CHAPTER–XXI

SECTION 251 TO 259 OMITTED

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CHAPTER–XXII

OF SUMMARY TRIALS

260. Power to try Summarily.–(1) Notwithstanding anything contained in this Code.–

(a) the Metropolitan Magistrate or the District Magistrate,

(b) any Magistrate of the first class specially empowered in this behalf by the Government, and

(c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the Government,

shall try in a summary way all or any of the following offences :–

(a) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

(b) offence relating to weights and measures under sections 264, 265 and 266 of the Penal Code :

(c) hurt, under section 323 of the same Code;

(d) theft, under section 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed ten thousand taka;

(e) dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed ten thousand taka;

(f) receiving or retaining stolen property under section 411 of the same Code, where the value of such property does not exceed ten thousand taka;

(g) assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed ten thousand taka;

(h) mischief, under sections 426 and 427 of the same Code:

(i) criminal trespass, under section 447, and house trespass, under section 448, and offences under sections 451, 453, 454, 456 and 457 of the same Code ;

(j) insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506, and offences under sections 509 and 510 of the same Code;

(jj) offences of bribery and personation at an election under section 171E and 171F of the same Code ;

(k) abetment of any of the feregoing offences;

(l) an attempt to commit any of the foregoing offences, when such attempt is an offence;

(m) offences under section 20 of the Cattle Trespass Act, 1871;

Provided that no case in which a Magistrate exercises the special powers conferred by section 33A shall be tried in a summary way.

(2) Omitted.

Scope and application—The object of this Chapter is to shorten the record and the work of the court but it is not intended to deprive the accused person of any of the rights given by law. The proceedings are to be conducted with the same case as in regular trials or perhaps with more care so that the accused may not entertain any apprehension of failure of justice on account of the procedure. The responsibility in the case of summary trial is very great. The court will take care that the procedure is not made more summary than is laid down. Summary trials are improper in serious cases (33 Cr. LJ 210). Sub-section (2) of section 260 has been omitted by Ordinance No. XXIV of 1982 dated 21.8.82

and thereby the provision of converting summary trial into a regular trial has been abolished. The trial is to be simplified and shortend by dispensing with the recording of evidence and judgment in an elaborate manner and by not allowing unnecessary abjournment. A Magistrate can not split up an offence into its component parts for the purpose of giving himself summary jurisdiction. Time limit for trial as contemplated under section 339C will not apply.

28 DLR 13—Sumuj Ali Vs. The State—Substance of accusation not read to him nor he was examined under section 342 Cr. P. C. These are mandatory provisions even in summary trial and non-observance of which vitiates the trial.

Appeal—Appeal lies under section 408 Cr. P. C. It should be read with sections 414 and 415 Cr. P. C.

8 PLD 13—Magistrate's power to try summarily offences under section 403 P. C—Value of misappropriated property above the limit prescribed under section—Summary trial held, illegal.

261. Power to invest Bench of Magistrates invested with less power.—The Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences:—

(a) offences against the Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 and 504;

(b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month with or without fine.

(c) abetment of any of the foregoing offences;

(d) an attempt to commit any of the foregoing offences, when such attempt is an offence.

Appeal—Appeal lies in all cases on conviction by Magistrate of second and third class to District Magistrate, under section 407 Cr. P. C.

262. Procedure for summary trials.—(1) In trials under this Chapter, the procedure prescribed in Chapter XX shall be followed except as hereinafter mentioned.

(2) **Limit of imprisonment.** No sentence of imprisonment for a term exceeding two years shall be passed in the case of any conviction under this Chapter.

Scope and application—In summary trial. Chapter XX of Cr.P.C shall be followed in respect of all offences triable summarily. There is nothing in the Chapter limiting the amount of fine that may be imposed in a summary trial. Limit of imprisonment in this section applies only to offences enumerated in section 260. The scanty procedure laid down in this Chapter should be strictly followed A breach of the provision of section 262 (1) is not merely an irregularity but an illegality (AIR 1945 All 98).

263. Record in cases where there is no appeal.—In cases where no appeal lies, the Magistrate or. Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the Government may direct the following particulars :—

(a) the serial number;

(b) the date of the commission of the offence;

(c) the date of the report or complaint;

(d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused;

(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d) clause (e) clause (f) or clause (g) of sub-section (1) of section 260 the value of the property in respect of which the offence has been committed.

(g) the plea of the accused an his examination (if any);

(h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor;

(i) the sentence or other final order; and

(j) the date on which the proceedings terminated.

Scope and application—In every case the form prescribed in this section with the particulars written constitute the record. The record should be written and signed by the Magistrate himself. Although the object of a summary procedure is to shorten the course of trial, it is nevertheless incumbent on the Magistrate to put on record sufficient evidence to justify his order (10 CWN 79). The record should show clearly the precise nature of the offence, and should be complete in all particulars. There should be some examination of accused as laid down in section 342 Cr. P. C.

31 DLR 323—Mantu Mia Vs. Mobarakullah—Offence under section 323 Penal Code tried summarily under MLR 27 of 1976 following the procedure as provided in section 263 Cr. P. C is not bad in law.

14 DLR 595—Muslim Mandal Vs. The State—Section 264 and 265 when read with sections 262 and 263 make it clear that in no summary trial whether it be appealable or non-appealable, need formal charge in writing be framed. Section 264 (2) specially when read with opening words of section 265, makes it clear that the judgment and judgment alone, embodying as it does, the substance of the evidence and the particulars mentioned in section 263 is the self-contained record of the case (Ref : PLD 1956 Sind 9, 8 DLR 230).

7 DLR 274—Abdul Hanif Vs. The Crown—Though section 263 dispenses with the framing of a formal charge in a summary trial, the record prepared thereunder must specify not only the offence complained of but also the date of the commission of such offence. The specification of the offence in the record should be sufficiently full and clear to give the accused sufficient notice of what he is charged with and what he has to meet. An omission in this respect occasions a failure of justice (Ref : 4 DLR 364).

Revision—Revision lies to the Sessions Judge under section 435 and 439A Cr. P. C if the particulars required are not recorded in strict letter, the conviction will be set aside (41 Cr. LJ 283, AIR 1956 All 399). Omission to record the plea of the accused will vitiate the conviction (29 Cr. LJ 265).

264. Record in appealable cases.—(1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

(2) such judgment and memorandum of the substance of the evidence as required by section 355 shall be the only record in cases coming within this section.

Scope and application—The expression 'substance of the evidence' implies a judicious selection of the part of the evidence which is really material. It is not sufficient to state that the witnesses to the prosecution support the statement of the complainant or other prosecution witnesses. Failure to embody the substance of the evidence in the judgment vitiates the trial (24 Cr. LJ 484). While writing judgment under the section, the provisions of section 367 Cr. P. C are not to be complied with.

36 DLR 91 (SC)—Md. Matiur Rahman Vs. Asgar Ali—Section 264 is only attracted when an appeal lies and the obligation is that the learned Magistrate' before passing any sentence record a judgment in the case.' On a fair reading of section 263 and 264, only in a case of conviction need a brief statement of the reasons be given, where there is no conviction but an acquittal the section does not require that reason should be given. It is highly desirable that even in cases of acquittal in cases tried summarily a brief statement of the reasons for the finding is given though the language of the section does not require it. But to say that in the absence of such well-reasoned judgment the order of acquittal is bad does not appear to be the law, because the Legislature has not prescribed such minimum requirement as being canvassed.

27 DLR 155—Daud Ali Vs. The State—In respect of such cases in which provision for appeal has been provided, not merely the substance of evidence to be embodied in the judgment but substance of evidence should also be recorded to help the appellate court to dispose of the appeal.

265. Language of record and judgment.—(1) Records made under section 263 and judgments recorded under section 264 shall be written by the presiding officer, either in English of the language of the Court, or if the court to which such presiding officer is immediately subordinate so directs, in such officer's mother tongue.

(2) **Bench may be authorised to employ clerk.** The Government may authorise any Bench of Magistrate empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings.

(3) If no such authorisation be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record.

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment.

