is essential that the Magistrate or the Judge, who is to hold the scales of justice evenly between the State and the accused, should have some means of ascertaining the quality of information obtained by the Police Officer during the course of investigation every day.¹

4. Section 172(2), Cr.P.C. empowers a Criminal Court to send for the police diaries of a case under inquiry or trial in that Court and permits use of such diaries to aid it in such inquiry or trial, but the provisions thereof expressly prohibit the use of such dairies as evidence in the case. The expression "to aid it in such inquiry or trial" indicates that it can be used by the Court for the purpose of enabling itself to have a better understanding of the evidence brought on the record of the case by the prosecution. Inspection of the police diaries can reveal sources of further inquiry, viz, the pointation of some important witnesses that the court can summon, or how the evidence produced was collected to better understand the links between the evidence on the record. The Court can thus use the police dairies in the course of inquiry or trial for resolving obscurities in evidence through questioning the

relevant witnesses or for bringing relevant facts on record to secure the ends of justice through legally admissible evidence, e.g., by summoning as witness those persons who are though referred to in the police diary but not sent up as witnesses by the investigating officer and whose testimony appears to be relevant in the inquiry or trial, or by calling production of some document that appears to be relevant to the matter under inquiry or trial. The Court, however, cannot take the facts and statements recorded in police dairies as material or evidence for reaching a finding of fact: these dairies by themselves cannot be used either as substantive or corroborative evidence.² It is important to underline that the police diary is itself not the evidence and therefore inadmissible for having no evidentiary value; it is, however, just a source to help understand the undiscovered or misunderstood aspects of the evidence existing on the record, if any, and introduce new dimensions to the case, leading to discovery and production of new evidence, if required to meet the ends of justice. Whatever the court infers from a police diary must translate into admissible evidence in accordance with law, and the court cannot simply rely on, and adjudicate upon the charge on the basis of, statements made in the police dairy. Therefore, reference by the High Court to the police file for reaching the conclusion that the accused Muhammed Saleem has been implicated in this case falsely was legally invalid and uncalled for.

Opinion of the investigating officer - not admissible

5. The opinion of a Police Officer who has investigated the case as to the guilt or innocence of an accused person is not a relevant fact, and is therefore not admissible, under the Qanun-e-Shahadat Order, 1984; as he is not an "expert" within the meaning of that term as used in Article 59 of the Qanun-e-Shahadat Order, 1984. Even the Criminal Procedure Code (Cr.P.C) does not authorize him to form such an opinion. To determine guilt or innocence of an accused person alleged to be involved in the commission of an offence is a judicial function that can only be performed by a court of law. This judicial function cannot be delegated to the Police Officer investigating the case. The Police Officers are empowered under the provisions of Chapter XIV of the Cr.P.C, only to investigate the non-cognizable offence with the order of a Magistrate and the cognizable offence without such order. This power of investigation, in no way, includes the power to determine guilt or innocence of the accused persons. An investigation, as defined in section 4(1)(l) of the Cr.P.C., includes all proceedings under the Cr.P.C. for the collection of evidence conducted by a Police Officer or by any other person authorized by a Magistrate. This definition makes it clear that the assignment of a Police Officer conducting an investigation is limited to the collection of evidence, and the evidence when collected has to be placed by him before the competent court of law. Only the court has the power and duty to form an opinion about the guilt or innocence of an accused person and to adjudicate accordingly on the basis of evidence produced before it. An opinion formed by the investigating officer as to the non-existence or existence of sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused person to a Magistrate under sections 169 and 170 of the Cr.P.C does not tantamount to opinion as to the guilt or innocence of the accused person. And despite such opinion of the investigating officer, the final determination even as to the existence or non-existence of sufficient ground for further proceeding against the accused person is to be made by the Magistrate under sections 173(3) and 204(1) of the Cr.P.C. on examining the material available on record, and not on the basis of that opinion of the investigating officer.³ Therefore, the reference to and reliance on the opinion of the investigating officer by the High Court in its judgment was also legally untenable.

Merits of the case

6. Coming back to the merits of the instant case, we have noticed that according to the crime report and the ocular account of eye-witnesses (PW-9) and (PW-10), the complainant party immediately took Saif Ullah (deceased), who was seriously injured to DHQ Layyah, where he passed away and later on his dead body was brought to the THQ Hospital, Fateh Pur. The statement of Dr. Umair Gul (DW-1), which states that immediately after the incident the deceased was brought to the THQ Hospital, Fatehpur and examined by him. He stated that while realizing the seriousness of the injuries, he was

referred to the DHQ Hospital Layyah and before reaching the said Hospital the deceased passed away around 06:30 p.m. The time given in the postmortem also confirms the statement of (DW-1). The statement of Doctor Umair Gul (DW-1), an independent witness, shakes the credibility of the two eye-witnesses (PW-9) and (PW-10) leading to the conclusion that they were not present at the scene of the crime. We further note that the ocular account of (PW-9) and (PW-10) has been disbelieved by the High Court, which we find was rightly disbelieved, against Muhammad Saleem who was alleged to have played a similar role in the occurrence, and he stands acquitted. Therefore, the same evidence cannot be relied upon to convict Muhammad Idrees, unless there is an independent corroboration of it to the extent of his involvement in commission of the offence. Recovery being inconsequential there is no corroborative evidence to distinguish the case of the petitioner from that of the acquitted accused. The ocular account and the contents of the crime report are inconsistent with the medical evidence on the record. According to the case set up by the prosecution through ocular account, six fire shots were made on the two thighs of the deceased, three on the left thigh and three on the right thigh; however, according to the medical evidence, the right thigh has three entry wounds and one exit wound, while the left thigh has only two fire wounds. In the above facts and circumstances of the case, we are of the view that the prosecution has failed to establish its case against the petitioner beyond reasonable doubt. Hence, this petition is converted into appeal and allowed. Resultantly, the conviction and sentence of the petitioner Muhammad Idrees is set aside. He is acquitted of the charge and shall be released forthwith unless required to be detained in some other case.

Criminal Petition No.629-L of 2019:-

7. Through this petition, the complainant has challenged the acquittal of Muhammad Saleem. For the reasons given above, the prosecution has failed to establish its case beyond reasonable doubt. Therefore, this petition is dismissed and leave refused.

MWA/M-18/SC Order accordingly.