Chapter VIII

ESTOPPEL

115. Estoppel—When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustrations

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Case Law

Section 115—Kinds—explained—There is a class of estoppel which seems to be intermediate between estoppel by record and estoppel *in pais*. The rule is that a party cannot, after taking an advantage under an order, be heard to show that it is invalid and ask for setting it aside or to set up to the prejudice of persons, who have relied upon it, a case inconsistent with that upon which it was founded., That rule covers cases inter parties only. Such a party will not also be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it. *Lal Khan vs. Allah Ditta PLD 1950 Lahore 196; PLR 1950 Lahore 273.*

Section 115—Property bought on giving out that it was for building a school—Other people acting on that understanding—Property cannot be dedicated for any other purpose. *Muhammad Imdad Ullah. AIR 1946 Allahabad 468.*

Section 115—Admission made by mistake—All other parties under same mistake—No estoppel. *Kochuri PLD 1947 PC 344.*

Section 115—Estoppel by representation when effective. Section deals with the doctrine of estoppel by representation. The words used in the section are declaration, act or omission which are included within the word representation. The meaning has been made perfectly clear by the use of those words. The declaration, act or omission, must be clear, definite, unambiguous and unequivocal. *Radhasyam Gope PLD 1957 Dacca 184.*

Section 115—Estoppel—Principle explained—The principle which is incorporated in section 115 of the Evidence Act is a simple and equitable doctrine which lays down that if a person has acted to his detriment or altered his position on the basis of any declaration, act or omission of another person, that other person will not be allowed in any suit or proceedings between himself and the other person or his representative to go back upon it to the detriment of the opposite party. *Muhammad Yunus vs. Muhammad Ismail PLD 1959 (WP) Karachi 755 (DB).*

Section 115—Feeding the grant by estoppel—What is?

The doctrine of feeding the grant by estoppel which appears as the solitary illustration to section 115 of the Evidence Act and in section 43 of the Transfer of Property Act is based on the ground that if a person, for value received, conveys what he does not own but subsequently he acquires the title which he conveyed, then the transferee can enforce the conveyance against him. *Ghulam Muhammad Shah vs. Fateh Mohd. 7 DLR (FC) 71.*

Section 115—Principle governing estoppel—The doctrine of estoppel rests upon the principle that the person invoking it has relied upon a declaration, act, or omission of another person and has thereby been induced to change his position to his detriment. *Lal Khan PLD 1950 Lahore 196; PLR 1950 Lahore 273.*

Section 115—Estoppel does not create a cause of action unless the conduct of the representer amounts to fraud or constitutes a contract. A mere statement of intention does not create any estoppel. *12 DLR (SC) 246.*

Section 115—Estoppel against statute—Whether a candidate who has been declared Chairman by Notification in the Official Gazette has created an estoppel against statute by his subsequent conduct. *Hazrat Ali vs Election Commission 41 DLR 486.*

Section 115—Applicability of the principle—Facts and circumstances of the case warrant applicability of this principle—Corporation will be estopped

from accepting the petitioner's resignation. *M A Mannan vs. Biman Bangladesh Airlines 41 DLR 318.*

Section 115—Tenant building with the consent of landlord—Landlord cannot eject him from land. *Shubrati AIR (33) 1946 Allahabad 403.*

Section 115—Scope—Not applicable to plea of fact to be proved before statue becomes applicable. *S Nan Singh AIR (33) 1946 Lahore 73.*

Section 115—University permitting student to take examination—Permission against law—No estoppel against University cancelling the permission. *Warisali Khan PLD 1956 (WP) Karachi 155.*

Section 115—Sale-deed, recitals in—Cannot cause estoppel between presumption and party to sale-deed. *Lal Khan PLD 1950 Lahore 196; PLR 1950 Lahore 273.*

Section 115—As shown in the sale-deed the property sold was agricultural land. It was contended that both the seller and the purchaser looked upon the property as a piece of agricultural land and as such the evidence that the land in question was anything other than agricultural land cannot be accepted and the purchaser cannot be estopped from showing the real nature of user of the land in question by means of other evidence. The principle of estoppel as enunciated in section 115 of the Evidence Act, cannot stand in the way of the purchaser giving other evidence to show the real nature or character of the land. The recitals in the document are undoubtedly a kind of evidence. But by themselves those recitals cannot stop the purchaser from giving other evidence. *Athar Ali vs. Abdul Taher PLD 1961 Dacca 349; 2 DLR 758.*

Section 115—Recitals in deed—Not to operate as estoppel between a party to deed and a third party.

A recital in a deed cannot operate as estoppel between a party to the deed and a third party. *Lal Khan PLD 1950 Lahore 196; PLR 1950 Lahore 273.*

Section 115—There is no room for any application of the doctrine of estoppel outside the provisions of section 115 of the Indian Evidence Act in this country. *Lal Khan PLD 1950 Lahore 196; PLR 1950 Lahore 273.*

Section 115—Waiver—When may be inferred—Party must know about its right. *Manak Lal PLD 1957 SC (Ind.) 346.*

Section 115—Estoppel in criminal case—The rule is that where an authority is permitted by law to function only once and communicates to the Court that it has functioned in a particular way it will not be permitted by the

Court to say that subsequently it functioned in a different manner as it subsequently did. This rule which insists on finality and consistency in litigation is not estoppel as enacted in section 115 of the Evidence Act which only applies to civil cases, but is much wider in its scope and application than mere estoppel within the meaning to the words in section 115 of Evidence Act. *Sultan Md (1955) 7 DLR (FC) 78.*

Section 115—Deed of relinquishment executed for consideration : Courts of justice are also Courts of enquiry in this country, and if a deed of relinquishment is executed for consideration of which the executant has taken the benefit, there is no reason why in appropriate cases such an agreement should not be equitably enforced, in the absence of any statutory prohibition. *Quamaruddin vs Aisha Bibi 8 DLR WP 86.*

Section 115—Judgment-debtor in a money decree entering into a contract with a third party whereby the latter undertakes to pay the decretal dues of the judgment-debtor to the decree-holder. In executing the decree, the decree-holder cannot proceed against the third party as he is not the legal representative of the judgment-debtor. There are, however, certain exceptions to this general rule. *Sajjdul Huq vs Sultan Hassan 11 DLR 293.*

Section 115—Estoppel, doctrine of—In order to feed an estoppel, the representation i.e., a party's declaration, act or omission, must be clear, definite, unambiguous and unequivocal and that the person making the representation should so conduct himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it. *6 PLR (Dac) 181.*

Section 115—Estoppel arises in cases of pre-emption where notice is given to co-sharer under section 26C BT Act: So far as the question of pre-emption is concerned, estoppel can arise when a person purchases a property describing it as an occupancy holding and notice is given to the co-sharer tenant under section 26C of the BT Act, and on the faith of that representation contained in the notice the co-sharer tenants apply for pre-emption under section 26F of the Bengal Tenancy Act. *Afran Ali Sheikh vs. Ead Ali Talukder 14 DLR 791.*

Section 115—Principle of feeding the estoppel—When any one fraudulently or erroneously transfers certain immovable properties in which he had no interest at the time of such transfer, but the transferor subsequently acquired an interest in the said immovable property, the benefit of such subsequent acquisition will go to the transferee on the principle of feeding the estoppel. *8 PLR (Dac) 959.*

Section 115—Purchaser not estopped from showing the real nature of the land by other evidence—Evidentiary value of recital in the document—Purchaser cannot be estopped from showing the real nature of user of the land in question by means of other evidence. The principle of estoppel as enunciated in section 115 of the Evidence Act, cannot stand in the way of purchaser giving other evidence to show the real nature or character of the land. The recitals in the document are undoubtedly a kind of evidence but by themselves those recitals cannot stop the purchaser from giving other evidence. *Athar Ali vs. Abdul Taher Bhuiya 12 DLR 758.*

Section 115—Estoppel against statute—No estoppel against statute—The Court is bound to act as required when the provision of an Act are brought to its notice—No question of *res judicata. Jenendra Ch. Majumdar vs. Dhirendra Ch. Saha 8 DLR 170.*

Section 115—Estoppel or waiver—Necessary ingredients for establishing estoppel or waiver—Principle to follow in commercial transaction—To establish a case of waiver or estoppel it is necessary to show that the party alleged to have waived its rights had acted in such manner as to lead the other side to believe that such rights will not be enforced or will be kept in suspense or abeyance for some particular time. A mere gratuitous indulgence shown in not enforcing strictly one's legal rights for a brief period cannot give rise to the inference that the rights have been abandoned for all times. *Ocean Industries Ltd. vs Industrial Development Bank 18 DLR (SC) 355.*

Section 115—There cannot be any acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement. *Haque Bros vs Shamsul Huq 39 DLR 290.*

Section 115—Estoppel will come into play if description of property going to be sold is set forth in notice under Order 21, rule 66(2) CPC : An argument based on estoppel may have been put forward against the judgment-debtors if there was description of property in the notice issued under Order 21, rule 66(2) CP Code as to bring it to their notice that property other than what they regarded as covered by the decree was going to be sold. *Manzoor Jahan vs. Haji Hussain Bakhsh 18 DLR (SC) 347.*

Section 115—Estoppel—Does not operate to extinguish rights—Merely operates as bar to suits—Estoppel operates as a bar to suit; it does not however operate to extinguish a right. Estoppel deals with questions of fact and not

questions of right. In other words, there is no general rule that a man is estopped from asserting his right which he said he will not assert, though it may be that a man who agrees not to assert a right may in certain circumstances be bound by his agreement. The latter case, however, is of relinquishment of right which is a contractual act and as such must be distinguished from mere estoppel. *Qutubuddin vs. Muhammad Siddique, (1269) PLD (Lahore) 418.*

Section 115—Kabuliyat (creating a tenancy) executed after coming into force of section 75A (SA & T Act) is hit by its provision : Before the High Court question arose, whether the Kabuliyat executed after coming into force of section 75A of the Act was hit by its provision and, on the order hand, whether the suit was barred by estoppel.

Held : The Kabuliyat is null and void being hit by the provision of section 75A of the Act. Section 75A being a statute there can be no estoppel against a statute under certain circumstances as in the present case where the Kabuliyat is shown to be tainted with illegality. *Sree Sudhir Chandra Saha vs Heirs of late Jan Mahmud Sirker, 21 DLR 429.*

Section 115—An invalid transfer cannot be validated by recourse to the doctrine of estoppel. Vendee not being the transferee himself is not estopped from impeaching the validity of sale-deed executed in his favour by the vendor. *Meher Chand Banu vs Salimullah, 22 DLR 316.*

Section 115—Estoppel—Right of representation in matter of succession—Mere silence or failure to object to attestation of mutation—Does not necessarily amount to intentional representation.

To estop a person from asserting his right, it is necessary to prove that he had made representation intentionally to another person. Mere silence or failure to object may not amount to intentional representation in every case. *Qutubuddin vs Mohd Siddique, (1969) PLD (Lahore) 418.*

Section 115—Estoppel—When cannot be invoked in case of a statute enjoining doing of a particular act: In case of a statute enacted for the benefit of a section of the public, i.e. on grounds of public policy where the statute imposes a duty of a positive kind for the doing of the very act which the party suing seeks to do, it is not open to the opposite party to set up an estoppel to prevent it. In this case the rule of estoppel was allowed to prevail over the statute because it appeared that if the rule was allowed to prevail it would defeat the public policy of the State. *Matira Bewa & others vs Sree Sudhir Chandra Saha & others 35 DLR 56.*

Section 115—No estoppel against statute—When not operative. The rule that there is no estoppel against the statute shall apply when the invocation of the principle will defeat the public policy behind the statute. The general rule is that no man can take advantage of his own wrong and to this general rule, the rule that there is no estoppel against the statute is an exception but this rule of exception is attracted only when the invocation of the principle of estoppel will defeat the public policy behind a statute. *Matria Bewa & others vs Sree Sudhir Chandra Shaha & others 35 DLR 56.*

Section 115—Plaintiff having voluntarily leased out their lands in contravention of the law could not now turn and say that the lease is null and void and seek recovery of possession of their property on that basis. *Matria Bewa & others vs Sree Sudhir Chandra Saha & others. 35 DLR 56.*

Section 115—Fishery—Lease of—Appellant society could not show any infringement of statutory rules in creating lease of fishery—No question of estoppel arises against Government either quasi or promissory. *Haruni Fishermen's Co-operative Society vs Md Ebadat Ali & others 40 DLR (AD) 266.*

Section 115—According to the modern sense of the term, *estoppel in pais* has been said to arise, firstly, from agreement or contract; secondly, independently of contract from act or conduct of misrepresentation which has induced a change of position in accordance with the real or apparent intentions of the party against whom the estoppel is alleged. *West Punjab Government vs Akbar Ali PLD 1952 L 430.*

Section 115—The representation must have been acted upon to the detriment of the representee—The main question, in determining whether estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it, *Sarat Chandra Dey vs Gopal Chunder Lala, 19 IA 203; Ranbir Karan Sing vs Jogindra Chandra Bhatiachariji, 1940 AIR (All) 134; Jethibai vs Chhabildas Donngarsi, 1935 AIR 142; Jonh Agabog Vertannes vs James Golder Robinson, 1927 AIR (PC) 151, 156.*

Section 115—Mere signature of a party on an award does not necessarily estop him from disputing its correctness. *Gunnu Meah vs A Rahman, 1929 AIR R 166; Manohar Lal vs Amano, 1924 N 14.*

Section 115—No one can take advantage of his own fraud invoking the principle that there is no estoppel against statute, The rule is attracted only when its invocation will defeat the public policy behind the statute. *Sree Sudhir Ch Saha vs Matira Bewa; 1986 BLD (AD) 182.*

Section 115—Plaintiff's karasha right sold in auction—Defendants claiming Kol Karasha right setting aside the auction sale under section 174 (3) BT Act impleading the Plaintiff—Plaintiff not disputing in the proceeding defendant's Kol-Karsha. He is estopped to deny defendant's Kol Karsha. *Sunil Kumar Biswas vs Muhammad Idris; 1981 BLD (AD) 367(b); 5 BSCR 203.*

Section 115—Litigation concluded by compromise decree. As consideration for compromise defendant gave up his claim—Subsequent suit for the claim barred by estoppel. *Abdul Mujib Choudhury vs Syed Abdul Mutalib; 1981 BLD 464.*

Section 115—No estoppel against statute' is an exception to the general rule that no man can take advantage of his own wrong. Plea of estoppel would be available to bar investigation of question of fact. It shall not apply when it defeats public policy behind a statute. *Matira Bewa vs Sree Sudhir Ch Shaha; 1982 BLD 148.*

Section 115—Promissory estoppel—government not immune from applicability of the doctrine of promissory estoppel and cannot repudiate a promise made by it. *Sharping Matshajibi Samabaya Samity vs Bangladesh; 1982 BLD 189.*

Section 115—In pre-emption case—When the pre-emptor negotiates the sale or the facts are such that his acquiescence can be safely concluded he is estopped and his conduct will be a bar though he filed the case within time. *Moulana Abdul Karim vs Nurjahan Begum; 1986 BLD 125.*

Section 115—Notification exempting duty and tax—Legality of subsequent notification and question of estoppel—The notification under section 19 was issued without any condition excepting the "terms and conditions." therein. Subsequent notification taking away exemptions can have no operation when a right had vested in the importer. The importer having acted upon the assurance given, the Government cannot retrace its steps and ask for duty at the rate mentioned in the subsequent notification. This is clearly a case of estoppel, the well-settled principle of promissory estoppel. *Collector of Customs, Chittagong vs A Hannan 42 DLR (AD) 167.*

Section 115—Consent Decree—Limitation and Estoppel—Plaintiffs elected to give up all the reliefs prayed for in the suit and to limit their prayer, by amendment, to a declaration that they are the sole legal heirs of the loanee. On understanding with the plaintiffs, the defendants neither opposed the amendment nor advanced any argument. Since the plaintiffs elected to relinquish all reliefs except the one for saving the suit from limitation and to secure some benefits for themselves, they are bound by the principle of estoppel and cannot be allowed to argue for the same reliefs which they had voluntarily abandoned. The decree obtained by them being based on understanding and consent of the parties, they are not permitted to take any appeal from such consent decree. On the same principle the defendant is also barred from preferring any appeal from the High Court Division's judgment. *Parveen Banu vs BHBFC 42 DLR (AD) 234.*

Section 115—Ordering retirement from service after the petitioners rendered 12 years' uninterrupted service—Admittedly the appointment of petitioners was made by the then Chairman of the Pourashava, a competent authority and since they joined services on the basis thereof and rendered 12 years of uninterrupted service, their appointment cannot now be said to be made irregularly. If any irregularity was there initially, it has been cured. After they were confirmed following probation of 2 years under the rules their services cannot be terminated arbitrarily in the manner as done by the impugned letter. The grounds of redundancy on which the petitioners have been retired is a colourable exercise of power. The respondent is therefore directed to reinstate the petitioners and pay them arrear salaries as claimed. *Kanaklata Halder vs Barisal Pourashava 42 DLR 533.*

Section 115 —estoppel—It is true the plaint refers to defendant's petition for some amendment in Commissioner's report relating to the decree in an earlier suit and her serious objection to such amendment and yet she has herself assailed the same decree in the later suit. This attracts the principle not of *res judicata* but of estoppel which means that a person shall not be allowed to say one thing at one time and the opposite of it at another time. *Nannu Miah vs Peer Banu Bibi 43 DLR 526.*

Section 115—Estoppel—It binds heirs—The plaintiff is claiming interest in the property by inheritance through his father. If his father had accepted the title of the defendants as tenants of the property, his father would be estopped from challenging the title of his landlord, and if his father would be estopped the plaintiff would also be bound by the said estoppel as estoppel binds heirs. *Bazlur Rahman vs Sadu Mia 45 DLR 391.*

Seciton 115—Mere offer and decline to offer do not constitute any waiver in law in order to act as an estoppel to deny preemption. *Kamaluddin and others vs Md Abdul Aziz and others 56 DLR 485.*

Section 115—There can be no estoppel where the truth is known to both parties. *Sarafat Hossain vs Dr Islamuddin 45 DLR 724.*

Section 115—Waiver—EstoppeI—An officer of Parjatan Corporation challenging the order retiring her from service before the age of superannuation cannot be said to have waived her rights and accepted the order just for the reason that she had accepted the gratuity money available to her. *Hasina Mawla vs Patjatan Corparation 45 DLR 112.*

Section 115—Estoppel & Acquiescence—Having induced the appellants to permit him to retire from service, the respondent cannot be heard to say they had no power to relieve him. Even if the appellants' action was not sanctioned by law, he cannot be the person to make any grievance of it, because he wanted a beneficial order in his favour and the applellants had only obliged him. *Bangladesh Parjatan Corporation represented by its Chairman and others vs Mofizur Rahman and another 46 DLR (AD) 46.*

Section 115—The equable principle of estoppel debars the plaintiff from recovering possession of the suit land from the delendants as they made substantial improvement of the land, although belore acquiring title by adverse possession. *Renupada Chakraborty vs Kurian Ullah and others 46 DLR 532.*

Section 115—Estoppel—The Railway being a part of the Government, the Government or any of its Ministry is estopped from challenging the validity of the contract concluded with the plaintill. *Pronab Kumar Chakraborty and others vs Bangladesh and others 46 DLR 268.*

Section 115—Estoppel—Partition is an equitable relief—Plaintitffs having abandoned their claim in respect of part of the suit property and the same having been acted upon they are estopped from giving a go by to the compromise to the prejudice of the compromising defendants. *Mayurer Nessa and others vs Julekha Khatoon and others 47 DLR 26.*

Section 115—Acceptance of pensionary benefits under compelling circumstances of the present case cannot be accepted as estoppel. *Jahangir Kabir (Md) vs Bangladesh 48 DLR (AD) 156.*

Section 115—It is clear that unless the defendant's position is changed or altered due to the representation made by the plaintiff, there will be no application of the doctrine of estoppel. *Abdur Rahman vs Tazlul Karim Sikdar and others 48 DLR 361.*

Section 115—Promissory estoppel—Though the tenant failed to pay rent within due date and became technically a defaulter, the receipt of Salami, a practice recognised in the agreement between the parties, can be taken as a promissory estoppel debarring the landlord to go beyond the terms of the agreement, *Munshi Amiruddin Ahmed vs Begum Shamsun Nahar 48 DLR 21.*

Section 115—When a party is fully aware of the wording of the abritration clause, and upto the time of submission of award no objection is raised as to the jurisdiction of the arbitrator the party must be estopped from raising such a plea after the pronouncement of the award. *Bangladesh Water Development Board and others vs Progati Prakaushali and another 49 DLR 335.*

Section 115—The plaintiff never abandoned his claim of ownership nor the defendants were misled by his prayer for an annual lease so as to change or alter their position to their detriment and the prayer for temporary lease being obviously under protest the doctrine of estoppel or waiver has no manner of application in the present case. *Dayal Chandra Mondal and others vs Assistant Custodian Vested and Non-Resident Properties (L&B) and others 50 DLR 186.*

Section 115—Before a party could be barred by the principles of estoppel, waiver and acquiescence it must be established that the opposite party acted bonafide on the clear, definite and unambiguous representation made by his adversary and that the opposite party has altered position in pursuance thereof. *Moslem Ahmed Sarker (Md) alias Muslim Ahmed vs Abdul Khaleque and others 50 DLR 616.*

Section 115—Right of pre-emption which is a statutory right cannot be given up or taken away or waived by mere allegation that the pre-emptor was present in the sub-registrar's office at the time of execution and registration of the deed in question. *Abdus Sobhan Sheikh vs Kazi Moulana Jabedullah and others 52 DLR 289.*

Section 115—By attestation to deed Exhibit A(2) the plaintiff cannot be held to have knowledge of the contents of the deed in order to be estopped under section 115 of the Evidence Act. *Wahida Begum vs Tajul Islam 52 DLR 491.*

Section 115—Promissory Estoppel is a principle evolved by Courts on the principles of equity and to avoid injustice. Where one party by his words and conduct make the other party a clear promise that promise would be binding upon the former who would not be entitled to go back from it. *Government of Bangladesh, & others vs ASM Firojuddin Bhuiyan 53 DLR 522.*

Section 115—In a case, as in the instant one transaction by Exhibit B, where transfer is challenged after lapse of considerable long time then recital in the

document being of long past can legally be considered, in the light of observation in the case reported in *AIR 1916 PC 110,* genuine and the court may taking the recital along with the circumstances go for making its decision as to validity of the deed. *Jitendra Nath Mistry vs Abdul Malek Howlader and ors 54 DLR (AD) 106.*

Section 115—The Government could not be allowed to work inconsistently, whimsically and capriciously to the prejudice of respondent later when the project was approved by another lawful Government agency at an earlier point of time. *Chairman, Board of Investment and others vs Bay Trawling Limited and other 51 DLR (AD) 79.*

Section 115—As the ADC (Rev) directed the payment of rent of the suit land by the defendant and the Government having accepted the rent from the defendant for which the Government was estopped from challenging the title of the defendant. *Osimuddin vs Bangladesh and others 1 BLC 375.*

Section 115—In the absence of any express terms and conditions in the lease deed it cannot be said that the lessor had promised to extend or renew the lease for any further period. *Chaila Khal Nobam Khanda Mathshyajibi Samity Ltd vs Revenue DC and others 1 BLC 339.*

Section 115—The decision of the local revenue officer accepting the plaintiff and his successive predecessors-in-interest as tenants in respect of the suit land under the Government is binding on the vested property department and so the latter cannot claim the suit property as the vested property. *Additional Deputy Commissioner (Revenue), Narayanganj vs AKM Latiful Karim & ors 1 BLC 576.*

Section 115—*Per AM Mahmudur Rahman J (delivering the majority judgment)*—The appellant waived her right of pre-emption by refusing to purchase the land transferred at the earliest opportunity and that she is estopped from repurchasing the land when the lower appellate Court had misread the evidence of PWs on question of acquiescence and estoppel. *Rokeya Begum vs Md Abu Zaher and others 5 BLC (AD) 97.*

Section 115—Respondent having submitted to jurisdiction of arbitrator by filing joint petition and accepting the order of the Court appointing Mr Asaduzzaman as the sole arbitrator and in participating in arbitration proceeding and in not challenging the authority of arbitrator to pass the award now cannot question the validity of the award. There had been waiver and acquiescence on the part of second party-respondent and the same is completely debarred from raising the question of jurisdiction for the first time in this appeal. *A Latif and Company Limited vs Project Director, PL-480, Title 3, LGED & another 9 BLC 271.*

Section 115—No case has been made out in the written statement that Jatindra and Krishna Pada Mondal made erroneous representation or declaration or by their act or omission intentionally caused the purchasers in kabala dated 10-11-73 to believe that defendant Nos. 16 and 17 were the real owners of the property and, in fact, the defendant had the knowledge about the death of Shuk Chand and the real state of things were known to the parties and hence no question of estoppel arises. *Ali Akbar Khan vs Gurudas Mondal and others 4 BLC 265.*

Section 115—Direction to absorb the ex-Mujibnagar Employees—Admittedly, during the war of liberation the petitioners as Mujibnagar employees fought in different places and in different capacities to liberate this country and they had been listed as bonafide Mujibnagar employees by the Ministry of Establishment and the Hon'ble Prime Minister had also given direction to absorb them and, in such circumstances, Government is bound by the principle of promissory estoppel to absorb them. *Gazi Abdul Hannan and others vs Secretary, Ministry of Establishment, Government of the People's Republic of Bangladesh and others 4 BLC 58.*

Section 115—Landlord sold the possession of the godown giving the right to sell its possession—Not evictable under the Premises Rent Control Ordinance—The plaintiff by accepting the terms and conditions of the contract entered into between the defendant and the original owner Agarwala giving the defendant the right to sell the possession of the premises is estopped from evicting the defendant from the premises as the defendant cannot be treated as a tenant under Premises Rent Control Ordinance as tenant at will but he is liable to pay rent and arrear of rent is recoverable by suit when no eviction is applicable to the provision of Transfer of Property Act. It is a kind of estoppel which may be called waiver or forbearance on the part of the plaintiff or an agreed variation or substituted performance. *Moksed Ali (Md) vs Hajee Mohammad Ali 4 BLC 612.*

Section 115—Direction to absorb the ex-Mujibnagar employees—In view of the direction given in the three judgments of three Division Benches of the High Court Division and also in view of the directive as given by the Hon'ble Prime Minister dated 10-11-1996 to the Establishment Division for absorbing the Ex-Mujibnagar employees within 90 days in the service of the Republic, the respondents are directed to absorb all petitioners in all the writ petitions in their respective posts of Sub-Registrar as per final nomination given by the Establishment Division on 19-12-1985 and as per decision of the Government made earlier within sixty days from the date of receipt of a copy of this judgment

as the Government is bound by the principle of promissory estoppel to absorb the petitioners in the Government services. *Abdul Gafur Mondal (Md) and others vs Secretary, Ministry of Establishment, Government of the People's Republic of Bangladesh and others 2 BLC 483.*

Section 115—The contention that the petitioner, Mrinalendu Pal is not a citizen of Bangladesh, rather he is an Indian citizen who has got no *locus standi* to file the writ petition is negatived as the respondents have totally failed to place any material before the Court to substantiate such contention and besides that the respondents treating the petitioner a citizen of Bangladesh issued all notices at his residence at Chittagong and the petitioner also gave objection and representation to the authorities and now the respondents cannot say that he is not a citizen of Bangladesh as they are debarred completely to deny the citizenship of the petitioner whose property cannot come under the mischief of the definition of vested property. *Mrinalendu Pal vs Divisional Commissioner and others 2 BLC 495.*

Section 115—*Res judicata*—Estoppel—As the plaintiff respondents are reagitating the very same question agitated in the writ petition filed by them against the defendant appellants though the question has been set at rest by the decision in the writ petition disposed of on merit which was affirmed by the Appellate Division for which the decision of the writ petition will debar the plaintiffs from reagitating the same question in the suit filed by them against the defendants. Even the plaintiffs cannot raise the very same question invoking the doctrine of promissory estoppel which is also barred by the principle of constructive *res judicata. Rajdhani Unnayan Kartipakha vs Mohammed Jabed Ali and others 2 BLC 588.*

Section 115—Temporary injunction —Estoppel—To get an order of temporary injunction for maintaining *status quo* in respect of the suit land the person seeking such relief is to show firstly, that he has got an arguable case and secondly, if such an order is not passed then balance of convenience will be disturbed. As the Rajuk gave impression in the year 1962 that their lands would not be used for which some of the owners of the land had refunded the money received by them and others could not and that the RS Khatians had already been finally published by the Government in the names of the plaintiffs which show that plaintiffs have an arguable case and the plaintiffs can invoke the doctrine of estoppel. *Rajdhani Unnayan Kartripakha vs Mohammed Jabed Ali and ors. 2 BLC 584 .*

Section 115—Acceptance of pensionary benefits by a person compulsorily retired from service cannot be accepted as estoppel within the meaning of section

115 of the Evidence Act. *Jahangir Kabir (Md) vs Bangladesh, represented by the Secretary, Ministry of Home Affairs 1 BLC (AD) 96.*

Section 115—Admittedly, the plaintiff was granted LPR but he gave representation to the government for reconsideration of his age which was rejected and thereupon the plaintiff received all his dues upon retirement and therefore all these facts clearly show that the plaintiff had acquiesced in the decision taken by the Corporation about the date of his retirement and waived his claim for extension of service. Moreso, Rule 9 of the Service Rules sets a bar to a change of the date of birth of the incumbent as recorded at the time of appointment. *Bangladesh Agricultural Development Corporation (BADC) vs Abdul Barek Dewan being dead his heirs Bali Begum and others 4 BLC (AD) 85.*

Section 115—In view of categorical admission of the petitioners it does not lie in the mouth of the petitioners that "Ergotan Tablet" was of standard quality and they are estopped to say so. *Square Pharmaceuticals Limited and another vs Government of Bangladesh, and another 3 BLC 22.*

Section 115—The nature of evidence on the crucial question is neutralised by oath versus oath of the contending parties resulting thereby the pre-emptee has failed to make out any case of waiver and acquiescence so as to operate estoppel. *Moslem Ahmed Sarkar (Md) alias Muslim Ahmed vs Abdul Khaleque and others 3 BLC 158.*

Section 115—The submission that the Ministry of Fisheries and Livestock had given consent to the surrendering of the disputed land, the said Ministry is estopped from denying the right, title and interest of the petitioner in the land in question has fallen through. *Ansar Ali son of late Nawsher Ali vs State 3 BLC 68*

Section 115—Respondent No.4 evidently is junior to the writ-petitioners who are the members of the General Administrative Cadres and they are entitled to promotion according to the joint seniority list prepared in 1991 with all benefits attached to their posts and such benefits cannot be taken away as has been done by the impugned orders as those fail on the doctrine of promissory estoppel. *Chairman, Bangladesh Water Development Board, WAPDA & anr vs Kazi Hedaytul Islam and others 6 BLC (AD) 31.*

Section 115—It is by now well settled that consent or waiver cannot give jurisdiction where there is inherent lack or absence of it and in that case the order is a nullity. *Registrar, Supreme Court of Bangladesh vs Md Shafiuddin and another 6 BLC (AD) 141.*

Section 115—Accepting the offer of the petitioner to purchase the property in question the Bhawal Court of Wards Estate filed an application in printing form on 19-1-97 required under section 184(1) of Income Tax Ordinance of 1984 stating that the property in question would be sold to the petitioner at a consideration of Taka three lac and odd which has created promissory estoppel in favour of the petitioner and against the respondents and hence the impugned notice published in the daily newspaper inviting tender for long term lease of the property in question is without any lawful authority and is of no legal effect. *Meherunnessa vs Bangladesh and others 6 BLC 209.*

Section 115—The claim of the plaintiff-bank cannot be hit by the Doctrine of Promissory Estoppel as the plaintiff has not asked the defendants to apply for remission of the interest under the Circular dated 7-10-1991 issued by Bangladesh Bank when the said Circular has got no force of law and not binding on the plaintiff-bank and also the said Circular is not a mandatory one but a directory one. *Pubali Bank Ltd vs Abdul Kader and anr 7 BLC 656.*

Section 115—The importers having acted on the promise made by the appellants under section 25A of the Act to accept the price determined by the Government appointed inspectors the appellants cannot go back on that promise as it was meant to be binding on them. The Appellate Division is in agreement with the decision of the High Court Division that SRO No. 113 dated 11-5-97 cannot affect the vested right of the respondents to be assessed by CRF price. *Commissioner of Customs and others vs Monohar Ali and 26 others 8 BLC (AD) 87.*

Section 115—When the DW 1 admitted in his cross-examination that they knew from monthly statements of jute stock that more than 4,000 bales of jute were used to be stored in the godown but they did not raise any objection resulting thereby they acquiesced the excess storage of jute. In such circumstances the repudiation of claim of plaintiff No. 1 because of storage of excess quantity of jute in violation of clause 9(a) of the absolute warranties had no legal basis and was done illegally. *Fibre Deals Ltd vs Sadharan Bima Corporation and others 8 BLC 337.*

Section 115—Promissory estoppel—The respondent-Government cannot be allowed to act inconsistently with its promise made by memo dated 10-4-1995 which is binding on it. The Government thus cannot be exempted from its liability to carry out its promise given to the petitioner to sell the three-fourth share of the property and by the doctrine of promissory estoppel the Government cannot escape from its liability saying that the promise was merely an administrative decision. *Asaf Khan vs Court of Settlement, First Court & ors 8 BLC 1.*

Section 115—Legitimate expectation—The memo dated 10-4-1985 informing the petitioner No. 1 to pay the price of three-fourth share of the property and the resolution of the Abandoned Property Management Board dated 17-12-92 maintaining the earlier decision to sell the three-fourth share of the disputed property to the petitioners gave rise to a legitimate expectation of the petitioners to have completed the legal formalities for transferring the property in question to them. Subsequent silence of the Government authority amounts to denial of such expectation which is unfair. Accordingly, the respondent-government are directed to transfer the three-fourth share of the property in question within 60 days from the date of receipt of the price fixed. *Asaf Khan and others vs Court of Settlement, First Court and others 8 BLC 1.*

Section 115—It appears that by the earlier SRO, the Government has made a promise that upon fulfilment of such conditions if the importers import taxicabs they will be given the benefit as mentioned therein. The petitioners having acted upon accordingly the Government now cannot go back upon it. If they go back it will be inequitable. So, it appears that the doctrine of promissory estoppel operates when one of the parties in reliance of the promise made by the other party acts to his detriment and in such case the other party should not be allowed to go back from his promise as the same would cause injustice on the party relying upon the said promise.

Thus the importers having acted on the promise made by the government under section 19 of the Act to avail the facilities granted in SRO No. 56 on compliance of all the terms and conditions incorporated therein, the government, rather the respondents, are estopped from going back from that promise rather the same is binding on them. The principle of promissory estoppel and fair action are applicable to the facts of the case and the respondents are debarred having no justification in law to supersede earlier notification which has to remain in force without limitation to time. Thus subsequent notification to the extent it superseded the earlier one will have no binding effect in such special cases concerning public interests. *Cab Express (BD) Ltd vs Commissioner of Customs and others 9 BLC 398.*

Sections 115 and 45—The comparison of the LTI by the court is its discretion and it does not depend on parties' prayer alone nor any court can be compelled to take recourse to particular mode of proof of handwriting. *Dr Wakil Ahmed and ors vs Sufia Khatun and ors 53 DLR 214.*

Sections 115 and 63—As there is no evidence that Sheikh Bagu had any knowledge about the contents of the document attested by him beyond his mere attestation, it cannot be said that he was in any way bound by the transaction by

the kabala in question. *Amanatullah and others vs Ali Mohammad Bhuiyan and another 2 BLC (AD) 134.*

Sections 115 and 118—As there is no law whereby PW 1, Abdul Haque, who already started deposing, is debarred from giving evidence for his present employer and the sections 115 and 118 of the Evidence Act have no manner of application in the facts of the present case. *Bangladesh Shilpa Rin Sangstha vs Aziz Pipes Limited 3 BLC 295.*

116. Estoppel of tenant; and of licensee of person in possession—No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

Case Law

Section 116—Special Tribunal—Matters decided by, are *res judicata*—Matters in which tribunal has no jurisdiction—Not *res judicata. Khurshid Anwar PLD 1956 Lahore 134.*

Section 116—Tenant paying rent to third party—Does not become tenant under him. *Amir Baksh PLD 1960 (WP) Lahore 256; PLR 1961 (1) WP Lahore 412 (DB).*

Section 116—Estoppel operates not only against the tenant himself but any other person stepping into the land : The section does not contain the whole law of estoppel. The tenant's estoppel operates even after the termination of the tenancy.

Section 116—A person who stepped into the house of a tenant who had been inducted into the demised premises by the landlord is estopped from setting up his subsequent acquisition of some interest in the premises in order to defeat the suit of the landlord for ejectment. Such a person can, however, agitate

question of title in some other properly constituted suit. *Nuruddin Mia vs Mvi Abdul Muzahar Ahmed 2 DLR 344.*

Section 116—Landlord and tenant—Estoppel—The tenant who has been inducted on the land by predecessor-in-interest of the present landlord on the tenants executing a lease in favour of the landlord, is estopped under section 116, from raising the plea that at the time when he was inducted on the land by the landlord, the latter was not the exclusive owner of the land but had other co-sharers, who not having been impleaded in the rent suit as co-sharer landlords, the suit was defective.

Though it is open to the tenant to show that the title of the person who delivered possession to him had ceased to exist subsequent to the demise he cannot say that the interest of the landlord was less than what he must have in order to put the tenant in possession of the entire property. *Md Mofiz Chowdhury vs Nawabur Reja Chowdhury 2 DLR 65.*

Section 116—Even in case of derivative title the rule of estoppel is not ousted where the tenant does not deny the facts constituting derivation but denies that the lessor had exclusive title when he let him into possession. *Md Mofiz Chowdhury vs. Nawabut Reja Chowdhury 2 DLR 65.*

Section 116—During the continuance of such tenancy— C instituted a suit in 1919 and got a decree which established his title as proprietor of plot of land X. Notwithstanding this, A had got his name recorded as the owner in possession of the plot X on the local record-of-rights in January, 1919. In August, 1925 C filed another suit (hereinafter referred to as "the 1925 suit)" against A for a declaration of his title to X and for cancellation of the entry in the record-of-rights. In September, 1929, this suit was decreed *ex parte*. A's application to set aside the ex parte decree under the provisions of the Code of Civil Procedure was dismissed on 3rd May, 1927 and an appeal from that order of dismissal was dismissed on 4th July, 1928.

Between the dates of the *ex parte* decree and the dismissal of the application of A to set aside the *ex parte* decree, A granted to B an oral monthly tenancy of X at a rent of Rs 30.00 per month.

In February, 1928, under the orders of the Court, a receiver was substituted as a decree-holder for C in respect of the 1925 suit and on 28th February, 1928, the receiver obtained symbolical possession of X though Court's bailiff.

Held : As B was in occupation of X as tenant of the judgment-debtor A, the Court bailiff was justified in giving symbolical possession under Or XXI rule 36 CPC, and that the possession of A and B in respect of X was effectively

terminated on 17th February 1928. *Adynath Ghatak vs. Krishna Prasad Singh 1 DLR (PC) 1.*

Section 116—After 27th February, 1928 B got permission from C and from an official in the office of the receiver to remain in occupation of X as a licensee of C or the receiver. B, however, continued to pay Rs 30.00 to A, not as a payment of rent but in order to keep A quiet and prevent him from attempting to interfere with the grant of lease from C which was eventually granted to him in December, 1937, whereupon he, B, stopped paying rent to A. Thereupon A brought a suit against B for declaration of his title to and recovery of possession of X.

Held : After the determination of the tenancy on the 27th February, 1928, A was not the landlord of B and hence no question of B being estopped under section 116 Evidence Act from disputing the title of A arose. *Adynath Ghatak vs Krishna Prasad Singh. 1 DLR (PC) 1.*

Tenant bound to pay rent to landlord even if the latter is not in fact the owner of property—The subject of tenancy. *1955 PLR (Lah) 1055.*

Principle of estoppel against tenant vis-a-vis his de-facto landlord to be applied cautiously: The principle that an agricultural raiyat who was let into possession of the land and holds it under a *de facto* proprietor bona fide is entitled to retain possession as a raiyat although the *de facto* proprietor is subsequently proved to be not a real owner, is an encroachment upon the ordinary rule of law that the grantor is not competent to confer upon the grantee a better title than what he himself possesses and as such, must be cautiously applied and must not be extended.

To make the principle applicable there must, therefore, be a bona fide belief of the lessor and the lessee that the former had sole interest in the land to create the interest and the latter also believed that he obtained a valid right available against the sole real owner. *Abdul Hakim Sikdar vs. Takijadhy. 3 DLR 484.*

Estoppel and possession on sufferance—A tenant who is in possession of the demised premises on sufferance and not by holding over is estopped from denying the title of his landlord until and unless he surrenders its possession to the landlord. *Almasullah vs Srish Ch Dam 3 DLR 526.*

Estoppel—Jurisdiction : Defendant's allegation that Civil Court had no right to try suit as it related to land under section 4(1), Tenancy Act was accepted by civil Court—Plaint filed thereafter in revenue Court—Defendant's part of plea in revenue Court that revenue Court had no jurisdiction to try suit.

Held : The defendants were estopped to assert a state of facts contrary to their assertion in Civil Court. *PLR (Lah) 800.*

The defendant asserted that the plaintiff had accepted defectively printed maps on an earlier order of his and thus the plaintiff could not refuse to receive defectively printed maps on subsequent orders.

Held: That incompetency could not be a ground of estoppel. *1956 PLR (Lah) 1063.*

Tenant during the continuance of the tenancy cannot deny landlord's title. *Ahmad Shah Khan vs Abdul Barkat 11 DLR 427.*

Estoppel—Plaintiff setting up a case cannot plead differently : It was contended that the disputed land being within a municipal town, it was not acquired by the Government under the State Acquisition Act.

Held : The plaintiffs having stated categorically in their plaint that the disputed land being part of the Zemindary was acquired by the Government, it is no longer open to them to contend to the contrary. *Kali Charan Das vs Tamiruddin. 10 DLR 523.*

Admission by Municipal Committee that a certain place is not a street—Creates no estoppel. *1955 PLR (Lah) 579.*

Estoppel cannot operate against statute, *1954 PLR (Lah) 183.*

Pleading of estoppel cannot be made against statutes *1953 PLR Lah) 465.*

Tenant bound to pay rent to the landlord even though the latter is not actually the owner of the land of which the tenant is in possession. *1955 PLR (Lah) 1055.*

Estoppel of tenant and of licensee

A tenant under a landlord, if he may deny the title of the landlord.

Held : (1) A tenant who had been let into possession cannot deny his landlord's title, however, defective it may be, so long as he has not openly restored possession by surrender to landlord.

(2) The tenant cannot dispute the title of his landlord by alleging that he is possessing the premises by paying rent to some other person whom the tenant considered to be the landlord. *10 DLR (Dac) 207.*

Section 116 does not preclude erstwhile tenant from raising the plea that he has acquired the landlord's interest himself. *Abdur Rashid vs Salimullah College 20 DLR 1074.*

Estoppel—Question of estoppel in section 116 Evidence Act postulates that there is a tenancy still continuing and that it had its beginning at a given date from a given landlord—This foundation must be well-laid before raising the question of estoppel. *Dr Ratiranjan Chowdhury vs Parul Bala Marwari. 24 DLR 202.*

A tenant is not estopped, either before or after the expiration of the lease, from contending that the landlord's title has terminated by transfer or otherwise. *Dr Rati Ranjan Chowdhury vs Parul Bala Manwari" 24 DLR 202.*

In a suit between a landlord and tenant for enforcement of certain rights of the landlord—The question of title to the premises concerned is irrelevant—Tenant being inducted, landlord is precluded to dispute the relationship between them.

The suit being one between an alleged landlord and an alleged tenant for enforcement of certain rights of a landlord, the simple question which is to be tried in such a suit is whether there is existence of any relationship of a landlord and a tenant. In such a case the question of title to the premises in question is not relevant at all.

This position of law is based upon the rule of evidence regarding the doctrine of Estoppel as embodied in section 116 of the Evidence Act. If the landlord can prove that the defendant was inducted by him on the disputed premises or that the defendant has attorned to him and has continued in possession on payment of rent after recognising him as the landlord he cannot turn round and deny the title of the said landlord at the inception of the tenancy. *Merajuddin vs Md Anwarul Islam 26 DLR 314.*

In case of a person claiming derivative title from the original landlord, the tenant can always show that the title is not perfect. The language of section 116 of the Evidence Act is clear enough to constitute estoppel between tenant and the landlord at the time of the creation of tenancy. This statutory estoppel therefore binds the original contracting parties and at the time of the creation of the tenancy. *Amar Chandra Saha vs Ajit Kumar Das 33 DLR (AD) 37.*

The section does not estop a tenant from denying the right, as his landlord, of another person who claims to have succeeded to the landlord who put the tenant in possession. *Amar Chandra Saha vs Ajit Kumar Das 33 DLR (AD) 37.*

Attornment : In case of attornment the tenant is not estopped from denying the right of landlord. He can show the so-called attornment was under mistake of fact—Attornment claimed on the sole basis of rent payment presents a more

difficult case for the landlord. *Amar Chandra Saha vs Ajit Kumar Das 33 DLR (AD) 37.*

Estoppel by contract or tenant's estoppel—Explained—The estoppel as described in this section is known as tenant's estoppel or estoppel by contract. This estoppel is founded upon a contract between the tenant and the landlord. It provides that when a person enters into possession of immovable property as a tenant of another person then neither he not anybody claiming through him shall be permitted during the continuance of the tenancy to deny the landlord's title however defective that title might be. This necessarily implies that in case the tenant sets up a claim of title in himself he shall first surrender possession to the person from whom he had taken it. *Abdus Sattar vs Mohiuddin 38 DLR (AD) 97.*

A device resorted to by tenant whereby he defaults to pay rent and when sued for eviction, sets up plea of no relationship of tenant and landlord—Such a plea is unavailing when origin of tenancy is proved. *Abdus Sattar vs Mohiuddin 38 DLR (AD) 97.*

Section 116 is no bar when landlord's title is lost or extinguished—If tenant claims a title in himself, he must surrender possession to the landlord. If the landlord determines the tenancy, but the tenant continues to stay on, still bar of section 116 will operate. *Abdus Sattar vs. Mohiuddin 38 DLR (AD) 97.*

Mere non-payment of rent does not snap landlord and tenant relationship. *Abdus Sattar vs Mohiuddin 38 DLR (AD) 97.*

On the death of the tenant tenancy can be determined by either party, if tenant's heirs stay on they must pay rent or quit. *Abdus Sattar vs. Mohiuddin. 38 DLR (AD) 97.*

Promissory estoppel—Promissory estoppel not attracted when a promise would take the shape of contract by making it enforceable as a contractual obligation. *Sharping Matsajibi vs Bangladesh. 39 DLR 78.*

Section 116—Estoppel deals with questions of fact and not with question of right. *DCCI vs Secretary. 39 DLR 145.*

Section 116—When a person enters into possession of immovable property as a tenant of another than neither he nor anybody claiming though him shall be permitted during continuance of the tenancy to deny the landlord's title however defective that title may be. *Hajee Abdus Sattar vs. Mohiuddin; 1986 BLD (AD) 224(a).*

Section 116—A tenant during his possession is estopped from denying that the landlord who let him into possession had title at the time of the said tenant's entry. *Fazal Karim vs. Dulal Kanti; 1986 PLD 105.*

Section 116—A tenant cannot set up title to a property of which he is a monthly tenant without surrendering possession to his landlord. *Haji Kasimuddin Mondal being dead his heirs Afroza Bewa and others vs Md Jalaluddin Pramanik 48 DLR (AD) 205.*

Section 116—Tenant's Estoppel—Once a tenancy is established the tenant must vacate first and then he can claim independent title. *Ramisunnessa Bibi and another vs Soleman Molla and others 48 DLR 31.*

Section 116—A tenant cannot set up title to a property of which he is a monthly tenant without surrendering possession to his landlord. *Rabiul Alam and another vs Sree Bidhan Kumar Deb, Advocate 50 DLR 286.*

Section 116—The High Court Division has rightly found that the plaintiffs cannot dispute the title of Sadananda Ghosh and his heirs under section 116 of the Evidence Act and in order to claim title to themselves they must surrender the possession of the suit premises. *Amulya Ratan Chowdhury & others vs Sreemati Shaibalini Ghose & ors 3 BLC (AD) 68.*

Section 116—In view of section 116 of the Evidence Act a tenant cannot set up title to a property of which he is a monthly tenant without surrendering possession to his landlord. *Haji Kasimuddin Mandal being dead his heirs Afroza Bewa & others vs Md Jalaluddin Pramanik 1 BLC (AD) 156.*

Section 116—Once the relationship of landlord and tenant is established between the parties, the tenant is estopped from challenging the title of the plaintiff without surrendering possession in view of section 116 of the Evidence Act. *Selina Begum vs Azizun Nessa 6 BLC (AD) 115.*

117. Estoppel of acceptor of bill of exchange, bailee or licensee—No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such license.