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CHAPTER—XXIII

OF TRIALS BEFORE COURTS OF SESSION

The committal proceedings have been abolished by the law Reforms Ordinance, 1978. According to the provisions of section 205C, the Magistrate shall send the case to the court of Session which is exclusively triable by the said court. According to the provisions of sections 265A to 265L a new procedure has been prescribed for trial of sessions cases by the Court of Session.

265A. Trial to be conducted by Public Prosecutor.—In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor.

Scope and application—The duty of the Public Prosecutor is to represent not the police but the State and this duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the court according to law and not according to the taste of anyone else. One expects a Public Prosecutor to be fair to an accused person not to press for conviction of a graver offence if he thinks a lesser has been committed. After the framing of charge, a complaint case becomes a State case and therefore it has to be conducted by the Public Prosecutor (1980 Pak. Cr. LJ 438). So long as the Public Prosecutor leads and guides the advocate for a private party, no objection can be entertained.

40 DLR 282 (AD)—Alauddin Molla Vs. The State—Two versions of the same occurrence—Simultaneous hearing and disposal of both the cases desirable. Purpose of holding a simultaneous trial is lost if there is a long gap between the trials. (Ref : 38 DLR 75 (AD)).

12 DLR 324—The Superintendent and Remembrance of Legal Affairs, Vs. Aminul Huq—Public Prosecutor includes Assistant Public Prosecutor and any other person who conducts a prosecution under the direction of Public Prosecutor.

1980 P.Cr.LJ 438—Md. Sharif Vs. Rahman Ali—Contention that every case after framing of charge becomes a State case and as such to be conducted by Public Prosecutor. Held, not correct. Word 'Prosecutor' consequently deemed to include both Public Prosecutor as well as counsel appointed or nominated by complainant for prosecuting case on his behalf.

16 BLD (AD) 88—Rahamatullah Vs. The State and another—It provides that a Public Prosecutor or an Assistant Public Prosecutor will conduct the prosecution of a case before a Court of Session. No police officer is thus competent to file any application directly before the Sessions Judge seeking permission for further investigation when the case is pending for trial before the Sessions Court. (Rahamatullh Vs. The State and another. Ref. 48 DLR 158.

265B. Opening case for Prosecution.—When the accused appears or is brought before the Court in pursuance of section 205C, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.

Scope and application—This section corresponds to old section 286 with some changes due to abolition of assessor and jury trial. It provides that at the first hearing the Public Prosecutor shall open the case by describing the charge and stating the evidence on which the prosecution relies to prove the charge. The prosecutor's duty is not to secure a conviction but simply to lay the facts of the case before the court. In a criminal trial it is of great importance for the accused to know as to what the exact prosecution case, is in opening the case the Prosecutor can only state all that is proposed or intended to prove so that the Judge may see if there is any discrepancy between the opening statement and the evidence adduced. Nothing should be said in the opening in anticipation of defence that may be set up. When the prosecution proposes to examine new witnesses at the opening the Public Prosecutor should always mention the address and names of the new witnesses and the purpose for which they are being called and the court should always insist on it (36 Cr. LJ 344). In a case where statements recorded under section 161 Cr. P C were not

supplied to the accused the court directed that the informant be recalled, if so desired by an accused so that the accused can confront him with statement in question.

41 DLR 11—State Vs. Badshah Molla—Mere absconding cannot always be a circumstance to lead to an inference of guilt of the accused. Abscondance was not with any guilty mind. Existence of enmity is not disputed. Accused has been falsely implicated in this case out of grudge and enmity.

38 DLR 240 (AD)—Mohitullah Pk. Vs. The State—An accused shall be tried in accordance with the procedure prevailing on the day when the trial commenced—If the procedure is changed by the time when the trial commences he cannot claim a vested right to be tried in accordance with the procedure prevailing before that. 'Now the Code of Criminal Procedure defined a 'trial' as meaning the proceeding taken in Court after a charge has been drawn up, and includes the punishment of the offender.' Both old and new chapters provide for 'trial before Courts of Sessions.' One thing becomes very clear that trial in a sessions case presupposes the appearance of the accused before the court for the purpose of hearing the accusation or the charge against him or them Pending trial.' Accused appeared and the case was taken up for hearing on 16.3.81. From this moment trial is said to be pending.

35 DLR 1—Fazlul Huq Haider Vs. The State—Accused was discharged by the Magistrate before Ordinance 41 of 1978 came into force on 1.6.79. Hence his case will be governed by the provisions of Cr. P. C according to section 6 of the General clauses Act. The Code of Criminal Procedure does not contemplate a sessions case be adjourned at all. Therefore both the prosecution and the defence must come fully ready for trial on the date fixed for examination of witnesses in a sessions case Courts concerned and the prosecution should treat a session trial very seriously since defence has to incur heavy expenditure and take pains. Often accused party totally ruined by the time, trial is over. Duty cast on the police to prosecute where reasonable evidence exists. Prosecution

witnesses when present on the date fixed for trial should without fail be examined since their coming involves heavy expenditure which defence can hardly afford. Sessions Judge has no power to issue process against an accused not sent by Magistrate.

24 BLD 182 (AD)—Securities & Exchange Commission Vs. Abu Tyeb & ors.—Sections 265B. 265C, 265D, 265E & 265F—Steps under sections 265B, 265C, 265D & 265E are to be taken in the same session. No question arises for fixing another date for taking steps under section 265C or of separate hearing under section 265C of the Code. But a separate session in the Courts proceeding starts from section 265F. The High Court was wrong to direct that after the opening of the case under section 265B another date should be fixed for taking step under section 265C.

36 Cr. LJ 344—Trial before the Sessions Court practically commences when the case is opened by the prosecutor.

265C. Discharge.—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Court considers that there is no sufficient grounds for proceeding against the accused, it shall discharge the accused and record the reasons for so doing.

Scope and application—This section is new. There is no scope for examination of any witness, but there is scope for both sides to argue their case in favour of framing charge or discharge. The Judge shall also record reasons of discharge. The Judge is not bound to pronounce a definite judgment on the question whether the accused is guilty or not. That function should be reserved for trial. The words sufficient grounds for proceedings' do not mean 'sufficient grounds for conviction'. Satisfactory evidence to go to trial must be regarded as sufficient ground for proceedings. The function of the Judge under this section is very limited. The function of the Judge is not to weigh the evidence and circumstances at this stage of the case for and against the purpose of finding out the guilt or otherwise of the accused.

56 DLR 213 (HC)– Abdur Rahman Kha Md Vs. State–The order of the Additional Sessions Judge discharging the accused is not based on correct appreciation of the facts disclosed in the FIR and charge-sheet, and therefore, it suffers from illegality.

45 DLR 386–A K M Mohinus Saleh Vs. State–If the trial Court fails to perform its duty in respect of framing of charge and the charge is framed on insufficient materials High Court Division can investigate whether the charge is groundless.

14 BLD 308–Khandakar Md. Moniruzzaman Vs. State–Under Section 265C Cr. P. C it is the duty of the Court of Sessions, upon consideration of the materials on record and after hearing the parties, to discharge those accused persons against whom it appears to the Court that there is no ground for proceeding so that frivolous cases and cases of no evidence do not occupy the time of the Court and innocent persons are subjected to the rigours and expenses of a full-scale trial.

38 DLR 4–Haji Azizur Rahman Vs. Syeedul Haque–The legislature has enacted section 265C Cr. P. C apparently to protect the accused from facing the agony of futile and useless trial when the statements of the complainant and his witnesses available on record (read with the statement of the accused, if any) do not make out any prima facie case against the accused. Just as the accused is to be presumed innocent till he is proved to be guilty, similarly the prosecution or the person wronged cannot be throttled by the court arbitrarily and capriciously and must be given due opportunity to prove his case against the alleged wrong doer, if on initial scrutiny is found that his allegation does disclose the commission of a criminal offence against an accused.

37 DLR 293–Md. Kalim Uddin Vs. Abu Bakar–The Sessions Judge must put on record reasons based on materials for discharge of an accused person, failing which the order of discharge liable to be set aside. After investigation and finding a prima facie case the police submitted a charge-sheet against 12 persons including 9 opposite parties. The Sessions Judge discharged 9 opposite parties without recording any

reasons thereof and framed charge against the remaining 3 accused. The commitment proceedings having been done with in the dispensation of criminal justice, it becomes incumbent on the Sessions Court to scrutinise the materials on record carefully and to record his reasons for passing an order of discharge under section 265C of the Code of Criminal Procedure (Ref : 5 BCR 259, 6 BLD 96).

37 DLR 107—Md. Taheruddin Vs. Abul Kashem—If, before framing the charge the Sessions Court considers that there is no sufficient ground for proceeding against the accused, then it shall discharge the accused and record the reason for so doing under section 265 Cr. P. C. A Magistrate has similar power under section 241A Cr. P. C.

5 BCR 43 (AD)—Azahar Ali Khan Vs. The State—Absence of charge-sheet & statements under section 161 Cr. P. C. High Court Division was justified in directing the trial Court to conclude trial in the absence of charge-sheet and statement under section 161 of the Code of Criminal Procedure, delay of 7 years in holding the trial, delay being beyond the control of the prosecution. Proceedings cannot be quashed for such delay which was not deliberate.

34 DLR 238—Abdul Sohrab Vs. Giasuddin—Even if now cases are sent to the Court of Session upon a charge-sheet or otherwise under section 265C Cr. P. C; it is the duty of the Court of Session to discharge those accused against whom it appears to the court from the record that there is no ground for proceeding after recording its reasons upon consideration of the materials on record and after hearing both the parties so that frivolous cases and cases of no evidence do not occupy the time of the Sessions court and innocent persons are not harassed unnecessarily by being put to the trouble and expense of undergoing a sessions trial (Ref : 11 DLR 394 (SC), 1980 Pak. Cr. LJ 5).

8 DLR 636—Mukshed Ali Dewan Vs. The State—'Sufficient ground' means credible evidence.

17 BLD (HC) 11—Khondker Maniruzzaman Vs. The State—Discharge of accused and framing of charges against the accused.

The object of section 265C of the Code of Criminal Procedure is to enquire into the materials on record for prima facie satisfaction of the Court as to whether the accused should be discharged or proceeded against so that innocent persons may not be harassed on false and frivolous allegations.

If on the other hand, if the Court finds that there is ground for presuming that the accused has committed an offence it shall frame necessary charges against him under section 265D of the Code.

17 BLD (AD) 373– Jobaida Rashid Vs. The State–Sections 265C and 265D Cr. P. C. are abridged substitution of the now repealed Chapter XVIII of the Code and these cast a duty upon the Sessions Judge to apply his judicial mind in considering the materials collected by the prosecution and placed on record in order to come to a decision whether charge should be framed against a particular accused or not. [Ref. 2 MLR (HC) 23].

17 BLD (AD) 54–The State Vs. Khondker Md. Moniruzzaman–When prima facie there is no material on record to show that the accused was in any way connected with the alleged offence it is to be held that there is no sufficient ground for proceeding against the accused and he should be discharged. (Ref. 4 BLT (AD) 9).

19 BLD (AD) 20–Latifa Akhter and ors Vs. The State and another–Section 265C and Section 241A of the Code are two independent sections which deals with discharge of an accused brought for trial inrespect of cases triable by a Court of Sessions and by a Court of Magistrate. These two sections indicate that when an accused is brought for trial before a court of law the Court upon hearing the parties and on consideration of the reocord of the case and the documents may discharge the accused. These two sections having nothing to do with quashing of a proceeding. Section 561A is an independent inherent power of the High Court Division and this power can be exercised in case of abuse of process of court and for securing the ends of justice and or to give effect to any order under the Code.

50 DLR 551—Abdul Hai Vs. State—Discharge under the provisions of these sections is of different character than the discharge of the accused under sub-section (2B) of section 202 where discharge is made before taking of the cognizance

In our view there is no scope for making further enquiry after discharge if the accused under sections 241A or 265C of the Code as the same is made after taking cognizance. Moreover at the time of hearing under section 241A or under section 265C the court considers the record of the case, the documents submitted therewith and the submissions made by both parties. So, all necessary materials are before the court and as the order is passed on consideration of all such materials, there is no scope for passing any order for holding further inquiry. But there is scope for further enquiry when accused is discharged under the provision of sub-section (2B) of section 202 of the Code as the said order is made before taking of the cognizance.

49 DLR 373—Jobaida Rashid Vs. State, represented by the Deputy Commissioner, Dhaka—High Court Division under section 439 of the Code of Criminal Procedure having supervisory jurisdiction can scrutinise and go into facts to examine the property of the orders passed under section 265C or 265D of the Code.

50 DLR 103—Nazrul Islam Vs. State—আসামী পক্ষ থেকে মামলা অব্যাহতি দেয়ার জন্যে কোন দরখাস্ত দেয়া হোক বা না হোক আসামীর বিরুদ্ধে অভিযোগ গঠন করা হবে কিনা সে সম্পর্কে ২৬৫সি ও ২৬৫ডি ধারার বিধান অনুযায়ী দায়রা আদালত তথা যে কোন ট্রাইব্যুনালের দায়ীত্ব হচ্ছে উপরোক্ত বিষয় বিবেচনা করে এবং পক্ষদের বক্তব্য শুনে সঠিক সিদ্ধান্তে উপনীত হওয়া। শুধুমাত্র এজাহারে নাম উল্লেখ থাকলে এবং আসামীর বিরুদ্ধে পুলিশ অভিযোগপত্র দাখিল করলে বা অভিযোগের দরখাস্তে আসামীর নাম উল্লেখ থাকলেই তার বিরুদ্ধে যান্ত্রিকভাবে অভিযোগ গঠন করা সমিচীন নয়।

51 DLR 299—Salahuddin (Md) and others Vs. State—We do not find any reason to quash the instant criminal case by involving our inherent jurisdiction under section 561A Cr.P.C as the Code under section 265C provides for an alternative remedy.

6 MLR (HC) 83-90—Discharge of accused and framing of charge—Reasoning should be given in the case of former while no such reasoning is necessary in case of the latter—

Mere mentioning of the name of the accused in the F.I.R. and Police Report if so facto shall not entitle the court to frame charge u/s 265D. When the charge appears groundless from the materials on record the accused shall be entitle to be discharged u/s. 265-C of the Cr.P.C. Court is not obliged to record detailed reasons while framing charge. But in case of discharge the court must record reasoning for so doing.

1 MLR (HC) 4—H. M. Ershad Vs. The State—The Advocates of the accused are entitled to so through the papers & documents relied upon by the prosecution for framing charge.

5 BLT (AD) 9—The State Vs. Khondker Md. Moniruzzaman.—Charged under Section 201 of the Penal Code—The learned Additional Sessions Judge Considered the Statements of the witnesses recorded under section 161 of the Code of Criminal Procedure and framed charge against the accused respondent—Held: the additional sessions Judge without proper consideration of the materials on record and application of mind to Section 265C and 265D of the Code wrongly opined that their is ground for Presuming that the respondent had committed charge against him when as a matter of fact the materials on record do not sufficiently Provide any ground that the accused in involved as an abettor in the offence as alleged.

7 BLC (AD) 45—Taher Hossain Rushdi Vs. State (Criminal)—The High Court Division on detailed discussion of the materials on record rightly arrived at the view that there was no infirmity in the order of the learned Special judge rejecting the petition filed under section 265C of the Code of Criminal Procedure and framing charge under different section of the Penal Code read with section 5(1) of the Act II of 1947.

54 DLR (HC) 418—Ferdousi Islam Vs. Nur Mohammad Kha and others (Criminal)—In discharging an accused under section 265C of the Code the Court is obliged to record the reasons for so doing, which reasons should be reasonable.

22 BLD (HC) 118—Ferdousi Islam Vs. Nur Mohammad Kha and others)—If there is any other case ending in charge-sheet against others and the accused petitioner, the existence of such case does not entitle the accused opposite parties to be discharged from the instant case.

22 BLD 418—Mahmuda Begum and others Vs. The State—Sections 265C and 265D—After dilution of Chapter XVII a very heavy task and duty have been cast upon the Court under section 265C and 265D to examine the ingredients of the alleged offences while taking cognizance of a case and in framing charges against the accused persons so that nobody can launch vexatious and malicious prosecution against innocent people.

22 BLD (HC) 409—Hazrat Khan @ Hazrat Ali Khan Vs. The State—Criminal Trial—When the Court disbelieves major part of the prosecution case and the involvement of most of the accused and the medical evidence makes the case of the remaining accused doubtful, the Court cannot convict the remaining accused without corroboration from independent sources.

265D. Framing charge.—(1) If, after such consideration and hearing as aforesaid, the Court is of opinion that there is ground for presuming that the accused has committed an offence, it shall frame in writing a charge against the accused.

(2) Where the Court frames a charge under sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

Scope and application—The charge-sheet to which the accused is called upon to plead is a very important document. It should be drawn up and considered with extreme care and caution, so that accused may have no doubt whatever as to the offences to which he is called upon to answer and the Judge of the Appellate Court also may have no doubt upon the matter. The word 'Ground' means basis, foundation or valid reason. The whole object of framing a charge is to enable the defence to concentrate its attention on the case that he

has to meet. Conditions for framing of a charge are (i) presumption of the commission of an offence on the materials before the court (7 CWN 521) and (ii) offences triable exclusively by a Court of Session.

46 DLR 524—State. Vs. Auranga@ K. M. Hemayet Uddin—Statements made under sections 164 and 161 Cr. P. C are documents on record within the meaning of section 265D.

AIR 1941 Madras 804—Pannalal Marwari Vs. T. M. Krishnaswami Pillai—Charge framed by Sub— Magistrate—District Magistrate cannot quash it under section 436. District Magistrate has no jurisdiction under section 436 to quash a charge framed by a Sub Magistrate.

41 DLR 484—Monoranjan Kukharjee Vs. Election Commissioner—Martial Law is an extra constitutional dispensation with its departure it no longer casts a shadow upon the ordinary laws of the land. It is wellsettled that Martial Law is not a part of the constitutional scheme of this country. It is a temporary measure, a short-term arrangement. It meets only an interim need. When it leaves it usually legalises all past actions for purposes of immunity, with the tacit acknowledgement that its interference with the constitutional process is an aberration and needs to be condoned. But while leaving, the Martial Law does not leave a trial disqualification.

41 DLR 373—Shawai alias Mohammad Hossain Vs. State—Accused charged under section 148, 302/149 Penal Code but convicted under section 302—On the question whether such conviction is sustainable in law, Court held : Conviction under section 302/34 Penal Code is sustainable in law. Alteration of charge from section 302 to that of sections 302/34 Penal Code is permissible in the facts and circumstances of the case. The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence, is the foundation for a conviction and sentence, thereof. The question then arose for consideration whether such lacuna has prejudiced the accused or not. On consideration of the question of prejudice

it was held, 'In all the circumstances above noticed, we are satisfied that the absence of specific charges against the appellants under sections 307 and 302 PC has materially prejudiced him.'

4 BLD 285—Mohar Ali Vs. Riazuddin—Criminal trial. Discharge of accused. The Assistant Sessions Judge was not justified in discharging the accused merely on the ground that there was civil dispute between the parties. Without making any reference to the evidence which was to be adduced the Judge could not legitimately hold that identity of the persons setting fire to the hut was not established.

6 MLR (HC) 83—Discharge of accused and framing of charge—Reasoning should be given in the case of former while no such reasoning is necessary in case of the latter—

Mere mentioning of the name of the accused in the F.I.R. and Police Report if so facto shall not entitle the court to frame charge u/s 265D. When the charge appears groundless from the materials on record the accused shall be entitle to be discharged u/s. 265-C of the Cr.P.C. Court is not obliged to record detailed reasons while framing charge. But in case of discharge the court must record reasoning for so doing.

5 BLC 514—Aslam Jahangir Vs. State—The persistent case of the prosecution is that ten rounds of rifle and gun cartridges were recovered from the possession of the convict appellant but the charge appears to have been framed for illegal possession of five rounds of cartridge and in the absence of any explanation for the rest five cartridges the charge has become defective and as such the trial has been vitiated.

265E. Conviction on plea of guilty.—If the accused pleads guilty, the Court shall record the plea and may, in its discretion, convict him thereon.

Scope and application—This section corresponds to sub-section (2) of old section 271. It is open to the court to accept or not, the plea of guilt. Conviction on a plea of guilty is not sustainable when the facts alleged or proved by the prosecution do not amount to an offence. A plea of guilty should not be accepted in capital sentences. In a case of

murder, it has long been the practice of the court not to accept the plea of guilty, for murder is a mixed question of fact and law, and requires a certain intention or knowledge (26 Cr. LJ 177). Where an accused person pleads guilty, the court should record his confession and forthwith convict him therein. If there are other persons being tried with him, it is illegal for the court to postpone his conviction in order that he may technically be said to be jointly tried for the same offence with the other co-accused, and so that any statement in the nature of a confession he may have made may be cosidered against the co-accused. Where the court does not thinks it expedient to act upon the accused's plea of guilty the accused may be treated in such cases as if he had pleaded not guilty and the trial may be proceeded within the ordinary way. Where the court does not accept the plea of guilty and proceeds with the trial by recording evidence if is not justified in convicting the accused by reverting to the plea of guilty without referring to the evidence. Where a deaf and dumb person was convicted of an offence upon a trial without an attempt to communicate with him the charge against him, the conviction is liable to be set aside.

7 BLD 432—Abdul Latif Vs. The State—Admission of guilt by the accused—Whether the accused can be convicted solely relying on such admission—Whether such admission is to be recorded in the language of the accused—The reply of the accused while pleading guilty to the charge should be set down as nearly as possible in his own words and that having not been done the court is not in a position to know what he actually admitted—The accused may not understand the implication of such charge unless it is clearly explained to him that the consequence of admission of guilt shall be fraught with punishment like hanging or imprisonment for life—Basing the conviction solely on the basis of admission is disapproved by all the superior courts because murder is a mixed question of law and fact and unless the court is satisfied that the accused knew exactly what was implied by his plea of guilty, the plea should not be accepted but the case should be proceeded with—It is not safe at all to base the

conviction on the plea of guilty alone by the accused in case of murder.

40 DLR 402—Moniruddin Sana Vs. The State—No finding on a charge of capital offence can be safely based on the statements of an untruthful witness, even though corroborated by other witnesses.

29 DLR 211 (SC)—Yusuf Sk. Vs. Appellate Tribunal—If believed, conviction may be based on the evidence of a single witness.

6 BLD 1 (AD)—Md. Khaliluddin Vs The State—Whether defence suggestion can be taken as the basis for conviction. In the existing scheme of criminal trials an accused can be convicted either on his pleading guilty to the charge or on his confession under section 164 Cr. P. C or extra Judicial confession if strongly corroborated. Suggestion by Lawyer cannot be construed as admission of guilt. The accused is not required to prove his innocence. The prosecution must prove his guilt failing which the accused should be acquitted.

15 DLR 76 (WP)—M. Anwar Vs. Saadat Khayali—Unless the fact averred in the charge amount in law to an offence, the plea cannot amount to an admission of guilt under the section. An accused does not plea to a section of criminal statute. He pleads quilty to the facts which purport to disclose an offence under this section.

Appeal—Where an accused pleads guilty and he is convicted thereon, he has no right of appeal except as to the extent or legality of the sentence (section 412 Cr. P. C). If however the facts do not amount to an offence the plea of guilty is no bar to an appeal on merit (AIR 1954 Mad 1020).

5 BLC 332— State Vs. Romana Begum @ Nomi—The condemned prisoner by filing an application before the trial Court pleaded guilty for committing double murder when the trial Court by considering the facts and circumstances of the case and exercising its discretion under section 265E, Cr.P.C decided not to convict the accused on pleading of guilt and decided the case on merit.

265F. Date for prosecution evidence.—If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under section 265E, the Court shall fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing.

Scope and application—Accused may plead guilty, or remain silent (i. e. refused to plead which is the same as claiming to be tried) or may claim to be tried. If a plea of guilty is not accepted the court shall proceed to trial. When accused refuses to plead or claims to be tried the Judge shall fix a date straight way for hearing of the case on which date the prosecution must come ready with evidence.

37 DLR 107—Md Taheruddin Vs. Abul Kashem—After a charge is framed and the accused pleads not guilty to the charge and claims to be tried, the Sessions Court shall fix a date for the examination of witnesses. The Sessions Judge may, on the application of the prosecution issue any process for compelling the attendance of any witness or the production of any document or other things under section 265F Cr. P. C. Acquittal order by Sessions Judge invalid when such order is passed on the ground of PWs absence on the date of trial.

265G. Evidence of prosecution.—(1) On the date so fixed, the Court shall proceed to take all such evidence as may be produced in support of the prosecution.

(2) The Court may, in its discretion permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

Scope and application—On the date as fixed under section 265F the Judge shall go on recording the evidence of prosecution witnesses till the prosecution closes its evidence. The Prosecutor is bound to call all the witnesses who prove their connection with the transaction in question and who also must be able to give important information. If such

witnesses are not produced, without sufficient reasons being shown, the court may properly draw an inference adverse to the prosecution. The duty of the prosecution is not to secure a conviction but to assist the court in arriving at the truth and for the purpose to place before the court all the material evidence at his disposal. Public Prosecutor has not the option of choosing witnesses who will support the prosecution and withholding those who will not. The prosecution cannot refuse to call any witness merely because his evidence may in some respect be favourable to the defence. While not examining a witness it is not proper for the Public Prosecutor to tell court that he had information that the witness had turned hostile. Inference of hostility could be drawn only from the answer given by him and to some extent from his demeanour. The Public Prosecutor should as far as possible examine the witnesses so as to bring out facts in their logical order. Considerable latitude should be given for cross examination of witnesses and it should not be confined to the facts elicited in examination in-chief. After prosecution witnesses are examined, cross-examination by the accused and re-examination, if any, shall follow immediately. There is no right to reserve cross-examination. Examination and cross-examination are to be a continuous process, but sub-section

(2) vests the Judge with a discretion to permit for sufficient reason either the cross-examination of any witness to be deferred until 'any other witness or witnesses' have been examined or recall any prosecution witness for further cross-examination. Witness means prosecution witness. The counsel should have full freedom to cross-examine a witness, and nothing should be done which would hamper his cross-examination.

45 DLR 688--Siraj Mal Vs. The State—The mere fact that witnesses examined were not mentioned in the FIR is no ground for disbelieving them.

42 DLR 176 (AD)—Atiqur Rahman Vs. The State—Defence plea, when not acceptable—Plea of inadvertance, liable to be rejected if not taken during the trial but argued subsequently.

42 DLR 428—State Vs. Imdad Ali Bepari—Submission of sentence for confirmation—The order of conviction under section 302 P. C by the Session Judge on the basis of part of the evidence recorded by an Assistant Sessions Judge who is not competent to hold trial under that section is illegal. The death reference is rejected and the case is sent back for re-trial of the condemned prisoner in accordance with law and in the light of observations made.

10 BLD 280 (AD)—Md. Abdul Wahab Vs. The State—order of production and examination of witnesses—The Public Prosecutor's priviledge and discretion to determine the order in which witnesses should be produced and examined subject however to the limitations of section 135. Whether the exercise of discretion by the public Prosecutor is sound and proper so as to examine a medical witness as PW-1 before other witnesses. Public Prosecutor not to examine medical witness as PW-1 before other witnesses.

38 DLR 311 (AD)—Muslimuddin Vs. The State—Accused presumed to be innocent of the charge till guilt is established by legal evidence—No particular number of witnesses legally required to prove the offence.

35 DLR 119—Khashru Vs. The State—A conviction on circumstantial evidence cannot be based unless and until all the inferences to be drawn from the whole history of the case pointed so strongly to the commission of the crime by the accused that the defence version appears on the face of it impossible or highly improbable. Statements under section 164 cannot be used as a substantive evidence. It can be used for contradicting or corroborating a maker thereof.

35 DLR 41—Saad Ahmed Vs. The State—Witnesses examined though not mentioned in the FIR or in the charge-sheet and making serious allegation against the accused—Cannot be relied on.

28 DLR 192—S. M. Farook Vs. The State—Evidence of a witness declared by the prosecution to be hostile. Such evidence is not necessarily unture and cannot be treated by a court as unworthy of credit.

21 DLR 344—Md. Yakub Ali Vs. The State—A witness who is unfavourable is not necessarily a hostile (Ref : 12 DLR 578).

5 BLD 84—Abdul Bahar Vs. The State—Prosecution is to call all the witnesses to prove the case. If all the witnesses are not called without sufficient reason being shown the court may draw adverse inference against the prosecution. But the prosecution is not bound to produce a witness if he is not expected to give true evidence though he was mentioned in the F.I.R and charge-sheet. Non-production of witnesses named in the charge-sheet and FIR have weakened the prosecution case and as such an adverse inference should reasonably be drawn against the prosecution. Prosecution should produce essential witnesses to unfold narrative on which the prosecution is based.

265H. Acquittal.—If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Court considers that there is no evidence that the accused committed the offence, the Court shall record an order of acquittal.

Scope and application—This section applies only where there is no evidence, and would not cover cases where the court considers that the charge is itself, improper. Under this section, the Judge has a very important duty to perform after the examination of the prosecution witnesses, the examination of the accused under section 342 and hearing the argument of both sides. The examination of the accused should be oral examination. Written statement cannot be filed at this stage. It can be filed after he enters upon his defence. If the Judge comes to the negative conclusion, he will record an order of acquittal. A court can aquit the accused under this section only in a case in which there is no evidence that the accused committed the offence. The prosecution has to prove all the facts necessary to constitute the offence charged against the accused. If it fails to do so then in a sessions case after the case for the prosecution has been closed the court should acquit the accused, where no evidence of any of the links necessary to establish the offence has been adduced by the prosecution.

39 DLR 319—Kamar Ali Vs. Âbdul Manaf—All processes to compel attendance of PWs when failed, order of acquittal under section 265 is correct (Ref : 7 BLD 13).

38 DLR 303 (AD)—Mrs. Amena Hoque Vs. Rajab Ali—An order of acquittal can validly be passed, as per provisions of Chapter XXIII of the Cr. P. Code are concerned (which deals with trials before Courts of Sessions) under section 265H, which provides that an acquittal shall be passed, if the Court after hearing the prosecutor and defence, considers that there is no evidence to find the accused guilty.

37 DLR 107—Md. Taheruddin Vs. Abul Kashem—Formerly it was court's duty in warrant cases to recall P. Ws which could not acquit the accused on the ground of P. Ws absence. Recent substantive changes in the Code of Criminal Procedure in Bangladesh have not made any difference in the legal position in so far as the trial of a case before a Sessions Court is concerned. After charge is framed in a Sessions Court the complainant is turned into an informant. It is the State which becomes the prosecutor and it no longer remains the duty of the informant to secure the attendance of his witnesses in the Court. It becomes the Court's duty and unless the court exhausts all available modes of securing the attendance of witnesses, any order of acquittal for non-attendance of witnesses will clearly be illegal. Sessions Court may pass an acquittal order under section 265H after taking evidence of P. Ws after accused's examination and hearing of both the parties. Law authorises the Sessions Court to pass an order of acquittal under section 265H Cr. P. C only after taking the evidence for the prosecution, examining the accused, hearing the prosecution and the defence and giving a finding that there is no evidence that the accused committed the offence (Ref : 5 BLD 144).

35 DLR 75—Shamsuddin Bepari Vs. Abdur Razzak—An order of acquittal under section 265H of the Criminal Procedure Code cannot be passed unless and until the evidence for the prosecution is taken, the accused is examined and the defence is heard and the court makes a finding that there is no evidence that the accused committed the offence.

265I. Entering upon defence.—(1) Where the accused is not acquitted under section 265H, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Court shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Court shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

Scope and application—If the Judge does not acquit the accused under section 265H on the ground that there is no evidence, he shall call upon the accused to enter on his defence and adduce evidence and file with the record any written statement, if put in by the accused. The calling upon the accused to enter on his defence is essential and omission to do so is not a mere irregularity. If the accused asks for any process to compel the attendance of any witness, or production of any document or thing it shall be granted generally. Reasons for refusal of process, if any, must be recorded. In serious crimes generally it is not safe to examine witnesses unless the defence advocate is sure that it is absolutely essential to establish a material point. That onus never charges, it always rests on the prosecution (40 CWN 442). This new provision in the Cr. P. C has allowed an accused person in a session trial to put in a written statement. A written statement filed by the accused cannot take the place of the examination of the accused which is imperative. Written statement filed on behalf of the accused person is evolved out of the brains of the advocate for the examination of the accused and this procedure is adopted solely to the primary matter to be ensured that is, the accused has been given a proper opportunity to explain the vital matters in evidence against him but it must not be forgotten that if he fails or refuses to submit written statement and his

failure or refusal should be made abundently apparent on the face of the record in order that the inference against him thereon authorised by section 343 may be well founded. A mere written statement does not afford a proper or sufficient basis upon which to base such an inference because it proceeds merely by way of arguments from the mind of his lawyer.

9 BLD 110 (AD)—Tayeb Ali Vs. The State—Criminal trial—Burden of proving exceptions—To discharge this onus they did nothing except making a suggestion—They could have led evidence that the incident took place in their plot—It was the duty of the defence to file as exhibit the complaint petition of their counter case or at least submit it as part of their statement before the court.

265J. Arguments.—When the examination of the witnesses (if any) for the defence is complete, the prosecutor shall sum up his case and the accused or his advocate shall be entitled to reply :

Provided that where any point of law is raised by the accused or his advocate, the prosecution may, with the permission of the Court, make his submissions with regard to such point of law.

Scope and application—The burden lies on the prosecution to prove beyond all reasonable doubt that the offence was committed by the accused. If the prosecution cannot prove it, the accused is under no obligation to explain how the offence was committed or who committed the offence or by what means. No adverse inference can be drawn against him from the non-production of evidence by him. The object of summing up is to enable the Judge to appreciate facts, circumstances and evidences on record of the case both for and against the prosecution so as to help him in arriving at a right decision upon the points which arises for consideration The Public Prosecutor should marshall the evidence so as to bring out the lights and the shades, the probabilities and the improbabilities so as to give proper assistance to the Judge who is required to decide which view of the fact is true. The object of the law in this section is to set each side have an

opportunity of commenting on the evidence of the other and not to give an additional advantage to the accused. It seems to be plain that any arbitrary and undue curtailment of the party's right of argument is to be deprecated. But although it cannot be denied that for the proper admisinstration of justice the party should be allowed a full and unrestricted right of addressing the court.

41 DLR 11—State Vs. Badshah Mollah—No question relating to blood-stained cloth or injury in the hand was put to the condemned prisoner. This circumstance has no basis to base conviction. Mere absconding cannot always be a circumstance to lead to an inference of guilt of the accused.

265K. Judgment of acquittal or conviction.—(1) After hearing arguments and points of law (if any), the Court shall give a judgment in the case.

(2) Omitted.

Scope and application—It provides that after hearing the arguments the Judge will deliver judgment. If the accused is sentenced to an imprisonment the accused should be provided with copy of judgment free of cost.

40 DLR 402—Moniruddin Sana Vs. The State—Assessment of prosecution evidence—Court is entitled to note the conflict between the first recorded version of the prosecution case and the story that is made out at the trial—If the finding is to be based on the evidence of a solitary eye witness, the witness must be absolutely a truthful one and wholly reliable. No finding on a charge of capital offence can be safely based on the statement of an untruthful witness, even though corroborated by other witnesses. Statements in F.I.R which do not come in evidence cannot be used in finding the accused guilty of charge—Self-exculpatory confession of an accused cannot be legally used in finding co-accused guilty as it is no evidence as defined in section 3 of Evidence Act.

265L. Previous Conviction.—In a case where a previous conviction is charged under the provisions of sub-section (7) of section 221. and the accused does not admit that he has been previously convicted as alleged in the charge, the Court may,

after it has convicted the said accused under section 265E or section 265K, take evidence in respect of the alleged previous conviction and shall record a finding thereon :

Provided that no such charge shall be read out by the Court nor shall the accused be asked to plead thereto nor shall the previous conviction be referred to by the prosecution or in any evidence adduced by it, unless and until the accused has been convicted under section 265E or section 265K.

Scope and application—This section corresponds to old section 310 with modifications consequent upon abolition of assessor and jury trial. In effect the trial is in two parts, firstly the trial for the offence charged if there is a conviction, the second part comes into operation for the purpose of enhanced punishment (40 Cr. LJ 770). The Judge should include the previous conviction in his charge under section 75 Penal Code and get the accused plead to them. If the previous conviction is denied, the Judge should take evidence on the point. When previous conviction is admitted, sentence may be passed on it (17 Cr. LJ 289). The previous conviction refers to in section should be a conviction within Bangladesh.

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Section 266 to 336 have been omitted by Ord. XLIX of 1978.

CHAPTER—XXIV

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

337. Tender of pardon to accomplice.—(1) In the case of any offence triable exclusively by the Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Penal Code, namely, sections 216A, 369, 401, 435 and 477A, the District Magistrate, a Metropolitan Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a veiw to obtaining the evidence of any person supposed to have directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned whether as principal or abettor, in the commission thereof :

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record;

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

(2) Every person accepting a tender, under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

(2A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused quilty of an offence, send him for trial to the Court of Session.

(3) Such person. unless he is already on bail, shall be detained in custody until the termination of the trial.

(4) Repealed.

Scope and application—The object of this provision is to allow pardon to be tendered in cases where a grave offence is alleged to have been committed by several persons so that with the aid of the evidence of the person pardoned the offence could be brought home to the rest. The policy is to prevent the escape of offenders from punishment in grave cases for lack of evidence by grant of pardon to accomplices for obtaining true evidence. The District Magistrate can tender pardon at any stage of investigation, inquiry or trial even though he himself may not be holding such inquiry or trial (AIR 1954 (SC) 616). Term "District Magistrate" includes Additional District Magistrate empowered under section 10 (2) Cr. P. C to exercise all powers of District Magistrate. Such Additional District Magistrate has jurisdiction to accord sanction to first class Magistrate to tender pardon to approver. A person ceases to be an accused person from the moment the pardon is accepted and is to be treated as a witness thereafter. A pardon once tendered and accepted cannot be withdrawn subsequently (AIR 1944 Sind 184). There is no legal bar to the granting of a pardon in a case where offences mentioned in section 337 (1) are joined with offences not so mentioned. Pardon in such cases should not be granted if it is likely to prejudice the accused. Where the offence is under investigation, the Magistrate tendering pardon must have jurisdiction over the

offence. All that officers who can grant pardon under the provisions of this section has to see whether on the information at his disposal there is a prima facie case against the person to whom the pardon is going to be tendered for an offence which is exclusively triable by the Court of Session. Where the offence is under investigation the Magistrate can grant pardon only with the written sanction of the District Magistrate. The Government has no power to offer a conditional pardon to an accused for the purpose of giving evidence against other accused under this section. An accomplice is a person who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be jointly charged with the principal accused. The only condition on which pardon can be tendered to an accomplice is the only one specified in this section. The section requires that the disclosure shall be reduced into writing. It is illegal for a Magistrate to convert an accused into a witness (approver) except when a pardon has been lawfully granted under section 337 Cr. P. C. Though a conviction is not illegal because it proceeds on the uncorroborated testimony of an approver yet it has now become the universal practice not to convict on the testimony of mere accomplice unless it is corroborated in material particulars.

14 BLD 509—Md. Zakir Hosain Vs. State—Tender of pardon to accomplice. The sole purpose of granting pardon to an accused in specified offence is to procure evidence against other accused persons when the prosecution is faced with the difficulty of gathering evidence to bring home the charge against them. An accused is granted pardon on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor in the commission thereof. The court is not justified in tendering pardon to the accused without assigning any reason, particularly when the prosecution did not pray for it.

53 DLR (AD) 50—The accused raised no objection on the score of defect in charge at any stage of the trial. The objection raised for the first time in the Appellate Division is not

entertainable by virtue of explanation appended to section 537 of the Cr.P.C.

41 DLR 66—Angur Vs. State—Certificate of the Public Prosecutor necessary for the prosecution of a person who has earlier accepted pardon. Condition for tendering pardon—Enmity between the approver and the other two accused-whether such pardon is a pardon on condition.

22 DLR 109—Abdur Rashid Vs. The State—Accused not legally discharged or pardoned cannot be administered oath or examined as witness. His evidence when given in such circumstances is wholly inadmissible. Person accused not sent-up for trial is not an accused person and, therefore, can be examined as a witness. Administration of an oath to an accused person is opposed to public policy. Such administration of oath to an accused is an express statutory illegality and if oath is illegally administered to an accused the statement made by him cannot be used as evidence.

21 DLR 321—Abdul Jabbar Khan Vs. The State—The Magistrate holding inquiry himself is competent to examine an accused as a witness who has been tendered pardon.

16 DLR 23—Zahid Hassan Khan Vs. The State—Evidence of a co-accused turned approver, cannot be accepted under the section unless such person is connected by direct or indirect participation with the offence.

13 DLR 5 (WP)—Wazir Vs. The State—Enlargement of the approvers on bail weakens their evidence. Though the enlargement of the approvers on bail does not vitiate their evidence altogether grant of bail is certainly an element which weakens their evidence as it is a clear inducement or temptation which must have been offered to them for becoming approvers. One piece of weak evidence requiring corroboration cannot corroborate another weak evidence (Ref : 7 DLR 45 (WP)).

7 DLR 176 FC—Fazal Dad Vs. The Crown—Omission to record reasons for tendering pardon to an approver as required by sub-section (1A) of section 337 Cr.P.C is a curable irregularity and does not render the evidence of the approver

inadmissible in evidence in the absence of circumstance tending to show that the omission has occasioned a failure of justice.

4 DLR 247—Abbas Ali Vs. The Crown—When a pardon was granted to an accused person and at no stage of the proceedings was the pardon revoked, section 337 (2) of the Cr. P. C requires that, that person should be examined as a witness. If the Magistrate while sending him upto the Court of Session as a witness through mistake includes his name as an accused person that would not take away the legal obligation imposed in sub-section (2) of section 337 of the Cr. P. C and would not turn an approver into an accused.

338. Power to direct tender of pardon.—At any time before the judgment is passed, the Court of Session trying the case may, with the veiw of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to any such offence, tender or order or the District Magistrate to tender, a pardon on the same condition to such person.

Scope and application—After the case has been sent to the Court of Session either the Court of Session can itself tender pardon or it can direct the District Magistrate, to tender pardon. The Government cannot tender a pardon. Pardon can be tendered at any time before judgment is delivered; but it is extremely improper, though not illegal, to grant pardon at a late stage of the trial after the close of the prosecution and the defence (10 CWN 847). Special Judge appointed under the Criminal Law (amendment) Act, 1958, has power under section 6 (2) of the Act, to tender pardon to an accused and any pardon so tendered by him shall, for the purposes of section 339 and 339A of the Code, be-deemed to have been tendered under section 338 of the Code (1963 Cr. LJ 547).

339. Trial of person to whom pardon has been tendered.—(1) Where a pardon has been tendered under section 337 or section 338, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by

giving false evidence, not complied with the condition on which the tender was made such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter :

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entiltled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The Statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court Division.

Scope and application—The approver forfeits the pardon if he wilfully conceals anything esential or gives false evidence. He can be tried for the offence which was pardoned but not jointly with the other accused (1970 Cr. LJ 1457). It is the duty of the prosecution to establish that the approver has failed to comply with the conditions of the pardon either by wilfully concealing anything esential or by wilfully giving false evidence (AIR 1940 Nag 77). When a pardon has been legally tendered to an accomplice and he breaks the condition of his pardon by making a retracted statement at the trial proper sanction is necessary for the prosecution on each branch of the alternative charge. The sanction must be given by the High Court Division. Such an independent consideration cannot be expected from the Sessions Judge. An application to the High Court Division for sanction for prosecution of an approver should be made by motion in open Court and not by a letter of Reference (13 Cr. LJ 451).

Certificate of the Public Prosecutor—The person who is authorised to grant a certificate under this section is the Public Prosecutor, who conducted the case in which the

pardon was granted and he need not occupy the position of a Public Prosecutor.

53 DLR (HC) 59—Working days should be understood to mean actual working days during which the judge holds the court.

53 DLR (HC) 59— There no absolute direction to allow bail, even in case of failure to complete the trial within the statutory period, as the mardate, if any, for allowing bail is subjected by the words, "unless for reasons to be recorded in writing, the court otherwise directs [Ref : 18 BLD 357].

12 BLD 446—A. B. M. Shamsul Alam Vs. State—The section, whether will be precluded from operation in cases under Criminal Law Amendment Act, 1958, merely because 339-D mentions the cases stopped under sub-section-4 of Section 339C. Held : Section 339D Criminal Procedure Code will not be precluded from operation in cases under Criminal Law Amendment Act, 1958, merely because 339D mentions the cases stopped under Sub-section 4 of section 339C which is applicable in respect of cases under the Criminal Law Amendment Act in view of Section 6 (1) of the said Act.

10 BCR 11—Angur Vs. State—The first condition required for prosecuting an approver to whom pardon has been tendered and which was accepted by him is a certificate by the public prosecutor regarding his opinion under section 339 (1). This having been not done the condition was not fulfilled in the instant case. For prosecuting an approver it must also be established that the approver has forfeited his pardon. Since the appellant has not been prosecuted for giving false evidence but prosecuted only for committing the offence of dacoity in respect of which the pardon was granted no sanction under section 339 (3) was required before prosecution.

41 DLR 66—Angur Vs. State—Non-compliance of section 339 (1) Cr. P. C by the A.P.P. prosecution of approver who has not complied with the condition on which pardon was received. The petition for prosecuting the appellant (approver) by the successor A.P.P. cannot be termed as a certificate contemplated under section 339 (1) of the Code. Certificate

required under section 339 (1) Cr. P. C. if not complied with section 537 has no manner of application. Conviction of the appellant who was identified by P. W. 3 who say the appellant earlier while depossing as P.W. 7 in the case is not sustainable (Ref : 7 DLR 45 (WP)).

7 PLD Lah 375—When an approver is put on his trial, after forfeiture of pardon, for the offence with regard to which he had been granted pardon, his statement in the provious trial is admissible under the provisions of section 339 (2) Cr. P. C though it would otherwise have been inadmissible because of section 24 Evidence Act, in as much as such a statement was obviously the result of an inducement, viz, tender of pardon.

5 BLC 542—Fazer Pk.(Md)alias Fazer Ali Vs. State—The provisions of section 87 and 88 of the Code was duly complied with and it is also undisputed that as per provisions of law publication of notice in two Bengal newspapers was published but the only objection is that one Bengali newspapers was published from Bogra instead of Dhaka. Since no such objection was raised before the trial Court, this disputed question of fact cannot be allowed to be raised before the appellate Court for the first time.

339A. Procedure in trial of person under section 339.—(1) The Court trying under section 339 a person who has accepted a tender of pardon shall—

(a) If the Court is Court of Session before the charge is read out and explained to the accused under section 265D, sub-section (2), and

(b) If the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken, ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made.

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial; and shall, before judgment is passed in the case find whether or not the accused has complied with the conditions of the pardon and if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.

Scope and application—The procedure laid down under this section should be strictly followed (AIR 1929 Oudh 265). It is the duty of the court to explain the provisions of this section clearly to the accused to tell him that he is entitled to plead that he has complied with the conditions of the pardon. It is for the state to prove that pardon has been forfeited by the approver (AIR 1940 Nag 77).

22 DLR 42 (WP)—Aziz Vs. The State—A clear finding should be given by the trial Court as to whether or not an approver who is put on this trial had complied with the conditions of the pardon. It should give its own reasons for coming to that conclusion because no conviction can be sustained without such a finding.

339B. Trial in absentia.—(1) Where after the compliance with the requirments of section 87 and section 88, the Court has reason to believe that an accused person has absconded or concealing himself so that he cannot be arrested and produced for trial and there is no immediate prospect of arresting him, the Court taking cognizance of the offence complained of shall, by order published in at least two National daily Bengali newspapers having wide circulation, direct such person to appear before it within such period as may be specified in the order, and if such person fails to comply with such direction, he shall be tried in his absence.

(2) Where in a case after the production or appearance of an accused before the Court or his release on bail, the accused person absconds or fails to appear, the procedure as laid down in sub-section (1) shall not apply and the Court competent to try such person for the offence complained of shall, after recording its decision so to do, try such person in his absence.

Scope and application—This Section is new. Normally a trial in the absence of the accused is a nullity and the consquence has been avoided by this section. The accused who remains in absconding can be tried according to the provision of this section. It has been enacted to meet special type of case and under special circumstances. This section has become a general section, which apply to all classes of cases

when the accused remains in absconding. The notice under section 339B for the purpose of publication in the two National Daily it should include (a) Name of the Court (b) Name and address of the accused persons (c) Case number with sections (d) Date and time of appearance of the accused. Due to incorporation of section 339B Cr. P. C the provision of section 512 Cr. P. C has lost all importtance and it has become superfluous :— The amendments by Act XVI of 1991 with effect from 12.2.91 has inserted in appropriate place.

47 DLR 185—Muslim Vs. The State—The appellants were tried in absentia although they were in custody in connection with another case and not produced in the present case for no fault of their own. In such a position prayer for fresh trial is not entertainable. On merit the accused persons were not found guilty and acquitted from the charge.

47 DLR 61—Badaruddin Vs. State—Since section 339B(2) provides for absentia trial, section 512 has no application in the case of an accused who appeared before the court but thereafter absconded.

47 DLR 24—Abdul Motaleb shaque Vs. State—Non-working day of a particular judge for reasons beyond his control like unsuitable working condition in the court room should be excluded while computing the working day. The days on which the case was adjourned due to default of the accused should not be considered as working days, otherwise it will be easy for the accused to stretch the trial beyond the statutory period.

14 BLD 369—Sadeque Ali Vs. Judge, Senior Special Tribunal, Thakurgaon—Though the provisions laid down in section 339B of the Code Criminal Procedure for holding trial in absentia in a case involving offences under the Penal Code and the provisions for holding the trial in absentia by the Special Tribunal in a case involving offences under the special powers Act are similar, the Special Tribunal is under the statutory obligation to follow the procedures laid down in Section 27 (6) of the Special Powers Act before holding the trial. The notification regarding the attendance of the accused though once published in the newspapers by the Magistrate

while the case was before him, cannot be held to be a sufficient compliance with the requirement of law as envisaged by Section 27 (6) of the Special Powers Act. This illegality is not curable under Section 537 Cr. P. C.

14 BLD 471—Md. Mostafizur Rahman Vs. State—"Absconding and absconder" and "failure to appear"—An "absconder" may be said to be one who hides or conceals or makes himself inaccessible or does not come in public in order to defeat the process of court of his arrest. But an absentee accused should not be readily assumed to be an absconder without due inquiry and notice. "Failure to appear" as contemplated by section 339B(2) Cr. P. C means default or neglect on the part of the accused to appear in Court. So, if an accused is prevented by any genuine or reasonable cause from appearing in court, that by itself does not amount to neglect or default and for that matter a failure to appear in court. Maxim— "Justice hurried justice burried"—It is well settled that justice should not only be done but should be manifestly seen to have been done. Otherwise the common proverb that "Justice hurried justice burried" may become ture.

45 DLR 117—Mahbubur Rahman Khan@ Tipu. Vs. State—Frequent adjournment of criminal trial-Court's duty in the matter-Disinterested witnesses are losing interest to appear before the Court to avoid harassment of going to court again and again. It is desirable in the interest of administration of justice that witnesses be summoned on a day when the Court is in a position to examine them. No adjournment at the instance of any party should be allowed causing inconvenience to witnesses. Practice of adjourning criminal tial frequently on the prayer of the defence in spite of appearance of prosecution witnesses on the ground of absence of any accused overlooking provision of section 339B Cr. P. C is contrary to law and should be discontinued (Ref : 13 BLD-268).

42 DLR 162—Moktar Ahmed Vs. Haji Farid Alam—Failure to publish the order in at least one Bengali daily newspaper is violative of the provision of section 339B Cr. P. C and also of principal of natural justice. Interpretation of Statute—

Whether expression "in at least one newspaper" occurring in section 339B Cr. P. C is mandatory or directory. Held : Provision of section 339B is a mandatory and not a directory one (10 BLD 278).

42 DLR 15—Lal Mia Vs. The State—For compelling an absconder accused to be brought to trial, coercive power under sections 87 and 88 could be used-Section 339B added to the Code to provide for trial in absentia. Interpretation of Statute-Procedures though apparently procedural are substantive in nature. Failure to observe these would render subsequent proceeding coram non judice and a nullity. 30 days' time for appeal to be counted form the date of knowledge of conviction when relevant statutes do not prescribe any date from which limitation is to run.

42 DLR 94—State Vs. Jahaur Ali—Accused facing trial on capital charge-Entitled to be defended by a lawyer even if the trial is held in absentia-Court's responsibility to appoint a lawyer to defend Section 339B Cr. P. C does not come in conflict with the Rule of P. R Manual-Cardinal principle of criminal administration of justice stated (Ref : 36 DLR 333).

14 BLD 102—Md. Ali Hossain Vs. The State—It is well settled that the provision of Section 339B Cr. P. C is a mandatory one and unless it is duly complied with, it vitiates the trial.

14 BLD 301—Md. Jamsed Ahmed Vs. The State—In the absence of any notification in respect of the absconding accused in any News Paper as was required under the law, the Special Judge acted illegally in proceeding with the trial in violation of the express provision of law.

9 BLD 2 (AD)—S.M. Shahjahan Ali Tara Vs. The State—Bail-Whether refusal of bail on the ground that prima facie there was no illegality in the trial is proper-The appellant was tried in absentia and convicted under section 420 P. C and sentenced to R. I. for 7 years and fine of Tk. 35,000/-. He contends he surrendered to the court and was granted bail; the court erred in not allowing withdrawal of the case against him-In the peculiar circumstances of the case the appellant is

entitled to bail particularly when there is hardly any chance of his absconding.

10 BCR 53—Safiuddin Vs. Minhajuddin Chowdhury—No specific finding as to initial intention of the accused-Conviction under section 447 based on discrepant and contradictory statements of prosecution witnesses can not be sustained-Conviction under section 379 is however, maintained in the facts and circumstance of the case-Court to look into the quality of evidence but not to the number of witnesses.

40 DLR 150—Md. Sabuj Vs. The State—It was still obligatory to publish in official gazette a direction on the accused to appear before the court before taking up the trial if the accused was considered absconding because of their absence. Both the accuseds could not be regarded as having absconded as they were granted bail and summons and warrants were directed to be issued but there was neither any service of summons nor any report of their execution. The entire trial of the two accused persons held in their absence was illegal, in addition to the non compliance of provision of section 27 (6) Spl. Power Act.

36 DLR 263—Kala Meah Vs. The State—Trial of the accused is illegal when the accused has not absconded, but his failure to appear before the trying court is due to the fact that the Magistrate and Sessions Judge did not mention any date on which the accused was to appear in court (Ref : 5 BLD 21).

36 DLR 333—State Vs. Emdad Ali Bepary—Conviction of a person charged with committing an offence punishable with death, without his being respresented by a lawyer is illegal. Court's responsibility to see that in such a case a Lawyer is appointed to defend the accused. Chapter XII of the legal Remembrancer's Manual 1960 is to the effect : "Every person charged with committing an offence punishable with death, shall have legal assistance at his trial and the Court should provide an Advocate to plead for the defence unless they certify that the accused can afford to do so." No lawyer on behalf of accused was present in Court in this case. As such the Court

below, before proceeding with the case ought to have appointed an Advocate to defend the accused. In that view of the said illegality the conviction and sentence of the condemned prisoner under section 302 is not maintainable and therefore set aside and the case is sent back for re-trial to the court below after appointing an Avocate to represent the accused and give him chance to cross-examine the witnesses examined in the case.

33 DLR 12—Khalilur Rahman Vs. The State—A fugitive from justice (So long as he remains beyond the reach of the Court) is not entitled to any relief.

5 MLR (HC) 351—Fazer PK. (Md.) alias Fazer Ali Vs. The State—Publication in the news paper for trial of accused in absentia—The requirement of law is that before trial, publications must be made in two national dailies having wide circulation. Whether a daily news paper published from Bogra is of wide circulation is a matter of fact. When no objection was raised before the trial court in this regard, no such objection can be raised subseqently. The publication in two daily newspapers is a sufficient compliance with the requirement of law.

339C. