

Normally, the Court (s) do not interfere in **investigation** process which is *completely* dealt with by **investigating officer**. The conclusion of investigation, however, neither holds sent up person as **guilty** but that of an **accused** only. In short, the purpose of **investigation** is to bring truth on surface and to send *culprits* to face the trial or submit report regarding disposal of case under B or C class, as the case may be which, however, is *always* subject to approval of the competent court of law. The second part i.e **trial** is the legal procedure whereby the competent court decides the **guilt** or **innocence** of the sent up accused persons by following the dictated procedure.

4. It is worth adding here that **Code** itself has separated **investigation** from **trial** by detailing the procedure under different **chapter (s)**. It is Chapter XIV (*Information to police & their powers to investigate*) which deals with manner of **investigation**. It commences from Section 154 and ends at Section 176, hence *undoubtedly*, includes the Section 162 Cr.P.C. Thus, such course, *even*, can't prejudice the duties of the trial Court which has to record '**evidences**'. The proceedings before the Magistrate, during course of investigation, shall not prejudice the authority and competence of **trial court** but such court shall *absolute* and *independently* determine the question of guilt and innocence. None can deny that an '**evidence**' shall not stand complete when it is consisting on '**examination-in-chief**' and '**cross-examination**'. In the case of *Muhammad Ahmed v. State* (2010 SCMR 660) the purposes of '**investigation**' and '**trial**' were discussed and held as:-

"It may be mentioned here, for the benefit and guidance of all concerned, that determination of guilt or innocence of the accused persons was the exclusive domain of only the Courts of law established for the purpose and the sovereign power of

the Courts could never be permitted to be exercised by the employees of the police department or by anyone else for that matter. If the tendency of allowing such like impressions of the Investigating Officers to creep into the evidence was not curbed then the same could lead to disastrous consequences. **If an accused person could be let off or acquitted only because the Investigating Officer was of the opinion that such an accused person was innocent then why could not, on the same principle, another accused person be hanged to death only because the Investigating Officer had opined about his guilt.** It may be added that the provisions of sections 155, 156, 157 and 174 of the Criminal Procedure Code permit a police officer only to investigate a case. 'Investigation' stands defined by the provisions of section 4(1)(l) of the said Code in the following terms:-

'investigation includes all the proceedings under this Code for the Collection of Evidence conducted by a police officer....' (emphasis and underlining has been supplied)

This then clearly indicates that the job of the Investigating Officer is only to collect evidence and to place the same before the competent Court. Therefore, whatever expertise, if at all, could be claimed by an Investigating Officer, would be vis-à-vis his field of operation, namely, collection of evidence. Could his opinion ever become admissible in the medico-legal matters which is the area reserved for medical doctors or with respect to archaeological matters to determine whether an item was or was not an antique or about hand-writings or foot-prints or finger-prints or to find out whether a painting was the actual work of a renowned painter or a fake?. If the answer be in the negative, which it has to be, then how come he could be considered an expert and his opinion becoming admissible vis-à-vis the guilt or innocence of an accused person? It may be added that in the last 100 years since the Code of Criminal Procedure had been in existence in its present form, not once had it been authoritatively declared that an investigating officer was an expert in the matter of determining the guilt or innocence of accused persons whose opinion was admissible for the purpose, under the law of evidence. The prohibition contained in section 161, Cr.P.C. and in section 172 of the said Code regarding in-admissibility of the statements recorded by an Investigating Officer under the said section 161 or the case diaries prepared by him under the said section 172, would further clarify the said proposition. Reference may also be made to a judgment of the Lahore High Court, authorized by one of us which is reported as Haji Muhammad Hanif v. The State PLD 1991 Lah. 214."

The above discussion and legal position leaves no ambiguity that the purpose and object of '**investigation**' and '**trial**' are quite different hence the action (s), taken in the course of '**investigation**' cannot prejudice the procedure for conducting trial which, *undeniably*,

includes recording of evidence as well right to cross-examination. No doubt, the section 164 Cr.P.C includes a right to cross-examination to accused, as may be evident from referral of section 164 of *Code* which reads as :-

“Power to record statements and confessions.

(1) Any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Provincial Government may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(1A) Any such statement may be recorded by such Magistrate in the presence of the accused, **and the accused given an opportunity of cross-examining the witness making the statement.**

(2) ...

(3)..

but such right *legally* shall not prejudice the right of the accused to cross-examine the witness while standing in witness box before the trial court. It may well be added that such statement remains only a **statement** (piece of evidence, collected by investigation agency) in both case (s) i.e cross-examination by accused or dropping thereof. If any other view is taken then *first* such recorded statement shall have to be given the status of **‘examination-in-chief’** which the law, nowhere permits. Such legal position was entirely ignored by the learned trial court while declining the cross-examination on ground that witness was cross-examined during his examination under section 164 Cr.PC. Such approach, if allowed, shall cause serious *prejudice* to absolute domain of the **competent trial court** to determine guilt or innocence. Such statement could well be used for contradicting the witness regarding his previous statements, made by him in writing or reduced into writing, as is provided by Article 140 of Qanun-e-Shahadat Ordinance, 1984. Such *legal* position needs to be kept in view by all the lower Court (s) while conducting trial so that

no prejudice is caused to guaranteed right of ***fair-trial***, undeniably available even to an accused, within meaning of Article 10-A of Constitution.

5. In this case death penalty is provided yet the accused was deprived of his right to cross-examination which, *legally*, is the only weapon to test the veracity and credibility of the '***witness***'. Such trial, *legally*, being defective, can't be stamped. At this juncture Ms. Sadia Khatoon further contends that though they preferred application for cross examination that was also not entertained, same is yet pending. Such addition makes the position rather *miserable*. Accordingly, this is a case of *denovo* trial, hence impugned judgment recorded by the trial court is hereby set aside. Case is remanded back at the stage of cross examination of the witnesses and thereafter trial court shall record statement under section 342 Cr.P.C., provide opportunity of defence and after hearing the parties decide the case on merits.

6. Needless to mention that co-accused on the plea of *alibi* has been acquitted by the trial court and there is no appeal against him, therefore this order will not have impact upon acquittal of accused Yousuf. Further District and Sessions Judge shall withdraw criminal case No.997/2015 (crime No.1288/2015) (State vs. Nadeem and others) and proceed himself or assign it to any other Additional District and Sessions Judge.

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