Explanation (1)—The acceptor of a bill or exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2)—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them at against the bailor.

Case Law

Applicability—Applies to licences not relating to immovable property like licences of liquor, opium, etc. *West Punjab Government vs Akbar Hussain PLD 1952 Lahore. 430; PLR 1952 Lahore 576.*

Estoppel against a licensee—The principle of estoppel by representation operates as between the licensor and the licensee very much in the same way as between landlord and tenant. *West Punjab Government vs. Akbar Hussain, PLD 1952 L 430.*

Chapter IX

OF WITNESSES

118. Who may testify—All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Case Law

Child witnesses—Boy of 12 years is not a child witness. *Hatu Mallik. 18 DLR 427.*

Section 118—Child's evidence—His capacity of understanding to be tested. Before a child of tender years is asked any questions bearing on the *res-gestae*, the Court should test his capacity to understand and to give rational answers and his capacity to understand the difference between truth and falsehood. *Rangu Mia 7 DLR 564.*

Section 118—Child witness—Appraisal of evidence—Each case to be dealt with on its own facts—Statement to be scrutinised carefully. *PLD (1957) Lahore 788.*

Section 118—Child witness—Competence to testify when should be decided. It is not imperative for the Court to subject a child witness to a preliminary examination before his evidence is received. The Court may, when the witness is actually giving evidence in Court, satisfy itself that he is capable of understanding the questions that are put to him and of giving an intelligent

reply. In such a case, the evidence is certainly admissible. *Abdul Gani 11 DLR 338.*

Section 118—Judge should caution the jury that a child witness is prone to draw upon his imagination and is also capable of being easily tutored. Some sort of caution should be administered to the jury in order to help them to apprise the evidence of such witness for themselves. *Abid Hossain 19 DLR 408.*

Section 118—Utmost care should be observed in action upon the testimony of a child witness. *State 19 DLR 408.*

Section 118—Child witness—A boy of 13 is not a child witness of tender age—His evidence cannot be rejected. *Badiuzzaman 25 DLR 41.*

Section 118—Child witness—Testing his intelligence, before his evidence, not a condition precedent. *Hari Pada 19 DLR 573.*

Section 118—Capability test of a child witness—Where it is evidence from the testimony of a child witness in the dock that he was capable of understanding the right and the wrong, mere absence of a note in the deposition sheet of the trial Court as to the capability test of the child witness is not a material irregularity so as to render the evidence unacceptable. *Abdur Rashed 24 DLR 18.*

Section 118—Competency of a child witness to depose. The general rule is that the capacity of the person offered as a witness is presumed. The child witness having been put to the test laid down in the section, the trial Court proceeded to examine the witness—The competency of children is regulated not (by their age) but by degree of understanding which they appear to possess. *Abdullah Shah 20 DLR (WP) 63.*

Section 118—Testing of intelligence of witness of tender age is not a condition precedent to the reception of his evidence—Preliminary examination of a child witness before receiving his evidence is not imperative. Person who can understand questions and can give rational answers to them, is a competent witnesses to testify in Court. *Badiuzzaman 25 DLR 41.*

Section 118—Child witness—Question put to, to test his understanding need not be recorded. *Khalil PLD 1956 (WP) Lahore 840; PLR 1956 Lahore 1948 (DB).*

Section 118—Child witness—Note by judge that he could understand questions put to him—Presumption of correctness. *Khalil PLR 1956 (WP) Lahore 840; PLD 1956 Lahore 1948 (DB).*

Section 118—Child witness—Reliability of evidence depends on facts of the case. *Muhammad Afzal PLD 1957 (WP) Lahore 788; PLR 1958 (L) WP Lahore 554.*

Section 118—Child witness—Court may not ask questions to test understanding of—Such tests are guided by a rule of prudence. *Abdul Gani 11 DLR 338; PLD 1959 Dacca 944 (DB).*

Section 118—Evidence of child witness—Not reliable unless corroborated. The evidence of a child witness, direct or circumstantial, should not be relied upon unless it is corroborated. *Rashid Ahmad vs. The State 10 DLR 532; PLD 1959 Dacca 181.*

Section 118—Understanding of child witness—Should be tested before his examination about matters in issue—Value of evidence—Jury not warned about—Serious misdirection. *Rangu Mia 7 DLR 564 (DB).*

Section 118—The admissibility of evidence is not solely dependent on the competency of the witness. A witness may be competent, yet his evidence may be inadmissible as, for instance, where it relates to hearsay or to confession made to a police officer. *Magan Lal vs Radhakishan, 1946 AIR (Nag) 173.*

Section 118—The only test laid down by the Act of the competency of a witness is his capacity to understand and rationally answer the question put to him. *Abdullah Shah vs State PLD 1968 Pesh 1.*

Section 118—In the case of a child under twelve years of age the Proviso to section 5 of the Oaths Act expressly provides that the absence of an oath or affirmation shall not render inadmissible the evidence of such a witness. An omission to administer an oath goes only to the credibility of the witness and no to his competency. *Rameshwar vs State 1952 AIR (SC) 54.*

Section 118—Competency and credit of a child witness: Boy of 12 (much less of 15) cannot be said to be of tender age. *Ghulam Mustafa vs State 1968 P CrLJ 1525; 1968 SCMR 993(2).*

Section 118—Girls aged 8 and 9 years of mature understanding, capable of giving a picture of occurrence and standing test of cross-examination like adult persons, were not regarded to be child-witnesses. *Sikandar Shah vs State PLD 1965 Pesh 134.*

Section 118—Mode of recording evidence of a child—Where the guilt or innocence of a person depends upon the evidence of a small boy, the testimony should be recorded in the form of questions and answers. *Emperor vs Haria Dhobi, AIR 1937 Pat. 662; 172 IC 780.*

Section 118—Child witness competency of—PWs 12 and 13 though of tender age gave intelligent answers to questions and were found to be natural and nomal witnesses. Person who can understand questions and can give rational answers to them is a competent witness. *Abdul Kashem vs State 42 DLR 378.*

Section 118—Even a child witness can be relied if he/she is capable of understanding and replying the question intelligently. *Abdul Quddus vs State 43 DLR (AD) 234.*

Section 118—The competence of a child as a witness is beyond question. The only thing that requires to be done is to scrutinise his evidence with care and caution to see whether it suffers from any inconsistency. To base conviction upon his evidence it is prudent to seek corroboration. *Gadu Mia vs The State 44 DLR* 246.

Section 118—Though a child witness, PW 2 received injuries at the hands of the appellants when his father was done to death and the witness having testified about the factum of the occurrence and the same having not been shaken in cross-examination, the witness, though a child, should be believed in the facts of the case. *Forkan alias Farhad and another vs State 47 DLR (AD) 149.*

Section 118— All persons, who can understand the questions put to them or can give rational answers to those questions are competent to testify before a court. *Seraj Miah vs State 49 DLR 192.*

Section 118—In a case of carnal offence the prosecution is to be believed in awarding conviction to the offender even without material corroboration, if the victim's evidence is found believeable and trustworthy and does not suffer from any infirmity and inherent disqualification. *Shamsul Haque (Md) vs State 52 DLR 255.*

Section 118—Ali Akbar and the heirs of Ali Hossain amicably redeemed the mortgage of the suit land from Elahadad Chowdhury executing an Ewaz-nama by which Ali Akbar, Omar Ali and some other heirs of Md Putan got certain land while Elahadad Chowdhury got the remaining portion of the suit property. But in the Ewaz-nama the three daughters of Md Putan were not parties and, as such, the same is not binding upon them although the same is binding upon the parties thereto. *Nurul Islam Chowdhury vs Mvi Fazal Ahmed and others 4 BLC 490*

Section 118—As the learned Sessions Judge has made an endorsement about her satisfaction from the questions put to the child witness and her replies that the witness is capable of understanding the questions and of giving rational answers to those question for which the trial Court committed no illegality in

considering the PW 6 as a competent child witness. *Siraj Miah vs State 2 BLC 402.*

Section 118—Before examining a child witness the Court should satisfy itself that the child is sufficiently intelligent to understand and to give rational answers to those questions put to him and it is desirable to record brief proceeding so that the higher Court may feel satisfied as to the capacity of the child witness to give evidence. *Fazlul Haq Sikder vs State 1 BLC 173.*

Section 118—The PWs 1, 2 and 4 have deposed that Nazma, admitted daughter of both the accused and the deceased, told them that her father had killed her mother by beating when the dead body of her mother was lying in her front and in such a situation such disclosure cannot and should not be disbelieved in spite of non-examination of that minor girl. *Osman Gani alias Babul (Md) vs State 6 BLC 611.*

Section 118—Whether a child should be relied upon—It is in evidence that at the time of occurrence M was aged about 11 years and while deposing before the trial Court he was aged about 15 years and, according to him, he was reading in Class VI. Both the Courts below noticed the age of M and accordingly, they subjected the evidence to a close and careful scrutiny and found no reason to discard his evidence.

Held—He was quite capable of understanding the questions that were put to him and of giving rational answers thereto. In the circumstances his evidence cannot be discarded as an evidence of child witness within the meaning of this section. *Md Shah Alam and others vs State 5 BSCD 177.*

Sections 118 and 115—As there is no law whereby PW 1, Abdul Haque, who already started deposing, is debarred from giving evidence for his present employer and the sections 115 and 118 of the Evidence Act have no manner of application in the facts of the present case. *Bangladesh Shilpa Rin Sangstha vs Aziz Pipes Limited 3 BLC 295.*

119. Dumb witnesses—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Case Law

Section 119—In case of a witness who is dumb, provisions of section 119 of the Act is applicable. Such witness may make statement in writing or by using signs. But in case of a witness who is both deaf and dumb, there is no scope of giving any evidence as such witness cannot hear any question. *Morshed (Md) @ Morshed @ Md Morshed Alam vs State 53 DLR 123.*

120. Parties to civil suit, and their wives or husbands, husband or wife of person under criminal trial—In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife or such person, respectively, shall be a competent witness.

Case Law

Section 120—The PW 1 deposed in the suit as son for the plaintiff, the mother. The PW 1 was neither a party to the suit nor was an attorney on the basis of a power executed by the plaintiff in his favour to give testimony on her behalf in support of the plaint case and hence the PW 1 was an incompetent person to give testimony on behalf of the plaintiff in support of the plaint case which stands disproved. *Shahani Bibi being dead her heirs Mohammad Azim and others vs Nur Islam being dead his heirs Doly Islam and others 4 BLC 195.*

121. Judges and magistrates—No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate: but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations

(a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

(c) A is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before B, a Session Judge. B may be examined as to what occurred.

Case Law

A Judge is not, however, entitled to question the jury as to the grounds of their verdict. *E vs Derajtulla Sheikh, 1930 IC 443; see section 303, CrPC.*

Power of appellate Court to question a trial Court—The section empowers an appellate Court to question the trial Court on matters relating to the proceedings before the Presiding Officer and the answers to such questions can be taken into account when deciding the appeal. *Banke Bihari Lal vs Mahadeo Prasad, 1953 AIR (All) 97.*

122. Communications during marriage—No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married : nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consent, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Case Law

Conspiracy between husband and wife, no offence. *Laila Jhina 10 DLR (PC) 6.*

Where the husband sought to bring in evidence his wife's answer to his inquiry about the love letter sent to her by a third person the husband was not

permitted to disclose such information and it was held that the statement of the husband earlier recorded in this regard in the lower Court could not be brought on record. *Ali Nawaz Gardezi vs Lt. Col. Muhammad Yusuf, PLD 1962 Lah 558.*

123. Evidence as to affairs of State—No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withold such permission as he thinks fit.

Case Law

"Affairs of State"—Meaning of—The expression "affairs of State" in section 123 covers only such affairs of state whose disclosure or divulgence would be likely to seriously injure or jeopardise some important interest of the State. *Crown vs Abdul Gani PLD 1955 Lahore 39; PLR 1955 Lahore 195.*

Section 123—The words "affairs of State" presuppose that these relate to highly secret or confidential matters the disclosure of which might embarrass or harm the interests of the State. These words cannot contemplate allowing privilege to be claimed where the departmental proceedings have been taken against a clerical subordinate and in which the productions in evidence of the documents concerned might have been of very material assistance to the Court in arriving at a correct decision over the matter in issue before it. *Crown vs Sultan Ahmed 9 DLR (WP) 13; PLD 1955 Baluchistan 1.*

Section 123—Question whether disclosure of particular document would be against public interest or not rests with head of department concerned and court cannot go into the matter—Copies of documents of privileged official records procured by illegitimate means by unknown persons and exhibited in Court—Such evidence cannot be permitted to be adduced. *Syed Abul A'ala Moududi 22 DLR (WP) 57.*

Section 123—Evidence as the affairs of State—Unpublished official record relating to affairs of State are privileged and no one is permitted to give evidence relating to such save with permission of the head of department concerned—Decision regarding preliminary question. When particular document belongs to class of unpublished record relating to affairs of State or not must rest with Court. *Syed Abul A'ala Maududi 22 DLR (WP) 59.*

Section 123—Head of the department claiming privilege—No reasons given—Court cannot act on his mere words. *Crown vs Abdul Ghani PLR 1956 (WP) Lahore 300; PLR 1956 Lahore 904.*

Section 123—Document containing allegations against public servant resulting in his discharge—Not a matter of State—Privilege cannot be claimed. *Muhammad Afzal Khan PLD 1957 (WP). Lahore 17; PLR 1957 (1) WP Lahore 367.*

Section 123—Applicability—Duty of the Court laid down—When Court should not allow a document to be produced. *Crown vs Abdul Ghani PLD 1955 Lahore 39; PLR 1955 Lahore 195.*

Section 123—If a witness is not to claim privilege with respect to a certain communication he must be compelled to answer the question put to him. If he unjustifiably refuses to answer he should be compelled to do so. The Court has to determine when the witness is in the witness box, as to whether he is entitled to claim privilege with respect to certain communication or whether the privilege cannot be claimed therefor. If privilege is properly claimed no hostile inference under Illustration (h) of section 114 of the Evidence Act can be made against him. If he claims privilege improperly the Court must compel him to answer the question that is put to him. *Muhammad Hayat 3 DLR 172; PLD 1951 FC 15; FCR 1951 (FC).*

Section 123—Claiming privilege against production of document or giving of answers. Privilege under the section against production of documents can be claimed only when the disclosure of such papers may be prejudicial to the State. A mere claim of privilege against production is not enough. *Sultan Ahmed 9 DLR (WP) 13; PLD (1955) Lah 39.*

Section 123—Claim of privilege should be supported by evidence in Court giving some indication as to how the disclosure would affect the State's interests. *Sultan Ahmed 9 DLR (WP) 13; PLD (1955) Lah 39.*

Section 123—The words in the section cannot contemplate allowing privilege to be claimed where departmental proceedings have been taken against a clerical subordinate and in which the production in evidence of the documents concerned might have been of very material assistance to the Court in arriving at a correct decision over the matter in issue before it. *Sultan Ahmed 9 DLR (WP) 13; PLD (1955) Lah 39.*

Section 123—Some indication should be given to the Court as to why privilege under section 123 against production of a document is claimed; what

injury to the public is apprehended, or what affairs of State are involved in the matter. Without such indication the Court may draw an adverse inference from the non-production of the document concerned. *9 DLR (WP) 13.*

Section 123—Where documents are wrongly withheld claiming privilege under section 123—Inference against prosecution will be drawn. *9 DLR(WP) 13.*

Section 123—Privilege—Official concerned is to decide whether the public interest would suffer from disclosure. *Zahur Husain vs State PLD 1960 (WP) Lahore 1189.*

Section 123—It was for the Court to determine whether the privilege had been rightly claimed. If the Court comes to the conclusion that the witness was entitled to claim privilege no hostile inference could be drawn. If, on the other hand, the privilege was not rightly claimed it was open to the Court to compel the witness to answer the question put to him. *Chirag Din vs Crown 3 DLR (FC) 156.*

Section 123—Witness claiming privilege on unreasonable ground—Presumptions under section 114 would arise against him. *Muhammad Hayat vs Crown PLD 1950 Lahore 420 over PLD 1951 FC 15.*

Section 123—File sent for examination of Court—Not allowed to be shown to defence counsel—Not proper procedure—State must suffer for withholding evidence. *Ajab Gul vs Crown PLD 1954 Peshawar 20.*

Section 123—The discretion to the head of a department is clearly confined to granting or withholding permission to the giving of such evidence, but he has not the power to determine the question whether the evidence is of the description in respect of which his permission is required. *PLD (1955) Lahore 39.*

Section 123—The expression "affairs of State" in section 123 covers only such affairs of state where disclosure or divulgence would be likely to seriously injure of jeopardise some important interest of the State. *PLD (1955) Lahore 39.*

Section 123—Orders of detention are frequently based on confidential information which public officers cannot be made to disclose in view of provisions of sections 123 and 124. This, however, does not mean that the public officer cannot be asked in the reasons which "satisfied" him that the detention was necessary. When such a question is asked, it is for the witness to claim privilege and bring the communications which he does not wish to disclose within the provisions of sections 123 and 124. *Hayat 3 DLR (FC) 172.*

Section 123—The section gives effect to the principle that public interest must be paramount and private interests must give way when there is any conflict between public and private interests. *Lady Dinbai Dinshaw Petit vs Dominion of India, 1951 AIR (Bom) 72.*

Section 123—A document containing accusations against a public servant, which he claims, resulted in his discharge, is not covered by the phrase "matters of State" and is not privileged particularly when the very question to be decided is whether the order of discharge had resulted from an allegation of misconduct. *Muhammad Afzal Khan vs Federation of Pakistan PLD 1957 Lah 17.*

Sections 123 and 106—Preventive detention—Power of the High Court to assess the sufficiency of material leading to the satisfaction of the detaining authority in making a detention order—sufficiency of material and non-existence of material distinction between—Mere information report cannot be a valid ground for passing a detention order—Mere production of a government file showing an information report before the High Courts is not sufficient to justify the detention case—Question of onus to justify the necessity of detention and claim of privilege by the government, in terms of sections 106 and 123 of the Evidence Act, discussed. *Bangladesh vs Ahmad Ali 2 BSCD 87.*

124. Official communications—No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Case Law

Confidential reports on officers—No privilege may be claimed by State *Feroz-ud-Din 6 DLR (WP) 162; PLD 1954 Baluchistan 1.*

Section 124—When a claim of privilege is made it should be decided then and there. The question cannot be reserved for decision until the final judgment is given. If a public officer claims privilege without due care and caution, the Court is not relieved of the duty of determining whether section 124 of the Evidence Act is not being made a device for keeping back from the Court information which the Court is entitled to obtain. *Muhammad Hayat 3 DLR (FC) 172.*

Section 124—SP claiming privilege in the disclosure of facts regarding an order of arrest issued by him—No privilege granted. *Muhammad Hayat 3 DLR (FC) 172; PLD 1950 Lahore 429.*

Section 124—Witness claiming privilege without valid grounds—Presumption that disclosure, if made, would have gone against him. *Muhammad Hayat 3 DLR (FC) 172; PLD 1950 Lahore 429.*

Section 124—Vice-Chancellor of Punjab University—Public officer under the section. *Punjab University vs Jaswant Rai AIR (33) 1946 Lahore 220 (B).*

Section 124—The officer ordering the arrest is not justified in refusing to answer material questions with regard to function of his satisfaction by virtue of section 124 Evidence Act. *PLD (1950) Lahore 451.*

Section 124—Privilege—Can only be claimed by a Government Officer—Court can hold *suo motu* that a document was privileged—Confidential reports of Government officers are not documents relating to affairs of State. *Feroz-ud-Din 6 DLR (WP) 162; PLD 1954 Baluchistan 1.*

Section 124—Privilege claimed—Court must see if the disclosure is against public interest. *Feroz Khan Noon 1959 (1) PLR 4(SC)*

Section 124—Public officer—Test of—The question of emoluments cannot be considered to be the main test in interpreting the term "Public Officer" *Punjab University AIR (33) 1946 Lahore 220 (DB).*

Section 124—Opinion of Head of Department that unpublished official records relate to affairs of State conclusive. *Emperor vs Raghunath Singh AIR (33) 1946 Lahore 359.*

Section 124—Official communication. So constitute a privileged occasion, there must be an interest or duty in the person to whom the communication is made as well as in the person making it. *Edward Snelson vs Judges of HC Lahore 16 DLR (SC) 538.*

[1][**125. Information as to commission of offences**—No Magistrate or Police-officer shall be compelled to say whence he got any information as to the commission of any offence, and no

1. Substituted by the Indian Evidence Act (1872) Amendment Act, 1887 (III of 1887), for the original section 125.

Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation—"Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue.

Case Law

Secret information obtained in the ordinary course of duty constitute sufficient materials for making a detention order. *MA Aziz on behalf of KM Obaidur Rahman 21 DLR 503.*

126. Professional communications—No [1][Advocate] shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such [1][Advocate] by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any [2][illegal] purpose:

(2) any fact observed by any [3][Advocate] in the course of his employment as such, showing that any crime or

1. The word "Advocate" was substituted for the words "barrister, attorney, pleader or vakil" by Act VIII of 1973, 2nd Schedule, (with effect from 26-3-71).

2. The word "illegal" was substituted for the word "criminal" by the Indian Evidence Act Amendment Act (XVIII of 1872), section 10

3. The word "Advocate" was substituted for the words "barrister, pleader, attorney or vakil" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973). 2nd Schedule (with effect from 26-3-71)

fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such [1][Advocate] was or was not directed to such fact by or on behalf of his client.

Explanation—The obligation stated in this section continues after the employment has ceased.

Illustrations

(a) A, a client, says to B, an [2][Advocate]—"I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an [2][Advocate]—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Case Law

The provisions of the section should not apply where the client consents to contents of documents being brought on record. *Ali Nawaz vs. Muhammad Yusuf, PLD 1963 SC 51.*

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1. The word "Advocate" was substituted for the words "barrister, pleader, attorney or vakil" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973). 2nd Schedule (with effect from 26-3-71).

2. The word "Advocate" was substituted for the word "attorney", (Act VIII of 1973). 2nd Schedule (with effect from 26-3-71).

127. Section 162 to apply to interpreters, etc—The provisions of section 126 shall apply to interpreters and the clerks of servants of [1][Advocate].

128. Privilege not waived by volunteering evidence —If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such [2][Advocate] as a witness, he shall be deemed to have consented to such disclosure only if he questions such [3][Advocate] on matters which, but for such question, he would not be at liberty to disclose.

Case Law

Official communication—To constitute a privileged occasion, there must be an interest or duty in the person to whom the communication is made as well as in the person making it. *Edward Snelson vs Judges of High Court Lahore 16 DLR (SC) 538.*

129. Confidential communications with legal advisers—No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as

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1. The word "Advocates" was substituted for the words "barristers, pleaders, attorneys or vakils" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973). 2nd Schedule (with effect from 26-3-71).

2. The word "Advocate" was substituted for the words "barrister, pleader, attorney or vakil" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973). 2nd Schedule (with effect from 26-3-71).

3. The word "Advocate" was substituted for the words "barrister, attorney or vakil" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973). 2nd Schedule (with effect from 26-3-71).

may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

130. Production of title-deed of witness, not a party— No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

131. Production of documents which another person having possession, could refuse to produce—No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

132. Witness not excused from answering on ground that answer will criminate—A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind :

Proviso—Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Case Law

Proviso—The question whether a certain statement was made by a witness under compulsion must depend upon the facts of a particular case. *Dr M Abdul Sami vs State 14 DLR (WP) 1.*

133. Accomplice—An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Case Law

Section 133—Accomplice is a person who participates in the crime. *Zafar Ali vs State 14 DLR (SC) 174; 1962 PLD (SC) 320.*

Section 133—Accomplice's evidence—All that is required is that corroborative evidence should indicate that the story given out by the approver is true. *Nur Ali Gazi vs State 13 DLR 740: (1962) PLD (Dac). 249.*

Section 133—Confession of a co-accused, even when corroborated, cannot be the foundation of a conviction. *State vs Badsha Khan, 10 DLR 580; State vs. Abdur Rashid 10 DLR 568; Abdur Rahman vs State 14 DLR 272; Abdul Monsur Ahmed vs State 13 DLR 353.*

Section 133—Evidence of accomplice or bribe-giver. Corroboration is essential as to the implication of the accused and as to offence itself. *Osimuddin Sarker vs State 13 DLR 197; 1961 PLD (Dac.) 798. Juma 7 DLR (WP) 45.*

Section 133—Conviction on the evidence of an accomplice—Principles to follow. Rule of prudence requires same independent corroborative evidence implicating the particular case. *Bhubani Shahu vs King 2 DLR (PC) 39.*

Section 133—An accomplice cannot corroborate himself *2 DLR (PC) 39.*

Section 133—Corroboration of approver's evidence—Rule to follow. The rule as to corroboration of the approver's evidence does not require the prosecution to prove by independent evidence that the prisoner committed the crime but only to produce such independent evidence as shows or tends to show that the part of the approver's testimony wherein he states that the prisoner was one of the persons who took part in the commission of crime is true [Read the judgment as a whole where the subject has been dealt with elaborately and views for and against have been expressed]. *Ishaq 7 DLR (FC) 37.*

Section 133—Approver's statement—Principles of corroboration—Its extent. *Ishaq 7 DLR (FC) 37.*

Section 133—Corroboration need not be on all particulars. *Fazal Dad 7 DLR (FC) 176; Israil 9 DLR 416.*

Section 133—Informer and accessory after the event—To be treated as accomplices. *Sabjannessa Bibi 9 DLR 473; Md Yusuf 7 DLR 302.*

Section 133—Corroboration need not be by direct evidence [Read the judgment where the subject has been discussed elaborately] *Md Yusuf, 7 DLR 302.*

Section 133—Accomplice's evidence—Corroboration of, caution against hasty inference. An accomplice in his desire to screen his real partner in the crime may substitute an innocent person. *A Quader 8 DLR (SC) 165.*

Section 133—Bribe-giver's evidence slight corroboration is enough A. *Bari 7 DLR 457; 10 DLR 283.*

Section 133—Accomplice is a guilty associate. *Ghulam Rasul 1 PCR 90.*

Section 133—Witness withholding information from fear is not an accomplice. *Ghulam Rasul 1 PCR 90.*

Section 133—Accomplice, a moral wreck. *Ishaq 7 DLR (FC) 37.*

Section 133—Recovery of property from the possession of the accused together with the statement of the approver that these accused were his companions in dacoity is enough. *Ali PLD 1954 Lahore 201; PLR 1954 Lahore 93.*

Section 133—Evidence in corroboration or the testimony of an accomplice must be independent evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true not merely that the crime has been committed but that it was committed by the accused.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. *Dhanapati De AIR (33) 1946 Calcutta 156.*

Section 133—Accomplice—The test laid down in order to hold a certain person as an accomplice is, whether such person sustains such a relation to the criminal act that he or she can be jointly indicted with the accused whom he or she implicates. *Farid Muhammad PLD 1959 (WP) Peshawar 12.*

Section 133—Confession of accomplice—If sufficient for conviction of co-accused—If corroboration is necessary in material particulars. *Khasta Hassain vs Crown PLD 1949 Baluchistan 6.*

Section 133—Conviction may be only on corroborated testimony of accomplice. *Bhagavathar AIR (133) 1946 Madras 271.*

Section 133—Corroboration of statement of accomplice—Need not be of every particular. *Ishaq 7 DLR (FC) 37; PLD 1954 (FC) 335; 1954 FCR 35.*

Section 133—While it is necessary that the statement of the approver should be corroborated against the accused person, it is not necessary that there should be corroboration of the statement of the accomplice on all points he deposes about including the one that he himself took part in the crime. When appearing as a witness an accomplice cannot be divested of the status of a witness and to insist that before his statement is accepted in any particular, it should be corroborated, will amount to holding that what an accomplice says is not evidence. *Abdul Qadir PLD 1956 Lahore 100, PLR 1956 Lahore 757.*

Section 133—The evidence of an accomplice has to be considered as a whole and though the Court starts with the initial presumption against his trustworthiness it may accept his testimony if it is corroborated in material particulars. This rule that insists on corroboration does not require that corroboration must be on all the particulars of the story, nor that there must be corroboration on that part of the story of the accomplice in which he implicates himself. If the independent evidence produced in corroboration tends to show that the persons named by him were parties to the commission of the offence charged, the Court is entitled to accept his evidence even though there be no corroboration against the accomplice himself. *Israil 9 DLR 416; PLD 1957 Dhaka 454.*

Section 133—General corroboration of statement of accomplice—Not enough—Should be with reference to each accused. *Ali PLD 1954 Lahore 201; PLR 1954 Lahore 93.*

Section 133—The evidence of an accomplice cannot be believed unless there is a material corroboration not only with regard to the crime but also with regard to the criminal act. *Inayat Hussain Shah PLD 1954 Sind 246.*

Section 133—The uncorroborated testimony of an accomplice could, if accepted, form the basis of a conviction in a criminal case. However, in the course of judicial precedents a rule of prudence has been evolved under which it is always insisted that there ought to be independent corroboration of any

approver's statement on material points suggesting a link between accused persons and the crime before such a statement could be accepted as a safe foundation for their conviction. The reason for the rule is obvious. There is always danger of substitution of the guilty by the innocent in such cases and it is realised that it would be extremely risky to act upon the statement of a self-confessed criminal who while trying to save his own skin, might be unscrupulous to accept suggestions of others to implicate a person unconnected with the crime in place of his real accomplice for whom he may have a soft corner. But the corroboration required would depend on the facts and circumstances of each particular case and no hard and fast rules can be laid down in this behalf. Surely one of the factors calling for consideration may be the circumstance that the approver had no ostensible motive to involve any of the accused person falsely in the case. *Ghulam Qadir PLD 1959 (SC) 377.*

Section 133—Evidence of accomplice—Should be regarded with suspicion—Extent of suspicion depends on facts of the case. *Srinivas PLD 1947 Privy Council 141.*

Section 133—Evidentiary value of evidence of accomplice—Corroboration necessary for conviction. *Ishaq 7 DLR (FC) 37; PLD 1954 Federal Court 335; 1954 FCR 35, PLR 1955 Lahore 872.*

Section 133—Under section 133 of the Evidence Act, which the learned Sessions Judge seems to have completely overlooked, an accomplice is a competent witness against an accused person and a conviction, based on it, is not illegal, simply because it is not corroborated. The Courts, however, as guided by section 144 illustration (b), which lays down that an accomplice is unworthy of credit, unless he is corroborated in material particulars, insist on such corroboration, but then that is all. It does not mean that the evidence of an accomplice should totally be rejected. *Farid Muhammad PLD 1959 (WP) Peshawar 12 (DB).*

Section 133—Exculpatory confession—Not to be used against the accused.

Where the confession is of exculpatory nature it cannot possibly be used against any co-accused. *Rasul Bux PLD 1960 (WP) Karachi 956.*

Section 133—Person present at the time of commission of crime—Not taking part in it—If not an accomplice. *Ghulam Rasool. PLD 1950 Lahore 129; PLR 1950 Lahore 183.*

Section 133—Where the witness was present at the time of the commission of a crime but he did not give information about the offence.

Corroboration need not, however, be on the question of the actual commission of the offence. If this was the requirement then we would have independent testimony on which to act and there would be no need to rely on the evidence of one whose position may, in this particular case, be said to be somewhat analogous to that of an accomplice, though not exactly the same. What the law requires is that there should be such corroboration of the material part of the story connecting the accused with crime as will satisfy reasonable minds that the man can be regarded as a truthful witness. *Satyanarayan PLD 1956 Supreme Court (Ind) 280.*

Section 133—Person keeping a lookout when crime was committed—Accomplice, *Dhanapati De AIR (33) 1946 Calcutta 156 (DB).*

Section 133—Recovery of looted property from accused—Enough corroboration of accomplice Ali. *PLD 1954 Lahore 201; PLR 1954 93 (DB).*

Section 133—Corroboration of approver's evidence—Nature and extent of—Test to be applied—Evidentiary value. *Sarwan PLD 1957 Supreme Court (Ind) 555.*

Section 133—An approver is undoubtedly a competent witness under the Evidence Act. His evidence, however, cannot be acted upon as a rule of prudence unless it is corroborated in material particulars by other independent evidence. The reason for this caution is that the approver has participated in the commission of the offence himself. Such independent corroboration need not cover the whole of the prosecution story. It would not be safe to act upon such evidence merely because it is corroborated in minor particulars or incidental details. In such a case corroboration does not afford the necessary assurance for the conviction *Yaru PLD 1959 Karachi 662.*

Section 133—Corroboration—Dead body discovered before approver's statement—Recovery has no corroboratory value.

As the dead body had been recovered long before the approver's statement that recovery cannot be used in corroboration of approver's statement *Ashiq Hussain PLD 1958 (WP) Peshawar 10.*

Section 133—Corroboration of approver's evidence—Reasons for—Not reliable without corroboration. *Rafiq Ahmad PLD 1958 SC (Pak) 317; PLR 1958(2) WP 1160.*

Section 133—Corroboration of accomplices' statement—May be by circumstantial evidence. *Musafar PLD 1956 Federal Court 140; PLR 1956 Lahore 1313.*

Section 133—The rule of caution that the evidence of an approver should be supported by independent corroborative evidence connecting the accused with the crime is now regarded as a rule of law. Such corroborative evidence should show or tend to show that the story of the approver that the accused committed the crime is true not merely because the crime has been committed but that it was committed by the accused.

Section 133—Where the deceased was last seen with the accused and a blood stained hatchet was recovered at the instance of the accused it was sufficient corroboration. *Manzoor PLD 1957 (WP) Lahore 1023; PLR 1958 (1) WP Lahore 1189 (DB).*

Section 133—Uncorroborated evidence of approver—Accused unable to say why approver was implicating him—No ground for conviction. *Abdul Qadir 8 DLR (SC) 165; PLD 1956 SC (Pak) 407; PLD 1957(1) WP (SC) 166.*

Section 133—Uncorroborated evidence of approver—Not safe to base conviction on—Reasons. *Khadim Hussain PLD 1949 Lahore 230; PLR 1950 Lahore 121.*

Section 133—Person passing bribe—Accomplice—Must be corroborated by independent source. *Maqbool Hussain PLD 1957 (WP) Lahore 903.*

Section 133—The bribe giver is, in the eye of law, an accomplice and his statement that Rs 100 was paid by way of bribe cannot be accepted unless there is corroboration. *Ghulam Muhammad PLD 1957 Karachi 410.*

Section 133—Two bribe-givers giving bribe separately—One cannot corroborate statement of each other. *Abdullah Khan PLD 1960 AJK 14.*

Section 133—Eye-witness—Interested witness—Not necessary to corroborate evidence of such witness. *Mangal Singh PLD 1957 SC (Ind) 179.*

Section 133—Motive—Cannot corroborate evidence of an approver—Motive, however strong cannot afford the necessary corroboration of the testimony of an approver. *Qabil Shah PLD 1960 (WP) Karachi 697—1960 KLR 551 (DB).*

Section 133—Retracted confession of co-accused—Admissible against each other—Corroboration necessary. *Muhammad Ramzan PLD 1957 (WP) Lahore 956.*

Section 133—Co-accused, retracted confession of—Uncorroborated—Not sufficient for conviction—Direction to Jury. *Nurul Fakir PLD 1950 Dhaka 50: Rel. 49 CWN 719 (DB).*

Section 133—Corroboration of approver's evidence—Extent of—Not necessary in all details—Not necessarily by direct evidence. *Muhammad Zaman PLD 1950 Lahore 115; PLR 1950 Lahore 1948 (DB).*

Section 133—Corroboration—Nature and extent of—Principles governing the Court in the matter of corroboration. *Abdul Qadir PLD 1956(WP) Lahore 100; PLD 1956 Lahore 757 (DB).*

Section 133—It is well settled that no conviction should be based on the statement of an accomplice unless it is corroborated in material particulars.

Section 133—The corroboration required must be not only general corroboration of the statement of the accomplice but also against each of the accused persons before that person can be convicted of an offence. *Ali vs Crown 6 DLR (WPC) 52.*

Section 133—The Court should be unwilling to act on the evidence of persons who on their own showing are accomplices unless it received confirmation from other evidence. *1950 PLD (Lah) 288.*

Section 133—It is not necessary that corroborative evidence by itself should establish the offence deposed to by the approver. Recovery of looted property from the possession of the accused coupled with the statement of the approver that those accused were his companions in the dacoity is enough to prove that they had taken part in the dacoity. *Ali vs Crown 6 DLR (WPC) 52.*

Section 133—Accomplice's evidence needs corroboration as a safeguard. *Abdul Quddus vs State 35 DLR 373.*

Section 133—Statement made by accused hoping to be made an approver cannot be used against him. *Syed Naziruddin Ahmed vs State PLD 1963 B J 10.*

Sections 133 and 114, illustration (b)

Section 133—Accomplice's evidence needs corroboration as a safeguard—Although section 113 of the Evidence Act provides that an accomplice shall be a competent witness against the accused person and the conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice yet illustration (b) to section 114 of the Evicence Act is the rule of guidance to which the Court should have due regard. The said illustration (b) provides that the Court may presume that the accomplice is unworthy of credit unless he is corroborated in material particulars. The law and the rule of prudence are certainly not higher in the case of sexual offences. *Abdul Quddus vs. State 35 DLR 373.*

Section 133—Acceptance of uncorroborated testimony of victim girl—Court may presume to be unworthy unless she is corroborated in material particulars. The judge may accept her testimony by assigning reason. *Abdul Quddus vs State; 1983 BLD 18(b).*

Section 133— In a case where bitter enmity is admitted between the parties it required as a rule of prudence that there should be some such corroboration of the evidence of the interested witness as may inspire confidence in the mind of the court. *Abul Kashem and others vs State 56 DLR 132.*

Section 133—This section makes evidence given by a witness in a judicial proceeding admissible in a subsequent judicial proceeding where the question in controversy in both proceedings is identical and where the witness is dead, or cannot be found, or is incapable of giving evidence. *State vs Ershad Ali Sikder and others 56 DLR 185.*

Section 133—Though conviction of an accused on the testimony of an accomplice cannot be said to be illegal, Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. *State vs Ershad Ali Sikder and others 56 DLR 305*

Section 133—Accomplice stood in the witness box as PW 20 and made a disclosure of the offence committed by the condemned prisoners and appellants and oath was accordingly administered to him. Accomplice was pardoned with the condition of making a full and true disclosure of the whole episode leading to murder of victim Zainal Khan. Conditional pardon, as such, was granted to accomplice. No illegality and legal infirmity are manifested in giving testimony on administration of oath on the part of accomplice and it cannot be suggested at all that the evidence of the accomplice is an inadmissible evidence. *State vs Ershad Ali Sikder and another 8 BLC 107.*

Section 133—Testimony of an accomplice is stigmatised evidence in criminal proceeding. The cautionary provision incorporates a rule of prudence because an accomplice who betrays his associates is not a fair witness. What is required is to adopt great circumspection and care when dealing with the testimony of an accomplice. Though there is no legal necessity to seek corroboration of an accomplice evidence it is desirable that the Court seeks reassuring circumstances to satisfy the judicial conscience that the evidence is true. Corroboration need not be direct evidence and it is sufficient if it is merely circumstantial evidence of his connection with the crime. In the instant case, testimony of accomplice has been corroborated by the testimony of the PWs 17 and 19. *State vs Ershad Ali Sikder and another 8 BLC 107 .*

Sections 133 & 114(b)—Though the conviction of an accomplice cannot be said to be illegal yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars. *State vs Ershad Ali Sikder and others 56 DLR 185.*

Sections 133 and 114—Section 133 and illustration (b) to section 114 of the Evidence Act deal with the law relating to an accomplice evidence. An accomplice namely, a guilty associate in crime, is a competent witness. Section 133 lays down that the conviction based upon uncorroborated testimony of an accomplice is not illegal but Rule of guidance and Rule of prudence indicated in illustration (b) to section 114 of the Evidence Act has resulted in the settled practice to require corroboration of an evidence of an accomplice which is now virtually assumed force of Rule of law. The evidence of an accomplice does not demand outright rejection if there is no corroboration but, though, there is no legal necessity to seek corroboration of an accomplice evidence it is desirable that the court seeks reassuring circumstances to satisfy judicial conscience that evidence is true.

In the present case, PW I's evidence attributing authorship to Ershad Ali Sikder in causing death to Khaled stood corroborated by evidence of PWs 3, 4, 5, 7, 9, 10 and 14 and also the evidence of PW 21. PW 1, accomplice evidence connecting Ershad Ali Sikder, Faruque alias Jamai Faruque, LM Liaquat Ali Lashkar and Nasir Khan in causing injuries to PW 3 Munir, also stood corroborated by evidence of PWs 3, 4, 5, 7, 9, 10 and 14 and, also evidence of PW 22. Evidence of PW 1, Noor Alam that is accomplice evidence, satisfied the test of reliability. *State vs Ershad Ali Sikder and others 8 BLC 275*

Sections 133 & 114(3)—The combined effect of sections 133 and 114(b) is that though a conviction based upon accomplice's evidence is legal, the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. *State vs Ershad Ali Sikder and others 56 DLR 185.*

Sections 133 and 144— Testimony of accomplice—It is dangerous to base a conviction on such evidence alone. The Court almost invariably starts with the presumption against the trustworthiness of the accomplice and unless circumstances are quite exceptional the Court refuses to convict on the uncorroborated evidence of an accormplice. *Ator Ali vs State 44 DLR 478.*

134. Number of witnesses—No particular number of witnesses shall in any case be required for the proof of any fact.

Case Law

Number of witnesses—Not material—Testimony of even one witness sufficient. *Ishrat PLD 1958 Dhaka 384; 10 DLR 136.*

Section 134—Single witness of occurrence—When conviction may be based on his testimony. Where there is a single witness of the crime the question whether conviction may be based on his evidence or not must depend upon the circumstances of each case and the quantity of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the Court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness. The Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. *Vadivelu Thevar PLD 1957 Supreme Court (Ind.) 525.*

Section 134—If believed, conviction may be based on the evidence of a single witness.

Section 134—Section 134, the Evidence Act provides that no particular number of witnesses should in any case be required for the proof of any fact. If believed, conviction can be based on the solitary evidence. *Yusuf Sk vs. Appellate Tribunal 29 DLR (SC) 211.*

Section 134—High Court declined to interfere where the Special Tribunal as well as the Appellate Tribunal felt satisfied and relied upon one witness to pass sentence of conviction. *Yusuf Sk vs Appellate Tribunal 29 DLR (SC) 211.*

Section 134—Evidence has to be recorded viva voce. In civil proceedings, however, facts may be proved by affidavits with the consent of parties. *Abdul Rauf vs Khalida, PLD 1968 Lah 423.*

Sectition 134— Number of witnesses for proof of fact—It is true in view of section 134 conviction on any accused can be based even upon the evidence of a single witness. But that witness must be wholly reliable. PW 2, the only eye-witness in the present case, in the facts thereof, is not wholly reliable, if not wholly unreliable, and as such sufficient corroboration of her evidence is necessary to base conviction. *Ashrafuddin vs State 42 DLR 511.*

Section 134—Number of witnesses—Conviction of the appellants can safely be based on the solitary evidence of the eye-witness PW 1. His evidence is full, complete and self-contained. It may not have received corroboration from other witnesses, but it stands fully corroborated by the circumstances of the case and the medical evidence on record. Its fullness and completeness are enough to justify the conviction. *Abdul Hai Sikder vs State 43 DLR (AD) 95.*

Section 134—The testimoney of the solitary eye-witness could not be shaken in any manner by the defence in cross-examination for which it is difficult to disbelieve her testimony as she narrated the prosecution case in details. *Abdul Quddus vs State 43 DLR (AD) 234.*

Section 134—It is not enjoined that the prosecution is to examine certain definite number of witnesses. *Kazi Motiur Rahman vs Din Islam 43 DLR 128.*

Section 134—Quality and not quantity of evidence is acceptable. There is no impediment in law in conviction being based on the testimony of a single witness if it is honest and trustworthy, veracity of eye-witness cannot be doubted unless reason for false implication is given. *Ataur Rahman vs State 43 DLR 87.*

Section 134—Even if one prosecution witness is fully reliable then conviction of an accused can be based upon his evidence. *Shadat Ali vs State 44 DLR 217.*

Section 134—Solitary witness—True it is that conviction can be based on a solitary witness and it is not necessary to seek corroboration always from independent sources but in the instant case PWs 1-3 being close relations and their evidence being inconsistent, it is not safe to maintain the conviction. *Balu vs State 45 DLR 79.*

Section 134—Recovery of arms and ammunition after hot pursuit of the accused moving with the same—Whether evidence of a single witness wihout corroboration is sufficient to convict the accused—Victim PW 2 is a disinterested witness and can be relied upon and he has been corroborated in material particulars by the evidence of PWs 1 & 4.*Mahbubur Rahman Khan vs State 45 DLR 117.*

Section 134—In a case of sexual offence when the victim girl is a minor her evidence, if otherwise found to be reliable, may be sufficient for conviction of the accused even without independent corroboration. *Siraj Mal others vs State 45 DLR 688.*

Section 134—Even on the basis of a single witness a conviction can be maintained but such a witness must be fully reliable, above reproach and not shaken. *Ashok Kumar Saha vs State 46 DLR 229.*

Section 134—In order to convict an accused solely on the basis of a solitary witness like the police officer or the person who made the search and seizure, the Judge must ensure that such witness is disinterested and the evidence is unimpeachable and the other witnesses to the search who are alleged to have reversed from their previous stand are unworthy of credit. *Talebur Rahman alias Taleb and 2 others vs State 49 DLR 167.*

Section 134—Non-examination of nearby people not fatal to the prosecution case when there are eye-witnesses of the occurrence. *Milon @ Shahabuddin Ahmed vs State 53 DLR 464.*

Section 134—The trial Court discarded the evidence of PW 2 as to the plaintiffs' case of possession since 1963 completely overlooking the provision of section 134 of the Evidence Act. *Shishir Kanti Pal and others vs Nur Muhammad and others 54 DLR 440.*

Section 134—If a witness is otherwise found reliable or independent or non-partisan or disinterested, the evidence of such a lone witness can be taken as the foundation in making decision as to an issue in the case. *Shishir Kanti Pal and others vs Nur Muhammad and others 55 DLR (AD) 39.*

Section 134—Though in certain cases even a single witness is enough to prove the case of a party but in the present case the above principle should not be applied, specially when PW 1 is an interested witness, and evidence as to consideration money was not uniform. *Siraj Mia (Md) vs Nasima Akhter and another 55 DLR 554.*

Section 134—Corroborative evidence is not an imperative component in every case of rape. The rule is not that corroboration is essential before there can be a conviction. *Shibu Pada Acharjee vs State 56 DLR 285*

Section 134—The well-known maxim which is a Golden Rule that "evidence has to be weighed and not counted" has been given statutory placement in section 134 of The Evidence Act which provides that no particular number of witnesses shall in any case be required for the proof of any fact. *Shibu Pada Acharjee vs State 56 DLR 285*

Section 134—Law does not require any particular number of witnesses to prove a case and conviction may be well-founded even on the testimony of a solitary witness provided his credibility is not shaken. *Al-Amin and 5 others vs State 51 DLR 154*

Section 134—It is true that under section 134 of the Evidence Act conviction can be based on the evidence of a single witness but the evidence of

that witness must be of unimpeachable character. *Bimal Chandra Das alias Vim and 3 others vs State 51 DLR 466.*

Section 134—Out of the two plaintiffs any one of them was quite competent to give testimony in the court in support of the plaint case. There is no mandate of law that other plaintiff was also required to supply paper to the other plaintiff to give testimony on his behalf in support of the plaint case. *Shamsul Huda (Md) and another vs Mahmooda Khatun and others 5 BLC 649.*

Section 134—The Division Bench like the trial Court believed the only eye-witness. Believing only eye-witness is legally permissible and conviction can be based on the sole evidence of only one eye-witness. *Khoka vs State 5 BLC (AD) 86.*

Section 134—Only the eye-witness the PW 3 Johura Khatun who was in the room at the time of occurrence with her daughter and that her version of the occurrence having been corroborated by the evidence of PWs 4, 5, 6 and the medical evidence on record, the High Court Division committed no illegality in relying on such ocular evidence and dismissing the appeal. *Badsha Mia (Md) vs State 2 BLC (AD) 179.*

Section 134—When PW 1 is the informant and a member of the police force and is interested in the case it is unsafe to rely on such evidence of the solitary witness in the absence of corroborative evidence. *Masud and others vs State 3 BLC 107.*

Section 134—In the instant case PW 2, daughter of the deceased, is the sole ocular witness and there is admitted enmity between the parties where the prosecution has failed to examine any disinterested and independent witnesses, rather their testimonies being hearsay evidence has no evidentiary value and, as such, the testimony of PW 2 as a lone witness to the occurrence is not at all acceptable. *Mukta Miah & others vs State 6 BLC 211.*

Section 134—PW 1 is the sole ocular witness to the occurrence and it is neither desirable nor possible to search for any other witness to the occurrence as it took place at dead of night when law does not require particular number of witnesses to prove a case and conviction can be based even on the testimony of a solitary witness provided his/her credibility is not shaken by any adverse circumstances and the court is convinced that he/she is a truthful witness. On scanning the testimony of PW1, the same appears to be credible and conviction could very well be founded on such solitary testimony. *Rezaul Hoque @ Reza and others vs State 6 BLC 501.*

Section 134—If the testimony of the single witness is found to be entirely reliable, there is no legal impediment to convict the accused relying on such evidence. In the instant case, there is no reason to disbelieve the testimony of PW 2, who is the solitary eye-witness of the occurrence and it does not suffer from material infirmity. *Alauddin (Md) and others vs State 7 BLC 54.*

Section 134—Law does not require particular number of witnesses to prove a case and conviction may well be founded even on the testimony of a solitary witness provided his credibility is not shaken by any adverse circumstances appearing on the record against him and the court, at the same time, is convinced that he is a truthful witness. *State vs Ershad Ali Sikder and another 8 BLC 107*

Section 134—If the evidence of a single witness is wholly and fully reliable, conviction can be based on such evidence. In the present case, the deceased Jalil who is the sole eye-witness, according to the prosecution, is not at all wholly and fully reliable and, as such, conviction cannot be maintained on such evidence without reliable corroboration. *Zahed alias Zahed Ali and ors vs State 8 BLC 538.*

Section 134—Solitary testimony—Question of acting upon the solitary testimony of a lone witness—There is no material on record to show that PW 1 had any motive to bring false allegation or that he was acting at the instance of the police or that he was trying to fix the appellants for some personal reason—There is nothing to doubt his credibility. *Shahidullah vs State 6 BSCD 189.*

Sections 134 and 114—Prosecution is not bound to produce each and every witness of incident irrespective of consideration whether such witness is essential to unfolding of narrative on which prosecution case is based. Non-examination of three witnesses listed in charge-sheet is not at all fatal. It is not at all necessary to multiply witnesses to prove a prosecution case. It is axiomatic that evidence is not to be counted but only to be weighed and it is not quantity of evidence but quality that matters very much. Under section 134 of The Evidence Act, which is a Golden Rule, conviction can be safely based on solitary testimony of a witness if it inspires confidence in the mind of the Judge.

Learned Counsel for condemned prisoners and accused-appellants could not show how the prosecution version had been rendered less trustworthy as a result of non-examination of other three witnesses noted in charge-sheet. *State vs Md Abdus Samad Azad alias Samad and another 9 BLC 39.*

Sections 134 and 114(g)—As there is no corroboration of the testimony of the PW 1 as to the alleged snatching away of Taka twenty thousand from him conviction on the basis of such a solitary witness is not at all safe and

corroboration is a must. *Kamal alias Kamal Hossain and 2 others vs State 3 BLC 498.*

Sections 134, 5 and 114(g)—Although the occurrence took place on plot No. 406 belonging to Samir but he was not examined in this case and there are some huts of some persons quite a distance away from the PO plot and inmates of those houses were not cited as witnesses because none of them saw the occurrence and hence no adverse presumption can be drawn for their non-examination. The PWs 1 to 7 were natural witnesses to the occurrence as they were all present close to the place of occurrence and more particularly except PWs 1, 2, 6 and 7, PWs 3, 4 and 5 are independent and disinterested witnesses and their evidence is full, complete and self-contained. It is a settled principle of law that even the testimony of a solitary witness can be relied on in basing the conviction of an accused, if such evidence is full, complete and self-contained. Similarly, even the evidence of interested witnesses can be accepted as valid and reliable evidence if their evidence do not manifest any bias or enmity. *State vs Mainul Haque @ Mainal 7 BLC 586.*

Sections 134, 8 and 9—As the solitary eye-witness PW 3 who is found to be fully trustworthy and reliable and being corroborated by PWs 1-2 and 4-7 and the strong circumstances arising out of the conduct of the condemned-accused for his attempt of running away from his house and the place of occurrence and his long continuous absconsion during trial and even thereafter which has proved the charge of murder beyond all reasonable doubt. *State vs Ranjit Kumar Mallik 2 BLC 211.*

Chapter X

OF THE EXAMINATION OF WITNESSES

135. Order of production and examination of witnesses—The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

Case Law

Complaint—Examination by commission—Permitted when no prejudice is caused to accused by it. *Azizur Rahman Chowdhury, PLD 1956 Dacca 248; PLR 1954 Dacca 67; 6 DLR 114.*

Section 135— Recalling a witness—No explanation haivng been given as to why defendant-petitioners failed to cross-examine PW 1 and what prejudice will be caused in the absence of his cross-ecamination the judge rightly rejected the application for recalling the witness. *Abu Bakkar vs Akbar Ali Biswas 45 DLR 62.*

Section 135—While the four tendered witnesses were produced before the learned trial Court by the prosecution the learned Public Prosecutor/ Assistant Public Prosecutor ought to have drawn the attention of the four tendered witnesses to their statements and evidence recorded by the learned Magistrate, 2nd Class and thereby the prosecution has failed to comply with the provisions of section 135 of the Evidence Act. *Abul Kalam & others vs State 5 BLC 270*

136. Judge to decide as to admissibility of evidence—When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. The are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. the Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

137. Examination-in-chief—The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination—The examination of a witness, by the adverse party shall be called his cross-examination.

Re-examination—The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Case Law

Cross-examination—Purpose of cross-examination is to find out truth—Confusing a witness by prolonged cross. deprecated. *Muhammad Shati 19 DLR (SC) 216.*

Failure to cross-examine a witness tantamounts to admitting his statement—Fact deposed by witness about parentage of defendant not questioned by plaintiff in cross-examination—Evidence deemed to have been accepted by plaintiff. *Zar Jan vs Najmun Nisa (1969) PLD (Peshawar) 119.*

Section 137—Objection to the manner of cross examination put to PWs 2 and 3 in a lump and similarly to the IO. PW 9—Objection rightly taken when there was no such statement in the examination-in-chief of the witness. *Taleb Ali & ors. vs State 40 DLR (AD) 240.*

Cross-examination is the "greatest legal engine ever invented for discovery of truth. "(Wigmore on Evidence) *Abdul Hamid vs Karam Dad, PLD 1966 Lah 16.*

Section 137—There is a regrettable practice among a class of lawyers to use prolonged cross-examination for the purpose of leading a witness into error after his alertness has been reduced through fatigue and his resistance to suggestions made in the form of leading questions has thereby been reduced. Such a practice is plainly designed not for the disclosure of truth, but for the manipulation of error, and we take this opportunity of expressing our entire disapproval of the use of such methods. *Muhammad Shafi vs State PLD 1967 SC 167.*

Section 137—Statements elicited from a witness in cross-examination are a very important part of evidence before a Court. Before drawing any inference from the testimony of a witness, the Court must consider the statements made in the examination-in-chief and those made in cross-examination by putting them in juxtaposition and see whether the witness has stood the test. *Wajear Rahman Moral vs State 43 DLR (AD) 25.*

Section 137—Contention as to facts—The defence cannot make an ingenuous argument that the prosecution story cannot be believed as they did not mention about the connection doors in between the rooms as the defence did not put any suggestion as to non-existence of the same. *Abdul Quddus vs State 43 DLR (AD) 234.*

Section 137—Court is to consider the evidence of witnesses in their examination-in-chief in juxtaposition with their cross-examination. *Abul Khair and another vs State 55 DLR 437.*

Section 137—The wife at the relevant time of occurrence was at her husband's house and that she is subsequently found dead an obligation is cast upon the defence to account for the circumstances leading to the death of the deceased failing which the husband will be responsible for the death of the deceased. *Gias Uddin vs State 55 DLR 328.*

Section 137—From the evidence on record it appears that there is no suggestion that the convict-appellant husband was not present at his house when his wife died leading to the only inference that the husband was present at the time of occurrence. *Gias Uddin vs State 7 BLC 729*

Section 137—It is utmost important that the judicial officers should keep in view of the powers conferred on them by the Evidence Act and should exercise their discretion in using these powers to disallow cross-examination on immaterial and irrelevant matter or to disallow needless lengthy cross-examination even on relevant matters. This is intended to serve as useful guidance for the judicial officers during the trial in all matters particularly in criminal trials. *State vs Mainul Haque @ Mainal 7 BLC 586*

Section 137—Although the evidence of PWs 1 and 3 regarding possession of the land has not been controverted by cross-examining them but OPWs in their statements made positive assertion disputing the statements of PWs 1 and 3. Therefore, it cannot be said that the finding was not based upon non-consideration of the evidence on record, rather, such finding is based on overall consideration of the evidence on record. *Majida Khatoon vs Md Mominul Huq and ors 8 BLC 250*

Section 137—From the unchallenged evidence of PW 1 it is proved beyond all reasonable doubt that Majibul Hoque Bhuiyan had complicity in committing offence of forgery by opening a false account in the name of a fictitious person and converting the account as a cheque account making the credit balance as Taka 35,100 in place of Taka 100 and also the offence of criminal breach of trust in misappropriating in total Taka 61,000 on the four dates. Thus the charge under

sections 409 and 467 of the Penal Code is proved against him but the charge under section 201 of the Penal Code is not proved against him as relevant page of the ledger book was not removed during his tenure in office as Assistant Post Master. *Kazi Shamsul Alam and others vs State 8 BLC 714.*

Section 137—When a prosecution witness does not mention about a particular accused in his examination-in-chief, generally, no question is asked about him in cross-examination. In the instant case, surprisingly the defence took the risk and obtained prompt and ready answer from the PWs 7 to 9 that they did not see any of the condemned prisoners committing the offence which was rightly disbelieved by the trial Court. *State vs Md Joynal Abedin and others 5 BLC 672.*

Section 137—As there was no challenge in cross-examination about the threat of murder and the arrest of appellant was after absconsion it is proved that the appellant had threatened the victim with murder and he absconded after the occurrence till his arrest. *Mostafa (Md) vs State 1 BLC 82.*

Section 137—The seizure list witnesses were declared hostile and the prosecution cross-examined them but the PWs 1 and 5 have proved that the appellants were apprehended from the truck at about midnight along with the contraband articles but the defence failed to challenge such facts and the seized articles were of Indian origin and as such there is nothing to disbelieve the prosecution case. *Hasanuzzaman and others vs State 1 BLC 219.*

Section 137—The prosecution case hinges on the point that the accused persons could not show valid papers in support of the seized timbers found in their possession and that the timbers seized did not contain the hammer marks as required under section 41 of the Forest (Amendment) Act, 1927.

From a close scrutiny of the materials on record it appears that the valid papers in support of their possession of seized timber were duly produced before the forest officials but those were not taken into consideration. There is nothing on record, more particularly in the order sheet of the Magistrate, to dispose of the seized timbers during pendency of the trial and the seized timbers were sold before the trial had commenced. None of the seized materials could be produced before the trial Court for arriving at a correct finding as to whether those contained hammer marks or not. In cross-examination DW 1 has disclosed that it is correct to say that on depositing RR to Railway Division one can obtain TP (Transit Pass) and PW 1 in his cross-examination, has admitted that he scrutinised the said TP (Transit Pass) mentioned in the RR (Railway Receipt) issued correctly. The Courts below did not apply their judicial mind to the cross-

examination portion of the deposition of the witnesses as also the defence version of the case. The prosecution has miserably failed to prove its case and the accused persons should be acquitted honourably in view of the absence of reliable evidence on record for the prosecution. *Mobarak Ullah (Md) and another vs State 9 BLC 303*

Section 137—PWs 2 and 3 have deposed asserting that a LG gun was recovered from the control and possession of the appellant but the defence while cross-examining them did not put any suggestion to them challenging the fact that the said LG was not a gun or arm and thereby the appellant admitted the fact that the said LG was an arm. *Nazrul Islam vs State 9 BLC 418*

Sections 137 and 139— Any finding based on the examination-in-chief of a witness ignoring his cross-examination and vital circumstances surrounding the case must be held to be no proper finding in the eye of law. *Tamal Biswas vs State 5 BLC 398*

Sections 137 and 45—The evidence as given by PW 1 that Exhibit 2 was written by Mahbubur Rahman wherein by interpolation he made the balance as Taka 35,100 in place of Taka 100 had not been challenged in cross-examination. So, it is to be presumed that the defence accepted the above testimony of PW 1 as true. PW 11 also identified the signature of Mahbubur Rahman as appearing in Exhibit 2 which also remained unchallenged. In presence of such unchallenged direct evidence of PW 1 that the Exhibit 2 was written by Mahbubur Rahman corroborated by PW 11 there is no necessity for examining and comparing the writings of Exhibit 2 by handwriting expert which is a weak type of corroborative evidence. Therefore, his complicity in the commission of offences under sections 409 and 467 of the Penal Code is proved but the charge under section 201 of the Penal Code had not been substantiated. *Kazi Shamsul Alam & ors vs State 8 BLC 714.*

Sections 137 and 45—If on an internal examination, the doctor failed to give the nature of injuries, exact position and measurement, how could the court come to the conclusion on perusal of death certificate, which was issued on the basis of the records of the hospital, not on the basis of examination of the dead body. The learned Metropolitan Additional Sessions Judge was therefore not justified in forming his opinion as to the cause of death due to the stab injuries relying on the death certificate, particularly when none proved the injuries and without affording the defence to cross examine the author who issued the same. This finding of the learned Additional Sessions Judge is not based on legal evidence on record and cannot be sustainable in law. *State vs Liaqat Ali Khan 9 BLC 351.*

Sections 137, 21(2) and 101—The defence has practically admitted the prosecution version that the victim sustained knife injuries in the drawing room of PW 3 in presence of the condemned prisoner Liaqat. When the defence came with a specific plea, it was required to prove the same either by adducing reliable evidence or in the alternative, it could have substantiated its plea from the lips of the prosecution witnesses by cross-examining them but it has totally failed to establish its plea. It is improbable to believe that while an intruder was inflicting knife blows to Shahida in presence of Liaqat, the latter would remain as spectator, though he claimed her as his legally married wife. The prosecution has been able to prove that the convict Liaqat Ali Khan inflicted knife blows to Shahida as a result of which she died in the CMH on 15-10-93 resulting from the complications of such injuries. *State vs Liaqat Ali Khan 9 BLC 351.*

Sections 137 & 80—Although the Magistrate who held TI Parade was not examined but as the recognition in the TI Parade and the statement in the deposition was not challenged by the defence, there is no reason to disbelieve the PWs and the prosecution case is proved beyond all reasonable doubt. *Abdul Hashem Molla and 5 ors vs State 1 BLC 211.*

138. Order of examination—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the fact, to which the witness testified on his examination-in-chief.

Direction of re-examination—The re-examination shall be directed to the explanation of matters referred to in cross-examination and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Case Law

Witness examined on interrogatories—Re-examined on new points without permission of Court—Answers excluded from consideration. *Agha Mir Ahmad Shah PLD 1957 Karachi 258.*

Sction 138—Re-examination shall not be allowed to destroy the effect of cross-ecamination. *Ihteshamur Rahman vs Masuda Khatun and others 50 DLR 159.*

Section 138—The right of the adverse party to cross-examine a witness is never confined to the facts deposed to by the witness in his examination-in-chief but it extends to all matters relating to the suit. The adverse party has the right to cross-examine a witness on all facts relevant in the suit. *Khalilur Rahman (Md) vs Asgar Ali 52 DLR 145.*

139. Cross-examination of person called to produce a document—A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.

Case Law

Sections 139 and 137— Any finding based on the examination-in-chief of a witness ignoring his cross-examination and vital circumstances surrounding the case must be held to be no proper finding in the eye of law. *Tamal Biswas vs State 5 BLC 398*

140. Witnesses to character—Witnesses to character may be cross-examined and re-examined.

141. Leading questions—Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

142. When they must not be asked—Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

Case Law

Sections 142 and 154—Court may in its discretion permit a party to put questions to its witness which are usually put in cross-examination by the adverse party. *Babul vs State 50 DLR 490.*

143. When they may be asked—Leading questions may be asked in cross-examination.

144. Evidence as to matters in writing—Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witnesses to give secondary evidence of if.

Explanation—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustrations

The question is, whether A assaulted B

C deposes that he heard A say to D—"B wrote a letter accusing me of theft, and I will be revenged on him. "This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

Case Law

Sections 144 and 133—Testimony of accomplice—It is dangerous to base a conviction on such evidence alone. The Court almost invariably starts with the

presumption against the trustworthiness of the accomplice and unless circumstances are quite exceptional the Court refuses to convict on the uncorroborated evidence of an accomplice. *Ator Ali vs State 44 DLR 478.*

145. Cross-examination as to previous statements in writing—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Case Law

Section 145—Contradictory statement before committing and trial Court—Sessions judge not transferring statement to his file—Previous statement may be used to impeach credit of witnesses. *Hajrat Ali 1 DLR 42.*

Section 145—The recital of kabala per se shall not go into evidence unless the person who made the recital raises any objection therefor. *Feroja Khatoon vs Brajalal Nath 43 DLR 160.*

Section 145—Statement made under section 161 CrPC are not substantive evidence. Such statements can only be utilised under section 162 CrPC to contradict the witness in the manner provided by section 145 of the Evidence Act. *Abdus Subhan vs State 46 DLR 387.*

Section 145—For contradicting previous statement of a witness section 145 of the Evidence Act lays down the procedure by which a witness may in cross-examination be contradicted by his previous statement in writing or reduced into writing while section 155(3) of the Act prescribes the mode of contradicting previous verbal statement. *Altaf Molla 6 DLR 420; Mangal Khan 6 DLR 490.*

Section 145—Failure to comply with the section makes previous statement inadmissible. *Mangal Khan 6 DLR 490; Fateh Beg. 2 PCR 150.*

Section 145—Previous statement admitted under section 288 CrPC is evidence for all purposes.

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1. As to the application of section 145 to police diaries, see the Code of Criminal Procedure, 1898 (Act V of 1898), section 172.

Section 145—Limited purposes for which previous statement may be admissible as just for the purpose of contradiction only. *Crown vs Mongal Khan 6 DLR 490.*

Section 145—Entire statement put in under section 288, becomes substantive evidence. *Crown vs Mongal Khan 6 DLR 490.*

Section 145—Failure to bring previous statement on record for contradicting a witness results in the failure to consider materials which from the defence point of view were vital and in consequence there was miscarriage of justice. *State vs Abdul Aziz 23 DLR 91.*

Section 145—Approver's confessional statement, his evidence before the committing Court and the sessions trial all tallied together—In cross examination he resiled from his confessional statement— Prosecution entitled to refer to his evidence in the committing Court under section 288 CrPC without reference to section 145 of the Evidence Act. *Ahmad Din 22 DLR (SC) 1.*

Section 145—Approver's confessional statement in the committing Court and the deposition in examination-in-chief at the trial are in complete accord in essential particulars and there does not appear any contradiction between his statement in the committing Court and the statement made by him in examination-in-chief at the trial. It was only in course of cross-examination that the approver retracted his confession and resiled from his previous statement in the committing Court. When there was no contradiction between his previous statement in the committing court and his deposition in examination-in-chief in the trial Court, the prosecution was not in need of complying with the formalities prescribed by section 145 of the Evidence Act and was entitled to use his statement in the committing Court as transferred under section 288 CrPC for the purpose of corroboration of his deposition in examination-in-chief at the trial under section 157 of the Evidence Act. *Ahmed Din 22 DLR (SC) 1.*

Section 145—Previous statement of a witness when can be used as a substantive evidence. When a previous statement of witness is contradicted by his evidence in Court—Its effect. A previous statement of a witness cannot be utilised as a substantive evidence unless this is contained in the evidence of the witness duly recorded in his presence at a previous proceeding, such as commitment proceedings and then put it at the trial under section 288 of CrPC. A statement recorded by the police under section 161 of CrPC cannot be utilised as substantive evidence. It can only be utilised under section 162 of CrPC to contradict such witness in the manner provided by section 145—When a witness is contradicted by a statement recorded by the police in the course of investigation the only effect that it can have is to reduced the evidentiary value of his testimony in Court and makes the witness unreliable on the point on which he is so contradicted. *Nazir Hussain 17 DLR (SC) 40.*

Section 145—Admissions are themselves substantive evidence. Sections 18-20 mention the persons by whom admissions may be made and the circumstances under which they may be made. *Birendra Chandra Saha vs Sashi Mohan Saha 27 DLR (AD) 89.*

Section 145—Use of previous statement under section 145, Evidence Act is for the purpose of contradicting the witness's statement and hence the necessity for drawing the attention of the witness to that statement—Admissions are used for the purpose of substantive evidence in which case attention of the witness to his previous statement is not necessary—Section 145 not applicable in case of admissions. *Birendra Chandra Saha vs Sashi Mohan Saha. 27 DLR (AD) 89.*

Section 145 must be applied to admit evidence under section 288 of the CrPC. *Chhato Gada 15 DLR 517.*

Section 145—FIR—May be used to contradict the maker thereof. *State vs Ghulam Mustafa 1 DLR 71.*

Section 145—Murder—Partly digested food found in the stomach of man murdered early in the morning—Prosecution witnesses deposing in Court that he took his meal at midnight—Not saying so in their statement to investigating officer—Witness believed. *Shahidullah Khan PLD 1961 Dacca 1; 12 DLR 537.*

Section 145—The document sought to be proved might be a lengthy one and the witness might have some explanation for making a particular statement which he could furnish if confronted with that very statement and the significance of which might be lost on him if he is confronted with the document as a whole. In such a case section 145 is useful is bringing the particular matter in issue before him and giving him the necessary opportunity to explain. *West Punjab Government PLD 1952 Lahore 430; PLR 1952 Lahore 576.*

Section 145—Object of—Contradiction in statement should be brought to the notice of the witness. *Sheru PLD 1960 Karachi 195; PLR 1960(1)(WP) Karachi 453.*

Section 145—Omission in FIR—Not put to the witness—Much significance not attached to omission. *Akhtar Hussain PLD 1958 (SC) 251; PLD 1958 (2) WP 980.*

Section 145—Previous statement sought to be used for contradicting subsequent statement—May not have been taken down by authorised person. *Ramkishum Sao AIR (33) 1946 Patna 82 (DB).*

Section 145—Previous admission—Statement in witness-box not inconsistent with it—Previous statement admissible without being put to accused. *Firm Malik Des Raj. AIR (33) 1946 Lahore 65 (FB).*

Section 145—Privileged document—Cannot be used by an unauthorised person for cross-examination. *Zahur Hussain PLD 1960 (WP) Lahore 1189.*

Section 45—Medical evidence is only corroborative in nature, the ocular evidence of the eye-witness which substantially corroborates the major injuries on the person of the deceased be accepted. *State vs Md Shamim alias Shamim Sikder and ors 53 DLR 439.*

Section 145—The two eye-witnesses one is PW 2 who was examined under section 161, CrPC by the police nearly more than four months after the occurrence and the PW 3 eye-witness though examined by the police one day after the occurrence but there was material omission in his statement made before the police under section 161, CrPC creating doubt as to its acceptability . *Abdul Aziz Talukder and another vs State 6 BLC 143*

Section 145—The alleged 5 ocular witnesses who are close relations of the deceased claimed to have seen the occurrence which having not been stated to the investigating officer under section 161, CrPC indicating that they, with ulterior motive, have embellished the case for obvious reason for which such testimonies of the ocular witnesses cannot be relied upon. *Mirash Uddin and others vs State 7 BLC 342*

Section 145—The spot witnesses namely, PWs 1, 2, 5, 13 and 15 were claimed to have recognised 6 accused persons but none of them, except one accused, was named in the first information report. If those witnesses had at all recognised the 6 accused persons, as they claimed they did during the occurrence, those witnesses would have disclosed their names to the informant and to the investigating officer. But none of the aforesaid spot witnesses disclosed the names of the 6 accused persons except one. The recognition of the one accused namely. Rafiqullah Khan by PW 2, Ashim, also appears to be very doubtful as he did not state to the investigating officer that he saw accused Rafiqullah Khan with a Chinese axe in his hand although he said so in his evidence. Hence, the evidence of the aforesaid spot witnesses regarding their recognition of the 6 accused persons cannot be accepted as reliable and must therefore be rejected. *State vs Rafiqullah Khan alias Kazal & another 7 BLC 480*

Section 145—The PWs 2 and 3 testified in Court that they recognised condemned prisoner in the night of occurrence and this part of the evidence has been supported by PW 1 in her evidence but the informant lodged the first information report in the following morning at about 6-30 AM on 1-9-1986 without stating any name in the first information report as accused and the PWs 2 and 3 did not state to the first investigation officer about their recognition of

the condemned prisoner Shahajahan rather, they stated to the first investigation officer that the faces of the miscreants were covered by cloths but the PWs 2 and 3 disclosed the recognition on condemned prisoner Shahajahan about a month later to the second investigation officer at CID camp. Hence, the evidence of recognition of the condemned prisoner Shahajahan by PWs 2 and 3 cannot be accepted as legal and valid evidence in the present case. *State vs Shahjahan 7 BLC 503.*

Section 145—The prosecution has not been able to prove its case beyond all reasonable doubt, particularly when it appears that there was no eye-witness. Omission to state some vital points of evidence before the Investigation Officer which has deprived the defence to cross-examine the PWs on those points leads the court to receive the evidence of PWs 7 and 8 with a grain of salt and in view of its inherent infirmity it is unsafe to place any reliance on the same. *Zahed alias Zahed Ali and ors vs State 8 BLC 538.*

Section 145—Law is settled that the previous statement of any person cannot be taken into consideration if that person is not examined as witness in the court and the said statement not confronted with the previous statement as enshrined in section 145 of the Evidence Act. *Shahani Bibi being dead her heirs Mohammad Azim and others vs Nur Islam being dead his heirs : Doly Islam and others 4 BLC 195.*

Section 145—As the PWs 2 to 5 were not cross-examined as to their previous statements made before the Magistrate as required under section 145, Evidence Act, such statements are inadmissible. *State vs Yahiya alias Thandu & ors 1 BLC 185.*

Section 145—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. *Fazlu alias Md Fazlur Rahman and others vs State 1 BLC 558.*

Section 145—As the eye-witness Nos. 4 and 5 omitted to state the vital part of the occurrence to IO and the PWs 6 and 7 were not examined by IO and the PWs 4 and 5 did not state to IO that they had told the occurrence to PWs 1, 6 and 7 which create doubt about the prosecution case and such testimony of the ocular witnesses cannot be relied upon as there was omission on vital points and contradiction in their testimony. *Alam Howlader and others vs State, represented by the Deputy Commissioner 3 BLC 488.*

Section 145—Before lodging the First Information Report the informant talked to PW 8 who also accompanied the informant to the police station but the condemned prisoner having not been named in the First Information Report the deposition of PW 8 in Court stating the condemned prisoner as assailant of Kashem when in the First Information Report he was only suspected which is a departure from the First Information Report story and as it is embellishment cannot be accepted in this case for awarding death sentence when the evidence on record both oral and documentary, create doubt about the prosecution case and hence the condemned prisoner is entitled to get benefit of doubt and accordingly he was acquitted. *State vs Hasen Ali 4 BLC 582.*

Section 145—PW 1 has deposed in Court that the accused persons after entering the house demanded money from his bhabi who gave Taka 7,000.00 to them and after his brother was taken away by the accused persons she raised hue and cry and on hearing the same the witnesses came, and that the PW 2 has deposed in Court that on the night of occurrence he saw that 8 to 10 persons were coming and on his query and focussing the torch light he had been threatened by those persons, and that the PW 5 has said in court as an eye-witness that her husband was taken away in her presence and the accused persons after entering the house demanded money from her and on her denial she was told that they had money from the sale proceeds of cattle and on her showing the money the accused persons had taken away the same, and that the PW 3 has stated in court that on hearing hue and cry he went to the house accompanied by others and searched the victim who was found in the paddy field and when he was coming back from the field he met with the informant and all these vital facts were not stated to the Investigating Officer and in view of such omissions the evidence of the above witnesses cannot be accepted as all these omissions amount to contradiction. *Babu Mollah and ors vs State 4 BLC 559.*

Section 145—A statement made before the police during investigation however, being the earliest statements with reference to the facts of the occurrence can only be utilised under section 162 of the Code to contradict such a witness in the manner provided for by section 145 of the Evidence Act. Such statements made earlier before police, which are at variance during trial, has to be considered by the Court only with a view to weighing the evidence actually adduced in Court. However, the learned Judge is not obliged to ignore the evidence adduced before him even if it is at variance with the earlier statements made before the police and may altogether ignore the contradictions if he is otherwise satisfied about the credibility of the witness before him and may entirely rely on his evidence. The contradictions which are of material nature may put the learned Judge on alert so that he may properly weigh the probative

value of evidence given before him along with the earlier statements made before the police. *State vs Golam Mostafa and anr 9 BLC 63.*

Section 145—Sometimes too much importance is placed on omissions from the statements made by prosecution witnesses to the police during investigation. Strictly speaking, an omission cannot be regarded or proved as a contradiction because section 145 of the Evidence Act deals with statements in writing and requires the portion of the writing which is sought to be used for contradiction to be brought to the notice of the witness and the witness being questioned about it. As such, an omission in a previous statement, in general, cannot be used for the purpose of contradiction. Although an omission may not be relied on as a contradiction, but in a case of serious and glaring omission from a police statement, where what is actually stated in Court is irreconcilable with what is omitted and impliedly negatives its existence, may be relied on as a relevant circumstance. *State vs Golam Mostafa and anr 9 BLC 63.*

Section 145—A statement made before the police during investigation however, being the earliest statements with reference to the facts of the occurrence can only be utilised under section 162 of the Code to contradict such a witness in the manner provided for by section 145 of the Evidence Act. Such statements made earlier before police, which are at variance during trial, has to be considered by the Court only with a view to weighing the evidence actually adduced in Court. However, the learned Judge is not obliged to ignore the evidence adduced before him even if it is at variance with the earlier statements made before the police and may altogether ignore the contradictions if he is otherwise satisfied about the credibility of the witness before him and may entirely rely on his evidence. The contradictions which are of material nature may put the learned Judge on alert so that he may properly weigh the probative value of evidence given before him along with the earlier statements made before the police. *State vs Golam Mostafa and anr 9 BLC 63.*

Section 145—The statements made under sections 161 and 164 cannot be taken as substantive piece of evidence. The statements made under section 161, CrPC can only be utilised under section 162 CrPC to contradict such witness in the manner as provided by section 145 of the Evidence Act. In no case such statement shall be taken as the basis for drawing an adverse inference against the accused on any point. When the statements made under section 164, CrPC can be used to support or challenge the evidence given in Court by the witness who made such statements and such statements can only be used by the accused for the purpose of cross examining him in the manner as provided by section 145 of the Evidence Act. *State vs Nazrul Islam @ Nazrul 9 BLC 129.*

Section 145—The learned trial Court wrongly brought allegations under sections 307 and 457 of the Penal Code as there arises no such allegations under such sections of the Penal Code under the facts and circumstances of the case. The PWs 7, 8 and 9 stated in their respective evidence that they heard from the PWs 1 to 3 that Motaleb threw acid but the PWs 1 to 3 in their evidence told that they did not see anybody to throw acid. Moreso PW 16, the Investigating Officer, testified that no witness mentioned any name to him about the throwing of acid and thus the prosecution has failed to prove the throwing of acid by Motaleb towards the victim. The contents of the FIR were not read over to the Informant and the defence submission that Korban, who has enmity with the accused persons, in order to materialise his own wish turned the trend of the case in other direction and falsely involved the accused Motaleb cannot be brushed aside.

There is a glaring difference between the evidence of Informant and the contents of the FIR. There are also so many contradictions and omissions in the evidence of PWs and under such circumstances, conviction of the appellant cannot be sustained. *Motaleb (Md) @ Motleb vs State 9 BLC 155.*

Section 145—Professional Misconduct of an Advocate—Dismissal of a case for non-prosecution without the client's instruction and keeping him ignorant about the result of the case—When gross negligence amounts to misconduct, the consideration of motive is of less importance.

Held—In a case of misconduct the point that has to be looked into is the Professional Conduct of the Lawyer and judge his motive from his action. It will assume prominence when the act of the lawyer is apparently innocent. When the act is one of gross negligence which amounts to misconduct the consideration of motive is of less importance. *Ali Akbor vs Md Lutfar Rahman, Advocate 1 BSCD 183.*

Sections 145 and 114(g) —There are series of contradictions in the evidence of the PWs when neither any tenant nor any disinterested neighbour nor microbus driver nor the owner of the house No.6 Mirpur was examined which creates a serious doubt about the whole prosecution case and hence the trial Court was not justified in convicting and sentencing the appellants. *Mahmud-al Kader, and anr vs State 4 BLC 224.*

Sctions 145 and 17—Admission—Since the relationship of landlord and tenant between the plaintiff and the defendant was never a fact in issue, the application of the defendant dated 12-1-66 (unconnected with the relationship) and his deposition in a different proceeding could not be admitted into evidence as an admission suggesting an inference as to any fact in issue. The alleged

admissions were not set out in the plaint. Admission can be explained and the maker of the same must have an opportunity to explain them. *Abdur Rabban vs Aminul Hoque Sowdagar 43 DLR (AD) 19.*

Sections 145 and 155—The trial Court illegally referred to and considered the statements of witnesses recorded under section 161 Criminal Procedure Code, which could only be used to contradict or corroborate the witness. *Abu Bakker and others vs State 49 DLR 490.*

Sections 145 and 154—Prosecution witness may be cross-examined by the prosecution even without declaring him hostile after complying with provisions of section 145, Evidence Act. Further, it does not necessarily follow that if a witness is declared hostile by the party calling him he is to be treated as a witness of falsehood—Court will adjudge the value of a witness's evidence in the circumstances of a case. *Yunus vs State 34 DLR 208; 1983 BLD 121(b).*

Sections 145 and 154—Evidence of a hostile witness can be considered if corroborated but when it is sharply conflicting the safest rule is to lean in favour of the accused person. *Abdul Wahab vs State; 1986 BLD 390(a).*

Sections 145 and 155—Statement of a person recorded under section 164 CrPC is not a substantive peiece of evidence of the fact stated therein. Such statements recorded by a Magistrate under section 164 CrPC can only be used for contradicting the maker of it under sections 145 and 155 of the Evidence Act or for the purpose of corroborating him under section 157 of the Act. *Seraj Miah vs State 49 DLR 192.*

Sections 145, 155—Difference between sections—Section 145 lays down the procedure by which a witness may in cross-examination be contracted by his previous statement in writing or reduced into writing while section 155(3) of the Act prescribes the mode of contradicting previous verbal statement. *Altaf Molla 6 DLR 420.*

FIR—Evidentiary value of—How may be used.

A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under section 157, Evidence Act, or to contradict it under section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. *Nisar Ali vs State of UP. PLD 1957 (SC) (Ind.) 297.*

Rule as to confrontation: The rule as to confrontation does not apply to oral admissions by parties to suit. Such admissions when proved may be substantive evidence under sections 18, 21 and 145 of the Evicence Act and may not in term apply to such admissions but their value will be very slight if the maker thereof

has not been confronted with them even after he has given evidence inconsistent therewith. *Md Mustafa Chowdhury vs Sudhangshu Bimal Biswas 8 DLR 381.*

Previous statement of witness : A previous admission of a party who has gone into the witness box and has made a statement inconsistent with the admission cannot be used as evidence against that party unless the attention of the witness was drawn to that statement *Md Mustafa Chowdhury vs Sudhangshu Bimal Biswas 8 DL 381.*

Plaintiff—When he should be confronted with his own statement : In the present case purpose for which the recital sought to be utilised was to induce the Court to draw the inference that the case sought to be made out through the plaintiff was an after-thought. for, on the previous occasion, no such case was made out. No confrontation was, therefore, necessary. *Malik Din vs Mohammad Aslam 21 DLR (SC) 94.*

Plaintiff filed certified copies of document claiming that the defendant has made admissions therein regarding plaintiff's claim—document was admitted as piece of evidence and formal proof thereof was dispensed with but the defendant was not examined in the case—Held : Document cannot be relied upon for contradicting the defendant unless he is examined: *Syed Madaris Ali vs Syed Md Ilias Ali 24 DLR 191.*

The words 'previous statement' in section 145 refer to what has as yet not been proved but sought to be proved for contradiction purpose. But a statement which has already been proved in the same proceeding under section 21 or some other sections of the Evidence Act does not fall within the purview of section 145. To such statement prohibition of section 145 does not apply: From the language used in section 145, Evidence Act, it is clear that the previous statement, reference to which has been made in the said section, has not yet been proved but which is sought to be proved for the purpose of contradicting a particular witness deposing in the witness box. This provision cannot be interpreted to be referring to statement which has already been proved as substantive evidence in the said very proceeding under some other provisions of the Evidence Act. It cannot be argued that a statement which has already been proved either as an admission under section 21 of the Evidence Act or under some other provision of the Act and has become a part of the record shall cease to be evidence in the case and go out of the record if the maker of the statement examined as a witness chooses to make a statement contrary to his previous statement and his attention is not drawn to it. If the evidence is a substantive evidence under some other provisions of the Evidence Act it should not cease to be evidence notwithstanding clear provision of the Evicence Act in respect of admissibility of evidence: *Asadunessa vs Quamaruzzaman 26 DLR 363.*

Decision of the majority Judges—Defendant's deposition Exts.5 and 6 are inadmissible under section 19 of the Evidence Act.

Notwithstanding the challenge given as to the admissibility of Exts.5 and 6 which have been treated as substantive evidence, the High Court Division took the view that those previous statements are admissible for the purpose of contradiction. With respect, this conclusion is not founded on law. Exts. 5 and 6 are inadmissible in evidence and they cannot constitute as admission within section 19 of the Evidence Act. *Khorshed Alam vs Amir Sultan 38 DLR (AD) 133.*

View of Shahabuddin, J (minority)—Deposition by the defendant in previous rent and money suits to the effect that he did not know his mother's name or where she lived, etc. He may be confronted with such deposition in a subsequent case under section 145 Evidence Act to test his veracity. *Khorshed Alam vs. Amir Sultan 38 DLR (AD) 133.*

A witness may be cross-examined as to his previous statement made in writing and relevant to the matter in question and his attention must be drawn to those parts of the statement for the purpose of contradicting him. *Abdul Jabar vs State 37 DLR 278.*

Principle of law regarding cross-examination—Failure of a party to cross-examine the witness of his adversary on material evidence. Effect of—This rule of cross-examination is not merely "a technical rule of evidence" but also " a rule of essential justice, " *Nur Mohammad vs Sultan Ahmed 40 DLR.*

Section 145 refers to 'previous statement' and has no reference to 'admissions'.

Section 145 of the Evidence Act speaks of 'previous statements' and does not specifically refer to admissions.

In the present case there being clear admission made by the defendant in the solenama about his not having possession in the suit land, the confrontation under section 145 of the Evidence Act of his previous admission was not necessary in order to make it admissible in evidence. *Elamuddin Mondal vs Mafizuddin Ahmed 26 DLR 149.*

From the language used in section 145 of the Evidence Act it is clear that the previous statement, reference to which has been made in the said section, has not yet been proved but which is sought to be proved for the purpose of contradicting a particular witness deposing in the witness box. This provision cannot be interpreted to be referring to a statement which has already been proved as substantive evidence in the said very proceeding under some other provision of the Evidence Act. A statement which has already been proved as an admission

under some other provisions of the Act shall not cease under section 21 of the Evidence Act to be evidence, if the maker of the statement makes a statement contrary to his previous statement and his attention is not drawn to it. *Fakir Chand Mia vs Quamaruzzaman 26 DLR 233.*

Provisions of section 145 to contradict a witness's previous statement in cross-examination —It is not a substantial evidence—Exceptions to his rule.

Section 145 lays down that a witness may be cross-examined as to previous statement made by him in writing, but that if it is intended to contradict him by the writing, his attention must be drawn to that part of the previous statement by which it is intended to contradict him. This is to be done to afford an opportunity to the witness to explain the inconsistency between the statement made in the Court and his previous statement. The previous statement made by the witness is not substantive evidence and it cannot be used to prove the existence of a relevant fact. There are, however, exceptions to this rule. The statement of a person who is dead or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, when admitted in evidence under section 32 of the Evidence Act, becomes substantive evidence. *Birendra Chandra vs Sashi Mohan 27 DLR (AD) 89.*

Evidence of a witness declared by the prosecution to be hostile—Such evidence not necessarily untrue and cannot be treated by Court as unworthy of credit—Cross-examination of such witness by the prosecution may be permitted by Court. *SM Farooque vs State 28 DLR 192.*

First Information Report is not substantive evidence but can be used to corroborate or contradict the maker thereof. A First Information Report is not a substantive evidence as to facts stated therein but it is used for corroborating or contradicting its maker when he is examined as witness. But being the earliest document of facts in issue it gives a clue to the possible truth of the allegation against the accused. *SM Farooque vs State 28 DLR 192.*

Compliance with section 145 of the Evidence Act indispensable when an evidence is put in under section 288 CrPC—Entire evidence given in the trial Court as also the portion referred to in section 145 Evidence Act, is before the Court for adjudication. *Yunus vs State 34 DLR 208.*

Entry in the diary of the police-station on the report given by a constable over a telephone is not FIR and the complainant cannot be contradicted by statement in the entry. *Crown vs Faiz Mohd 2 PCR 210.*

Evidence given at the preliminary enquiry may at the discretion of the presiding judge be treated as evidence in the case subject to provisions of sections 145 and 157 of the Evidence Act, *Atchir Ali vs State 31 DLR (AD) 227.*

Confrontation of a witnesses with his previous statement—Found basically wrong.

The learned Single Judge is found to have misconceived the provision of law regarding confrontation of a witness with his previous statement. These respondents were implicated by PWs 1, 2, 4 and 7. So far as PW I is concerned he mentioned in the First Information Report lodged by him names of these accused -respondents and, as such, there was nothing in his First Information Report to contradict him. As to the other three witnesses, PWs 2, 4, and 7 they were not confronted, while on dock, with any of their previous statements regarding any omission of the names of these respondents and in fact there was no such omission in their previous statement and consequently their evidence stood the test of cross-examination. They had nothing to do with the petition filed by the Officer in-Charge of the Police Station for apprehension of the accused long after the occurrence. The only witness who could have been confronted with this petition was the Police drawn to the omission while he was on dock. Moreover, the petition, Ext A, was intended to procure arrest of only the absconding accused after charge-sheet was submitted, and, as such, it was totally unnecessary to mention the names of all the charge-sheeted accused therein. This petition had nothing to do with the participation of the accused in the incident. This petition is clearly inadmissible, so far as the evidence of PWs 1, 2, 4 and 7 is concerned who implicated them in their evidence during the trial. This document is found to have been taken into consideration on erroneous view of law.

Plaint of a civil suit filed three years after the incident could not be admitted in evidence, and more so, how it could be used to contradict other persons, namely, PWs 1, 4 & 7 who did not file the suit or make statement in the plaint. *Bangladesh vs Abed Ali 36 DLR (AD) 234.*

If no opportunity is afforded to the witness to explain the discrepancy the witness cannot be dubbed as false. *Farid Khan vs State, PLD 1969 Pesh 1.*

In every case where a witness is confronted with a portion of his police statement which he repudiates the police officer recording his statement should be questioned specifically with regard to that portion of the statement. The practice of merely asking the police officer perfunctorily whether a particular document represents the witness's statements as a whole cannot but be condemned. *Shah Nawaz vs State PLD 1959 Kar 383.*

The omission in First Information Report was not put to the witness in Court. Held—the omission was not of much significance. *Akhtar Hussain vs State, PLD 1958 SC (Pak) 251.* An omission in order to amount to a contradiction must be material. *Dondapani vs Duryodhan, AIR 1968 Orissa 167.*

Sections 145, 155 and 157—Judicial statement of a witness may be used for corroboration or contradiction—Cannot be treated as substantive evidence : *Khasru vs State; 1983 BLD 318(a).*

Sections 145 and 157—Statement recorded behind the back of the accused the same cannot be treated as substantive evidence against him. Such statement can be used to corroborate or to contradict a statement made in the court in the manner provided in sections 145 and 157 of the Evidence Act. *Hobi Sheikh and another vs State 56 DLR 383.*

Sections 145 and 157—When the FIR says that accused Ramzan Nessa brought a dao from the dwelling hut and gave it to the condemned prisoner but the informant as PW 1 says in Court that the dao was brought by the condemned prisoner Firoj himself and the PWs 3, 7 and 9 although deposed in Court that Ramzan Nessa supplied the dao to Firoj but they did not state the same to Investigating Officer while they were examined under section 161, CrPC and in such circumstances their evidence on this point was discarded. *State vs Firoj Miah and another 5 BLC 1.*

Sections 145 and 157—There is no contradiction or discrepancies in the statements of the eye-witnesses namely, PWs 1 to 3, regarding taking away the victim from his house and of Jahangir's giving blow and Habib Mallik's giving chora blow in his chest and the victim lying dead on the C & B road have been made in the FIR and there is no omission of these vital facts in the FIR. *Jahangir Howlader and another vs State 3 BLC 164.*

Sections 145 and 157—There are many contradictions in the evidence of the PWs and that absence of sign of rape in the medical report and non-examination of the wearing clothes made the whole case most doubtful one for which the appellant is not found guilty of the charge brought against him under section 6(1) of the Nari-o-Shishu Nirjatan (Bishesh Bidhan) Ain, 1995. *Seraj Talukder vs State 3 BLC 182.*

146. **Questions lawful in cross-examination**—When a witness is cross-examined, he may, in addition to the question hereinbefore referred to, be asked any question which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Case Law

Section 146—Composite questions cannot be asked. Answer to one question will furnish no reason for an inference regarding truth of another. *73 CWN 51.*

Section 146—Relationship is no ground to discard testimony of witnesses unless there is internal mark of falsehood in the evidence. *Majibar Rahman vs State; 1985 BLD 110(a)*

Section 146—Mere relationship of the witness should not be a ground for discarding his evidence unless he is found to be biased and lying. *Sarwar Kamal and others vs State 48 DLR 61.*

147. When witness to be compelled to answer—If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

148. Court to decide when question shall be asked and when witness compelled to answer—If any such question related to a matter not relevant to the suit or proceeding, except insofar as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness of the matter to which he testifies:

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence:

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Case Law

Sections 148, 149, 155—Medical witness—Prosecution cross-examining the witness—Procedure disapproved. *Dana PLD 1957 (WP) Lahore 137; PLD 1957 (L) WP Lahore 566 (DB).*

149. Question not to be asked without reasonable grounds—No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations

(a) An [1][Advocate] is instructed by a [2][client] that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(b) A pleader is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

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1. The word "Advocate" was substituted for the word "barrister" by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

2. The word "client" was substituted for the words "attorney or vakil", by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

150. Procedure of court in case of question being asked without reasonable grounds—If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any [1][Advocate] report the circumstances of the case to the [2][High Court Division] or other authority to which such [1][Advocate] is subject in the exercise of his profession.

151. Indecent and scandalous questions—The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Case Law

Sections 151-152—Regulating of questions put during examination of witnesses—Court has power to prevent offensive or irrelevant questions—Warning given to counsel. *M Ibrahim. 1954 FCR 120—7 DLR (FC) 65; PLD 1955 Federal Court 14.*

152. Questions intended to insult or annoy—The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

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1. The word "Advocate" was substituted for the words "barrister, pleader, vakil or attorney", by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

2. The words "High Court Division" were substituted for the words "High Court" by Act VIII of 1973, 2nd Schedule (with effect from 26-3-71).

Case Law

Section 152—Where an attempt is sought to be made to ask something which is not strictly relevant to facts in issue or is couched in a needlessly offensive and indecent form, the Court is perfectly within its right to disallow the question and warn the counsel putting it. *Ibrahim vs Crown, PLD 1955 FC 14.*

153. Exclusion of evidence to contradict answers to questions testing veracity—When a witness has been asked and has answered any question which is relevant to the inquiry only ~~insofar as it tends~~ to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations

(a) A claim against an underwriter is resisted on the ground of fraud. The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty.

He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) A affirms that on a certain day he saw B at [1][Khulna].

A is asked whether he himself was not on that day at [2][Chittagong]. He denies it.

Evidence is offered to show that A was on that day at [2][Chittagong]. The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in [1][Khulna).

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a blood-feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

Case Law

A witness cannot be questioned, and, therefore, not contradicted, on matters which are neither in issue nor relevant to the matter in issue. *Ram Bali vs State, 1952 AIR (All) 289.*

Section 153(3)—In the instant case except asking the PW 1 about filing of the written statement, the content thereof with which the PW 1 presently making any inconsistent statement was not put to him in order to enable the respondents to explain the circumstances against him. In that view of the matter, the content of written statement though contradictory to the defendant's own case of transfer, could not be produced and relied in order to contradict PW 1. *Ahmed Impex (Private) Ltd & others vs Moqbul Ahmed and others 56 DLR (AD) 92.*

154. Question by party to his own witness—The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

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1. The word "Khulna" was substituted for the word "Lahore" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule (with effect from 26-3-71).

2. Substituted by the General Laws (Statute Reform) Ordinance, 1960 (XXI of 1960), section 3 and 2nd Schedule, for "Calcutta" (with effect from the 14th October, 1955).

Case Law

Section 154—Hostile witness—What is—When witness may be allowed to be cross-examined by the party who called him. There must be hostile animus and that the witness being not desirous of telling the truth to the Court. *Abad Ali 12 DLR 578: PLD 1961 Dhaka 85 Rel: 33 CLJ 34 CLJ 107.*

Section 154—Hostile witness—Cross-examined by party calling him—Evidentiary value of where a witness is examined by party calling him his evidence is not to be rejected either in whole or in part but the whole of the evidence so far as it affects both parties, favourably or unfavourably, must be taken into account and assessed like any other evidence for whatever it is worth. *Fazlul Huq 11 DLR 316; PLD 1959 Dhaka 931.*

Section 154—Procedure for declaring a witness hostile not followed by Court—Testimony in cross-examination may be used by defence. *Baijnath Matho AIR 1946 Patna 109.*

Section 154—Permitting to cross-examine a party's own witness does not render him a hostile witness. *Daud Ali 13 DLR 389; (1962) PLD (Dac) 613.*

Section 154—Evidence of hostile witness—The magistrate was mistaken in not considering the evidence of the hostile witness. He appears to be of the opinion that if a witness is claimed to be hostile by the prosecution his evidence is not to be considered at all. *Emdad Hossain 19 DLR 727.*

Section 154—When a witness can be declared hostile—Evidentiary value of witness declared hostile. A witness who is unfavourable is not necessarily hostile; for a hostile witness has been defined as one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth. *Md Yakub Ali 21 DLR 844.*

Section 154—The question whether a witness is or is not desirous of telling the truth should weigh in the matter of allowing the prayer for cross-examination of a witness cited by a particular party. There can be no reason why a witness should be declared hostile simply because a part of his deposition goes against the party who calls him. *Md Yakub Ali 21 DLR 844.*

Section 154—Evidence of hostile witness—if can be rejected. There is no rule of law that the evidence of witness who has been treated as hostile must be rejected, either in whole or in part, or that it must be rejected so far as it favours the party calling the witness or so far as it favours the opposite party. *Suruj Mia 2 DLR 114.*

Section 154—Evidentiary value—How may be used. A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under section 157, or to contradict it under section 145 of that Act. It cannot be used as evidence to corroborate or contradict other witnesses. *Nisar Ali PLD 1957 (SC) (Ind.) 297.*

Section 154—"The adverse party" and "the party who calls"—Difference has nothing to do with the nature of evidence. *Mukthan Khan, 1 PCR 116.*

Section 154—Prosecution witness called by accused for further cross-examination—Request for declaring the witness hostile and permission to cross-examine him—Permissible—Witness continues to be prosecution witness when so called. *Crown vs Khalil-ur Rahman PLD (1953) Baluchistan 15.*

Section 154—Previous judgment discrediting witnesses in connected case—Not admissible to discredit witnesses. *Muhammad Khurshid PLD 1960 (WP) Lahore 1202.*

Section 154—Hostile witness—When a witness can be said to be hostile: A hostile animus that the witness being not desirous of telling the truth should weigh in the matter of allowing the prayer for cross-examining a witness cited by a particular party.

Section 154—It should be remembered that a witness who is unfavourable is not necessarily hostile, for a hostile witness has been defined as one who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court.

Section 154—There is no reason as to why simply because a part of the deposition of a witness goes against a party who calls him, that witness should necessarily be declared hostile. *Abed Ali Mia vs Islam Mia 12 DLR 578.*

Section 154—First Information Report no substantive evidence but can be used to corroborate or contradict the maker thereof. *SM Farooque vs State 28 DLR 192.*

Section 154—Evidence of a witness declared hostile given in the Committing Court put in under section 288 CrPC. The trial Court can however prefer the evidence given before it. *Yunus vs State 34 DLR 208.*

Section 154—Prosecution witness may be cross-examined by the prosecution even without declaring him hostile after complying with provisions of section 145, Evidence Act. Further, it does not necessarily follow that if a witness is declared hostile by the party calling him he is to be treated as a witness

of falsehood—Court will adjudge the value of witness's evidence in the circumstances of a case. *Yunus vs State 34 DLR 208.*

Section 154—Considering the entire evidence, if the court is satisfied about the credibility of the hostile witness, he can be relied upon. *Shah Alam vs State=BCR 1985 (AD) 315; 1985 BLD (AD) 198(a)*

Section 154—Evidence of a hostile witness can be considered if corroborated but when it is sharply conflicting the safest rule is to lean in favour of the accused person. *Abdul Wahab vs State; 1986 BLD 390(a)*

Section 154—Hostile witness—A witness is not necessarily hostile if he reveals the truth. Established practice, now forming a rule of law, regarding the evidence of a hostile witness is that the whole of his evidence so far as it affects both the parties, favourably or unfavourably, must be considered and the court which gets the opportunity to observe his demeanour is at liberty to make assessment of the evidence. If corroboration from other sources is available to the evidence of hostile witness, there is no reason why his evidence shall be rejected outright. If the evidence of the hostile witness fits in with the attending circumstances, then it may be accepted and considered along with other evidence. *Siddique Munshi vs the State 44 DLR (AD) 169.*

Section 154—Hostile witness (by minority) : The evidence of the two hostile witnesses cannot be rejected in whole or in part but the whole of the evidence so far as it affects both sides must be taken into consideration. *Sk Shamsur Rahman vs State 42 DLR (AD) 200.*

Section 154—Even it there is some discrepancy in the evidence of a witness with regard to some part of the case, for that his entire evidence on the remaining part should not be discarded. *Abdus Sukur Mia vs State 48 DLR 228.*

Section 154—Evidence of the witness, who has been declared hostile, would *ipso facto* not be of any worth for the prosecution, rather if on consideration of the evidence of such kind of witness it is found that evidence on record either has established the case of the prosecution or that prosecution case does not stand scrutiny then whatever order in any respect is made by the Court the same is very much sustainable in law. *Mobarak Hossain alias Mobarak vs State 56 DLR (AD) 26.*

Section 154—When a witness is cross-examined by party calling him the whole evidence is to be taken into consideration. As the evidence of hostile witnesses has corroborated the evidence of the other PWs the foundation of prosecution case is shaken and destroyed. *Fazlul Haq Sikder vs State 1 BLC 173*

Section 154—Merely because the evidence of a witness has been declared hostile his evidence cannot be brushed aside as his evidence is to be considered for what it is worth and his evidence cannot be treated as unreliable so as to exclude his evidence from considering altogether. *Abdur Rab alias Nedon Miah vs State 1 BLC 270.*

Section 154—The prosecution has declared hostile their own material witnesses but failed to substantiate that they were gained over or influenced by the accused. When the prosecution witnesses including the wife, two sons and a daughter of the deceased do not support the prosecution case it is difficult to sustain the order of conviction and sentence solely relying on the doubtful dying declaration. *Kala Miah & others vs State 6 BLC 335.*

Section 154—Hostile witness—Defined—Such a witness, whether can be relied upon—Credibility—Question as to.

A hostile witness may be defined as one who from the manner in which he gives his evidence shows that he is not disirous of telling truth to the Court—The principle as to the evidentiary value of a witness declared hostile has been well settled—In this connection reference may be made to case of *Profulla Kumar Sarkar & others vs Emperor* reported in *AIR 1931 Cal 401 FB*—It was held in that case that when a witness is cross-examined by a party calling him, his evidence is not to be rejected either in whole or in part but the whole of evidence so far as it affects both parties favourable or unfavourabe must be taken into account and assessed like any other evidence for whatever it is worth—Similar view was taken in the case of *Fazlul Huq vs State, 11 DLR 316.*

Section 154—A witness even if declared hostile, he can be relied upon if considering his entire evidence including the cross-examination by the parties, the Court is satisfied about the credibility of the witness. Section 154 of the Evidence Act provides that the Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination. *Md Shah Alam and others vs State 5 BSCD 177.*

Section 154—Cross examination without declaring a witness a hostile witness (per Shahabuddin Ahmed, J) :—As to material witnesses, such as Investigation Officer (who in this case made the GD Entry, then filed a *suo motu* FIR, investigated the case and submitted final report) and the Medical Officer (who allegedly held autopsy on the dead body) must be examined be the prosecution and in case the prosecution does not rely upon them on any points, the Public Prosecutor may cross-examine them with Court's permission under section 154 of the Evidence Act, even without declaring them hostile. Under no circumstances such official witnesses can be withheld by the prosecution. *Kashab Chandra Mistry and others vs State 5 BSCD 178.*

Sections 154 and 142—Court may in its discretion permit a party to put questions to its witness which are usually put in cross-ecamination by the adverse party. *Babul vs State 50 DLR 490.*

Sections 154 and 155—Evidence by eye-witness—Vital omission in FIR and statement to the Investigation Officer make their substantive evidence unreliable. *Babor Ali Molla & others vs State 44 DLR (AD) 10.*

Sections 154 and 155—The evidence of a witness is not to be rejected either in whole or in part simply because of being cross-examined by the party calling him, but the whole of the evidence as far as it affects both parties, favourable or unfavourable, must be taken into account and assessed like any other evidence. *Amir Hossain Dhali and others vs State 49 DLR 163.*

Sections 154 and 155—Since the prosecution has failed to show any hostile animus with the prosecution, mere declaration of some of the seizure list witnesses and first information report named witnesses hostile in no way cured the defect of the prosecution case and the prosecution has hopelessly failed to prove the recovery of the incriminating articles and hence the persistent evidence of the public witnesses regarding denial of their presence at the alleged recovery in no way can be cured by the official witnesses (police personnel) who are none but interested in this case and in the result the order of conviction and sentence is set aide. *Aslam Jahangir vs State 5 BLC 514.*

155. Impeaching credit of witness—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has [1][accepted] the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

1. Substituted by the Indian Evidence Act Amendment Act (XVIII of 1872), section 11 for 'had'.

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations

(a) A sues B for the price of goods sold and delivered to B. C says that A delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Case Law

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence. The evidence is admissible.

Previous statement is no evidence against a prisoner. *Suruj Mia 2 DLR 114.*

Section 155—Section 155 prescribes the mode of contradicting a previous verbal statement. *Altaf Molla vs Crown 6 DLR 420.*

Section 155—In respect of FIR the prosecutor has also the right of contradicting the maker thereof. Such contradiction cannot be used as substantive evidence. *Adalat 8 DLR (FC) 69.*

Section 155—The credit of a witness may be impeached by proving his former statement. *Altaf Molla vs Crown 6 DLR 420.*

Section 155—The prosecution witnesses having not been declared hostile their evidence cannot be discarded only because they are favourable to the accused. *State vs MM Rafiqul Hyder 45 DLR (AD) 13.*

Section 155—Contradictory statement as to the presence of convict Captain Kismat Hashem at Road No. 32 in the house of Bangabandhu Sheikh Mujibur Rahman casts a great doubt. *State vs Lieutenant Colonel Syed Farook Rahman 53 DLR 287.*

Section 155—The PW 14 who is a rickshaw puller cannot be said to be a chance witness as he was waiting for passenger at the gate of Hotel Gulshan and therefore, his presence at the place of occurrence was not by chance, but due to his profession. *State vs AKM Gousuddin alias MP Gous & others 3 BLC 536.*

Section 155—Although there are some minor discrepancies in the evidence of PWs. and the PWs 1-4 are close relations of the victim as well as of the informant but mere relationship cannot be a ground to disbelieve or discard their evidences and cannot be treated as unworthy of credit. *State vs Ranjit Kumar Mallik 2 BLC 211.*

Section 155 —Deceased Haji Syed Ali was only attacked and assaulted by the accused persons while PWs 1 and 2 were accompanying him but they were spared and they received no injury whatsoever. The PWs 2 and 3 were neither chased or hurt by the accused nor they fled away in fear in spite of these witnesses and the accused persons belong to the same village and were known to one another. These two spot-witnesses not only had the opportunity to recognise all the accused persons during the occurrence by the focus of their torch lights but they were so unruffled and composed as to count each blow struck on the deceased by the accused persons. Such eye-witnesses in all probabilities could not have been spared by the accused persons to become witnesses to the occurrence against them. They most certainly would have been eliminated by the armed accused in a bid to wipe off any evidence, particularly when these two witnesses were unarmed and when they are inimical to one another. Such eye-witness account of the occurrence is not only improbable but also highly incredible and these two witnesses cannot therefore be believed as their evidence was but a package of lies. *State vs Samsuddin and Ali Akbar @ Md Ali Akbar 7 BLC 742.*

Section 155—The evidence of PWs were full of contradictions in material particulars and were not mere unsubstantial discrepancies. The first information report case of the prosecution was departed from and embellished during the course of trial which has always been looked with disfavour and considered as a serious infirmity in the prosecution case. *State vs Siraj Mondal @ Siraj 8 BLC 52.*

Section 155—Prosecution could not elicit anything from the mouth of PW 9 by cross-examination inspiring the High Court Division to treat him by any

consideration to be a hostile witness. There is no apparent reason why this witness who accompanied the deceased as one of his trusted companions to Ishalmari should depose a falsehood to set the prosecution case at naught. *State vs Siraj Mondal @ Siraj 8 BLC 52.*

Sections 155 and 154—Since the prosecution has failed to show any hostile animus with the prosecution, mere declaration of some of the seizure list witnesses and first information report named witnesses hostile in no way cured the defect of the prosecution case and the prosecution has hopelessly failed to prove the recovery of the incriminating articles and hence the persistent evidence of the public witnesses regarding denial of their presence at the alleged recovery in no way can be cured by the official witnesses (police personnel) who are none but interested in this case and in the result the order of conviction and sentence is set aide. *Aslam Jahangir vs State 5 BLC 514.*

Sections 155 and 101—In view of the plaintiff's own case on which he must succeed or fall and further in view of the findings made by the High Court Division that the deceased plaintiff came before the Court with a false case and the substituted plaintiffs came before the Court with false oral evidence contrary to the documentary evidence, the point that by reason of failure of the defendant to pay the second instalment of the decretal dues within time the plaintiff was relieved of the burden under the contract for sale as has been raised by the learned Advocate for the petitioners is not only a bit loud but also rather late to deserve any consideration. *Shahida Khatun & others vs Progati Industries Ltd and another 3 BLC (AD) 73.*

Section 155(2)—Contradiction cannot be used as substantive evidence. *Adalat vs Crown 8 DLR (FC) 69 (76 rt. h col. 77).*

Section 155, Clause (3)—The statement recorded under section 164, Criminal Procedure Code can be used by the prosecution to impeach the credit of their own witness, if a contradicttory statement is subsequently given. *Abdul Ghani vs State, PLD 1963 Lah 445.*

Section 155, Clause (4)—General immoral character of the prosecutrix in rape cases.—Corroboration of statement of prosecutrix by independent evidence is always necessary. *Mumtaz Ahmed Khan vs State, PLD 1967 SC 326; Allah Bux vs State, PLD 1963 Kar 684.*

Sections 155 & 145—The Trial Court illegally referred to and considered the statements of witnesses recorded under section 161, Criminal Procedure Code, which could only be used to contradict or corroborate the witness. *Abu Bakker and others vs State 49 DLR 480.*

Sections 155 and 145—Statement of a person recorded under section 164 CrPC is not a substantive piece of evidence of the fact stated therein. Such statements recorded by a Magistrate under section 164 CrPC can only be used for contradicting the maker of it under sections 145 and 155 of the Evidence Act or for the purpose of corroborating him under section 157 of the Act. *Seraj Miah vs State 49 DLR 192.*

Sections 155, 145— Difference between sections.

Section 145 lays down the procedure by which a witness may in cross-examination be contracted by his previous statement in writing or reduced into writing while section 155(3) of the Act prescribes the mode of contradicting previous verbal statement. *Altaf Molla 6 DLR 420.*

Sections 155, 148, 149—Medical witness—Prosecution cross-examining the witness—Procedure disapproved. *Dana PLD 1957 (WP) Lahore 137; PLD 1957 (L) WP Lahore 566 (DB)*

Sections 155, 145—Mode of contradicting previous statement —Difference between sections explained. *Altaf Molla. 6 DLR 420.*

Sections 155 and 154—Evidence by eye-witness—Vital omission in FIR and statement to the Investigation Officer make their substantive evidence unreliable. *Babor Ali Molla & others vs State 44 DLR (AD) 10.*

Sections 155 and 154—The evidence of a witness is not to be rejected either in whole or in part simply because of being cross-examined by the party calling him, but the whole of the evidence as far as it affects both parties, favourable or unfavourable must be taken into account and assessed like any other evidence. *Amir Hossain Dhali and others vs State 49 DLR 163.*

Sections 155 and 157—Statements recorded under section 164 CrPC cannot be treated as substantive evidence of the facts stated therein. Such statements recorded by a competent Magistrate under section 164 CrPC can only be used for contradicting the maker of it under sections 145 and 155 of the Evidence Act or for the purpose of corroborating him under section 157 of the Evidence Act. *Khashru alias Khorshed vs State 35 DLR 119.*

Sections 155 and 157—There is no mention of the use of any 'lathi' by some of the accused in the FIR and also in the alleged dying declaration. Similarly, there is also no mention in the first information report or in the alleged dying declaration that convict appellant Akhtar Ali struck any dao blow on the left arm of the deceased. But this has nonetheless been deposed to and stated by the PWs 1, 2, and 3. This is not only an embellishment of the prosecution case but it also

demonstrates that they are not truthful witnesses. Accordingly, it is useless to have them corroborated by any other evidence. The evidence of PWs 1, 4 and 5 being tainted as highly interested cannot be used as corroborative evidence. Because one tainted evidence cannot corroborate another tainted evidence. *State vs Samsuddin and Ali Akbar @ Md Ali Akbar 7 BLC 742.*

Sections 155, 157, 145—Judicial statement of a witness may be used for contradiction and corroboration. *Khasru vs State; 1983 BLD 318 (a).*

When the witness contradicts only a part of his evidence the other part of his evidence should not be rejected and can be relied on if corroborated by other evidence and attending facts. *Nurul Islam vs State; 1987 BLD 193 (b).*

156. Question tending to corroborate evidence of relevant fact admissible—When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustrations

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Case Law

Section 156—Admissibility of First Information Report.—It becomes admissible, if the maker of the first information report comes in the witness-box and narrates the events of which he has personal knowledge and then further states that he had made the same narration earlier at the police station which was recorded by way of first information report. The last portion of the statement of the witness is admissible under this section as corroborating the testimony. *State of Rajasthan vs Shiv Singh, ILR 1961 Raj. 299; AIR 1962 Raj. 3.*

Section 156—The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the court should find no difficulty in acting on the testimony of a victim of sex crime alone to convict an accused where her testimony inspires confidence and is found to be reliable. *Al-Amin and 5 others vs State 51 DLR 154.*

157. Former statement of witness may be proved to corroborate later testimony as to same fact—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Case Law

Section 157—Statement made very soon after the occurrence—Circumstances which negative the assumption of a statement as being true. *Niaz vs State 12 DLR (SC) 89: 1960 PLD (SC) 387; Rafiq Ahmed vs State 11 DLR (SC) 91; Anis Mondal vs State 10 DLR 459.*

Section 157—Statement should be in relation to a fact fresh in the mind. *Md Sarfaraj Khan 5 DLR (FC) 280.*

Section 157—Evidence of TI Parade—Admissible under the section—Such evidence is only of corroborative value. *Md Bashir Alam 10 DLR (SC) 21*

Section 157—Statement of a ravished woman—Not substantive evidence. *1950 PLD (Lah.) 189.*

Section 157—Besides co-accused's confession reliance has been placed for corroboration on the evidence of a witness that the deceased was taken away by the accused and thereafter he was not seen alive. This statement cannot be relied on. *Khoka alias Jasimuddin 25 DLR 181.*

Section 157—Statement of a witness made shortly after the event—May be proved if made at or about the time—Belated statement unworthy of credit. *Habibullah vs State 21 DLR (SC) 88.*

Section 157—Victim stated to the witness (further) about the occurrence immediately after the occurrence—Admissible. *Ali Mohammad vs State 22 DLR (WP) 155.*

Section 157—Statement made at or about the time when the occurrence took place may be proved. *State vs Mokshed Ali Khan 20 DLR 714.*

Section 157—Mutation proceedings—Statements made before revenue authorities—Not evidence in Civil Court unless put to the witnesses. *Amin Muhammad PLD 1961 (WP) Karachi 173 (DB).*

Section 157—Previous similar statement made to another person—Not to be used to corroborate statement in issue. *Lim Siew Neo PLD 1958 Privy Council 96.*

Section 157—Statement made in previous suit—May be used to corroborate statement in subsequent suit. *Pandappa AIR 1946 Bombay 193.*

Section 157—Statement made at identification parade—May be used to corroborate statement is Court. *Emperor, AIR 1958 Bombay 189.*

Section 157—Statement made very soon after the occurrence-Circumstances which negative the assumption of a statement as being true. A statement made very soon after the occurrence excludes a hypothesis of implication of innocent persons and may, therefore, be used as corroboration. *Niaz 12 DLR (SC) 289; (1960) PLD (SC) 387.*

Section 157—Corroborative evidence may in point of time relate to periods before as well as after the crime. *Rafiq Ahmed 11 DLR (SC) 91.*

Section 157—In some exceptional cases even in the face of denial of the witness who is said to have made a statement, the previous statement may be used as corroboration. *Rafiq Ahmed 11 DLR (SC) 91.*

Section 157—"Relating to the same fact at or about the time when the fact took place" explained.—Trial Judge is the sole judge to decide the question: Evidence discloses that the plaintiff (i.e. the wife) after coming to her brother's house showed injuries as being inflicted by the defendant (the husband). There is nothing on record to show that there was time for concoction on the part of the plaintiff. It was argued on behalf of the husband that she did not make any complaint about this assault immediately thereafter as required by section 157 of the Evidence Act. The evidence does not show that there was any delay in her reporting the assault to the witnesses after reaching the house of her brother.

On a question whether there was any delay or not within the meaning of section 157 of the Evidence Act it is for the Judge who tried the case to decide whether the complaint was made as speedily as could reasonably be expected, and the Court of appeal would not interfere with the exercise of his discretion

when it was duly exercised as to the admissibility of the evidence. *Md Ebrahim Hossain Sarker vs Solemanessa. 19 DLR 751.*

Section 157—Mutation entries in revenue record—Carry rebuttable presumption of truth which continues to operate till dislodged by more convincing evidence—Statements to Revenue Authorities, allegedly made in mutation proceeding, neither placed before Civil Court nor admitted by party—Revenue Officer when examined in Civil Court failing to substantiate such statement—Inference of doubt as to genuineness of statement and authenticity of such entry drawn by Court. *Ali Bahadur Khan vs Muhammad Yusuf Khan, (1969) 21 PLR (Peshawar) 85.*

Section 157—Absence of corroborative evidence does not necessarily mean lack of legal evidence. *Ayub Ali (Md) vs Abdul Khaleque 56 DLR 489.*

Section 157—A former statement of a witness corroborating the same fact or when made about the time when the fact took place (or when made before any authority legally competent to investigate) may be proved in evidence. *Tota vs State 37 DLR 74.*

Section 157—Previous statement, use of—The statement of a witness made under section 164 CrPC is meant for binding him down to the statement made during investigation. The defence may use it to contradict the witness, whereas the prosecution may use it to corroborate him when he gives evidence in court (per Shahabuddin Ahmed CJ concurred by HM Rahman & ATM Afzal JJ. *Abu Taher Chowdhury vs State 42 DLR (AD) 253.*

Section 157—Upon a scrutiny it appears that the evidence of PWs are full of contradictions, inconsistencies and omissions and that there is a departure from the fact as stated in the written ejahar, for which it is difficult to believe such inconsistent evidence of PWs who are related to one another. *Pear Ali Khan alias Pear Ali vs State, represented by the Deputy Commissioner 3 BLC 555.*

Section 157—The discrepancies of trivial nature are not fatal but the discrepancies of vital nature striking truthfulness of prosecution case is very much vital and makes prosecution case out of Court. On a careful examination and scrutiny of testimonies of PWs 2 and 3 it is manifested that evidence of PW 2 ascribing parts to appellants Naimul, Hanif and Anarul in holding leg, waist and hand of deceased Md Rabiul stood destroyed by the testimony of PW 3 when he stated that deceased Md Rabiul Alam did not state which position of his body was caught hold by Naimul, Anarul and Hanif but on scrutiny and careful examination of the testimonies of PWs 2 and 3 it reveals that evidence of PWs 2 and 3 in striking dagger blow on the belly of deceased by condemned prisoner Md Saidul Huq is consistent and free from any sort of discrepancies. But the discrepancies occurred in testimonies of PWs 2 and 3 in involvement of

appellants for commission of crime are of vital nature rendering prosecution case very doubtful so far the appellants are concerned. Recognition of appellants by PW 3 did not appear to have been corroborated by any other prosecution witnesses and even PW 2 did not state in his evidence that he could identify the appellants, who are found not guilty of charges levelled against them and they are entitled to be acquitted *State vs Md Saidul Huq 8 BLC 132.*

Sections 157 and 3—Circumstantial Evidence—There are as many as seven circumstantial evidence which do not connect anybody with murder of the victim Salma. The oral evidence as adduced by the PWs contradicted one another in material particular. *State vs Monu Meah and others 6 BLC 402.*

Sections 157 and 9—All the TI parades were held after about one year from the date of occurrence and there was a chance for PW 1 to see the accused persons in court lockup before the identification in the TI parade for which no reliance can be placed on such TI parade and hence the conviction and sentence under section 395 of the Penal Code is not sustainable. *Mirza Abdul Hakim and others vs State 5 BLC (AD) 21.*

Sections 157 and 103—If the prosecution case is considered in juxta-position with the defence case, it appears that the prosecution has failed to discharge the onus of proving their case beyond any reasonable doubt and a genuine doubt is created in the mind as to the manner of occurrence. *State vs Azharul Islam 3 BLC 382.*

Sections 157 and 105—As the recovery of the bayonet and its place and manner of recovery suffer from glaring contradictions making it difficult to believe such recovery from the possession or control of the appellant and the existence of *mens rea* of the appellant could not be also established, the prosecution has failed to bring home the charge against the appellant beyond all reasonable doubt. *Sukkur Ali Kha vs State 3 BLC 206.*

Sections 157 and 105—The evidences as to the order to kill victim Kastura Bibi by convicted Abdul Jabbar are inconsistent and also suffers from contradictions and the prosecution failed to prove the case beyond all reasonable doubt and as such the conviction and sentence passed upon him under sections 302/34 of the Penal Code cannot be sustained in law. *Abdul Jabbar and another vs State 3 BLC 231.*

Sections 157 and 105— As there are many contradictions and the Doctor who first examined the victim was not examined and that 2 hurricane lamps were not before the court and that no blood-stained article was seized from the place of occurrence leading to the conclusion, the prosecution has failed to prove the case beyond reasonable doubt. *Kamrul Islam Sheikh vs State 3 BLC 187.*

Sections 157 and 106—No reliance can be placed on the evidence of PWs 3 and 4 for holding that the witness saw the condemned prisoner and his wife in the night of 16-5-95 going inside the hut and that they slept inside the hut in the night following the morning of which condemned prisoner's wife was found dead and hence it cannot be said that it was the condemned prisoner who caused death of his wife. Since the prosecution has not been able to establish the case by reliable witness the condemned prisoner is entitled to be acquitted. *State vs Azizur Rahman alias Habib 5 BLC 405.*

Sections 157 and 114(g)—There is material contradiction as to recognition of accused persons and that the IO has failed to mention the place of occurrence in the sketch map and he did not seize any blood stained earth and withholding of the identifying constables of the dead body, torch light and the GD Entry made it a case of no evidence and the appellants are entitled to be acquitted. *Sanu Mia and ors vs State 3 BLC 441.*

Sections 157 and 145—Statement recorded behind the back of the accused the same cannot be treated as substantive evidence against him. Such statement can be used to corroborate or to contradict a statement made in the court in the manner provided in sections 145 and 157 of the Evidence Act. *Hobi Sheikh and another vs State 56 DLR 383.*

Sections 157 and 145—When the FIR says that accused Ramzan Nessa brought a dao from the dwelling hut and gave it to the condemned prisoner but the informant as PW 1 says in Court that the dao was brought by the condemned prisoner Firoj himself and the PWs 3, 7 and 9 although deposed in Court that Ramzan Nessa supplied the dao to Firoj but they did not state the same to Investigating Officer while they were examined under section 161, CrPC and in such circumstances their evidence on this point was discarded. *State vs Firoj Miah and another 5 BLC 1.*

Sections 157 and 145—There is no contradiction or discrepancies in the statements of the eye-witnesses namely, PWs 1 to 3, regarding taking away the victim from his house and of Jahangir's giving blow and Habib Mallik's giving chora blow in his chest and the victim lying dead on the C & B road have been made in the FIR and there is no omission of these vital facts in the FIR. *Jahangir Howlader and another vs State 3 BLC 164.*

Sections 157 and 145—There are many contradictions in the evidence of the PWs and that absence of sign of rape in the medical report and non-examination of the wearing clothes made the whole case most doubtful one for which the appellant is not found guilty of the charge brought against him under

section 6(1) of the Nari-o-Shishu Nirjatan (Bishes Bidhan) Ain, 1995. *Seraj Talukder vs State 3 BLC 182.*

Sections 157 and 155—There is no mention of the use of any 'lathi' by some of the accused in the FIR and also in the alleged dying declaration. Similarly, there is also no mention in the first information report or in the alleged dying declaration that convict appellant Akhtar Ali struck any dao blow on the left arm of the deceased. But this has nonetheless been deposed to and stated by the PWs 1, 2, and 3. This is not only an embellishment of the prosecution case but it also demonstrates that they are not truthful witnesses. Accordingly, it is useless to have them corroborated by any other evidence. The evidence of PWs 1, 4 and 5 being tainted as highly interested cannot be used as corroborative evidence. Because one tainted evidence cannot corroborate another tainted evidence. *State vs Samsuddin and Ali Akbar @ Md Ali Akbar 7 BLC 742.*

Sections 157, 145, 32(I)—When the victim survived his injuries, the statement made to the Magistrate could never be a dying declaration and was not admissible under section 32 nor it is substantive evidence. It could be used to corroborate or to contradict the maker thereof. *Zainul Abedin vs State; 1983 BLD 108 (a)*

Statement of a victim girl after commission of the offence is legally admissible as corroboration. Its value and weight, however, is a different matter. *AIR 1952 SC 54: Abdul Quddus vs State; 1983 BLD 18 (C): It is not substantive evidence. 1950 PLD Lah. 189.*

Judicial statement of a witness may be used for corroboration or contradiction. *Khasru vs State; 1983 BLD 318(a).*

Sections 157 and 154—Evidentiary value—How may be used. A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under section 157, or to contradict it under section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. *Nisar Ali PLD 1957 (SC) (Ind) 297.*

Section 157 read with section 8, illustration

(J) Earlier statement of victim girl used to corroborate her subsequent statement relevant. *Abdul Quddus vs State 35 DLR 373.*

Sections 157 and 155—Statements recorded under section 164 CrPC cannot be treated as substantive evidence of the facts stated therein. Such statements recorded by a competent Magistrate under section 164 CrPC can only

be used for contradicting the maker of it under sections 145 and 155 of the Evidence Act or for the purpose of corroborating him under section 157 of the Evidence Act. *Khashru alias Khorshed vs State 35 DLR 119.*

158. What matters may be proved in connection with proved statement relevant under section 32 or 33—Whenever any statement, relevant under section 32 or 33, is proved all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved, if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

159. Refreshing memory—A witness may, while under examination, refresh 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 the time fresh in his memory.

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 it he knew it to be correct.

When witness may use copy of document to refresh memory—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.

An expert may refresh his memory by reference to professional treatises.

Case Law

Inadmissible document—May be used to refresh memory. Section 159 does not require that the writing or document used for refreshing memory should itself be admissible in evidence. *Emperor AIR (33) 1946 Bombay 189.*

Section 159—Before a witness is allowed to refresh his memory from any writing made by him it must be shown that the writing was made by the deponent at the time of the occurrence or so soon after, that the Court considers it likely that the transaction was at that time fresh in his memory. *Pannalal Shaw vs Nanigopal Biswas, 1949 AIR (Cal) 103.*

160. Testimony to facts stated in document mentioned in section 159—A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustrations

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept. although he has forgotten the particular transactions entered.

[1]**161. Right of adverse party as to writing used to refresh memory**—Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Case Law

Section 161—A statement made to the police by a prosecution witness cannot be used to contradict him if he is declared hostile—Effect of bringing such evidence on record. It appears that after PW 6 was declared hostile the

1. As to the application of section 161 to police diaries, see the Code of Criminal Procedure, 1898 (Act V of 1898), section 172.

public prosecutor cross-examined him with reference to his statement under section 161 CrPC in order to contradict him. A statement to the police cannot be used to contradict a prosecution witness if he is declared hostile.

The learned Magistrate of course did not specifically refer to this statement of PW 6 in his judgment, but when it was illegally brought on the record it might have influenced his mind to the prejudice of the accused. *SM Farooque vs State 28 DLR 192.*

162. Production of documents—A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents—If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence : and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the [1][Penal Code].

Case Law

Section 162—Court's abundant power to inspect the document in order to determine the validity of the claim of privilege. *Govt. of West Pakistan vs Begum Agha, A Karim 21 DLR (SC) 3.*

Section 162—A person summoned to produce a document must, if the document is in his possession or power, bring it to Court. If he has any objection to the production or admissibility of the document, it is for the Court to decide whether the objection is well founded or not. *Mohammad Hayat Khan vs Govt.*

1. The words "Penal Code" was substituted for the words "Pakistan Penal Code" by the Bangladesh Laws (Revision and Declaration Act, 1973 (Act VIII of 1973), Second Schedule.

of West Pakistan, PLD 1969 Lah 985: Govt. of West Pakistan vs Begum Agha Abdul Karim Shorish Kashmiri, PLD 1969 SC 14.

Section 162—The question whether disclosure of the contents of a public document would be against public interest and if privilege should be claimed in that regard is to be decided by the head of Department concerned. *Begum Sardar Mohammad Hayat Khan vs Government of West Pakistan, PLD 1969 Lah. 985.*

Section 162—An officer's refusal to produce a document on grounds of public policy is final, and the Court is not competent to call for and examine the secret archives of the State in order to satisfy itself of their confidential nature. *47 IC 225.*

163. Giving, as evidence, of document called for and produced on notice—When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

164. Using, as evidence, of document production of which was refused on notice—When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration

A sues B on an agreement and gives B notice to produce it. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

Case Law

In order to attract the application of the provisions of this section the original document must be proved to have been called for and not produced after notice to produce it is given. *Kashibai Martand vs Vinayak Ganesh, 1956 AIR (Bom) 65.*

165. Judge's power to put questions or order production— The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing : and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question :

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved :

Provided also that this section shall not authorise any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Case Law

Section 165—Answer of witnesses conveying contents of statement to police—Not admissible. *Muhammad PLD 1953 Federal Court 317.*

Section 165—Judge's power to put questions to the witnesses when should be exercised. It is true that section 165 of the Evidence Act gives very wide power to the judge to put any question he pleases to any witness in order to discover or obtain proof of relevant facts. This power, however, should be used with great circumspection. *Balashri Das Sutradhar 13 DLR 289; (1962) PLD (Dac.) 467.*

Section 165—When the defence fails the Judge can himself put question under section 165 to bring out the discrepancy. *State vs. Abdul Aziz 23 DLR 91.*

Section 165—Duty of Court—Courts should try to clear away the doubts created by different pieces of evidence. *Hakim Khan PLD 1958 (WP) Peshawar 33.*

Section 165—Meaningless question—Judge cannot force a witness to answer. *Bashir Ahmed PLD 1957 (WP) Lahore 841.*

Section 165—Existence of a material thing is provided by oral evidence—This is not enough—Court may direct production of that thing in Court under section 165.

Section 165 of the Evidence Act is intended to arm the Court with the necessary power for the purpose of getting at the truth. The Court in order to discover or to obtain proof of relevant facts may order the production of the thing. Finding of the Court in respect of a material thing which is the subject matter of the case may be defective, if the relevant fact is proved merely on oral evidence without the production in Court of the incriminating article.

In this case even the Custom Inspector did not state as to whether the seized cloths were of Indian origin. On consideration of the materials on record we find there is substance in the grievance that in the absence of the seized articles before the Court the trial is defective and this has seriously prejudiced the appellant. *Phani Bhusan Halder vs State 27 DLR 254.*

Section 165—This section gives "unlimited" powers to Court to examine or re-call witnesses in order to arrive at the truth. The Courts are not to sit as "unconcerned statues". *Ali Newaz Gardezi vs Lt Col Muhammad Yusuf Khan, PLD 1962 Lah. 558.*

Section 165—The Court should normally refrain from putting itself in the position of prosecutor or defence counsel. *Kanchan Ali vs Shah Jahan, PLD 1962 Dhaka 192.*

Section 165—It is the duty of the Judge to put questions to clear doubts arising out of the statements of witness. *Hakim Khan vs State, PLD 1958 Pesh. 33.*

Section 165—But the witness is not bound to answer Court questions which are meaningless. *Bashir Ahmed vs State, PLD 1957 Lah, 841.*

Section 165—Considering the statement made under section 164, CrPC by Anjali Rani and on a close scrutiny and analysis of the evidence and the materials on record it transpires that the prosecution signally failed to bring home the charge against the respondents of kidnapping or abducting the victim girl. *Haren Halder vs Md Akkas Ali & ors 3 BLC 455.*

166. Power of jury or assessors to put questions—In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Case Law

Section 166—The Court must not take sides and must not question the witness in the spirit of beating him down or encouraging him to give an answer. *Sunil Chandra Roy vs State 1954 AIR (Cal) 305.*

Chapter XI

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

167. No new trial for improper admission or rejection of evidence—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Case Law

Applicability—Section 167, applies to all judicial proceedings in or before any Court, including jury trials. *Abdul Rahim AIR 1946 Privy Council 82.*

Section 167—After rejection to improper evidence when the Appellate Court will interfere with the lower Court's decision. Under section 167 it is necessary to show that the rejection of evidence was likely to affect the decision of the case. If the Appellate Court is satisfied that even if the evidence had been admitted it ought not to have varied the decision, the rejection cannot be made a ground for interfering with the decision. *Makhan Khan 1 PCR 116. Azaharuddin vs Crown 2 DLR 380.*

Section 167—Where inadmissible evidence has been admitted at a trial by jury, the High Court may, after excluding such evidence, maintain the conviction, provided the admissible evidence remaining is, in the opinion of the court, sufficient clearly to establish the guilt of the accused. *Azaharuddin 2 DLR 380; Abdul Rahim, AIR 1946 PC 92.*

Section 167—Confession by accused in original trial—Not admissible against co-accused in later trial. *Syam Osta PLD 1956 Dhaka 147; 6 DLR 32; PLR 1953 Dhaka 770 (DB).*

Section 167—Inadmissible evidence admitted—No ground for retrial—Case should be decided by keeping out of consideration inadmissible evidence—Duty of appellate Court. *Shahidullah Khan 12 DLR 537; PLD 1961 Dhaka 1.*

Section 167—Scope and application—Petitioner No. 9 and the predecessor of petitioners 1-8 instituted a suit for declaration of their title in respect of 4 annas share in the suits and with a prayer for joint possession with their co-sharers. The trial Court dismissed the suit on holding that the plaintiff's had no title to the land. On appeal, the 1st appellate Court set aside the trial Court's judgment and decree and allowed the prayer of the plaintiffs. The 2nd Appeal of the High Court by the defendants was allowed and the judgment and decree of the 1st appellate Court was set aside on holding that the 1st appellate Court did not consider the material evidence which were mainly documentary and which was considered by the trial Court and such non-consideration prejudiced the defense case, On this view, the High Court remanded the case to the 1st appellate Court for disposal after considering the material evidence. At special leave stage, on the contention that in view of section 167 of the Evidence Act, the High Court ought to have disposed of the appeal finally instead of remanding the case to the 1st appellate Court.

Held—Section 167 of the Evidence Act has no application to a case where it is found that non consideration of some material evidence in reversing the judgment of the trial Court which was partly based on such evidence has vitiated the judgment of reversal. *Swaraswati Dasi and others vs Satis Chandra Kirtanya and others 1 BSCD 183.*

Section 167—This section provides that improper admission or rejection of evidence shall not be ground by itself for reversal of a decision, if there is other independent evidence to support such decision. *Mozammel Hoque vs Badsha Meah 4 BSCD 109.*

The Schedule—Enactments Repealed.] Rep. by the Repealing Act, 1938 (I of 1938), section 2 and Schedule.

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The

Law of Evidence Amendment Act, 1956[1]

[27th December, 1956]

An Act to supplement the Law of Evidence.

Whereas doubts exist as to the admissibility of the certified copies of the copies of common records;

And whereas it is necessary to remove such doubts;

It is hereby enacted as follows :—

1. Short title, extent and commencement—(1) This Act may be called the Law of Evidence Amendment Act, 1956.

(2) It extents to the whole of [Bangladesh][2].

(3) It shall be deemed to have come into force on the 15th day of August, 1947.

Copies of common records to be public documents—(4) Notwithstanding anything contained in the Evidence Act, 1872, copies of common records of the divided districts of Bengal and Assam in the custody of a public officer, the originals whereof are either in West Bengal or Assam, shall be deemed to be public document within the meaning of clause (1) of section 74 of the Evidence Act, 1872 and other provisions of the said Act shall apply accordingly.

Explanation—'Common records' mean and include documents of public nature in the custody of a public officer immediately before the 15th day of August, 1947, relating to a district or part of a district, which has fallen partly in [the then East Pakistan (now Bangladesh)][3] an partly in India as a result of the award of the Boundary Commission appointed under section 3 of the Indian Independence Act, 1947.

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1. For Statement of Objects and Reasons, see the Dacca Gazette, Extraordinary, dated the 20th December, 1955, Pt. IVA, P. 2068; for proceedings in the Assembly, see the proceedings of the meetings of the Provincial Assembly of East Pakistan held on 29th November and 2nd October, 1956.

The Act was extended to the Chittagong Hill-Tracts, vide Notification No. 2921-J., dated the 25th July, 1957, published in the Dacca Gazette, dated the 8th August, 1957, Pt I,p. 596.

2. The word "Bangladesh" was substituted for the word "East Pakistan" by the Bangladesh Laws (Revision and Declaration) (2nd Amendment) Act, 2000 (Act XL of 2000), 2nd Schedule.

3. The word "the then East Pakistan (now Bangladesh)" was substituted for the word "Pakistan" by the Bangladesh Laws (Revision and Declaration) (2nd Amendment) Act, 2000 (Act XL of 2000), 2nd Schedule.

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Evidence Act

[I of 1872]

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—The end—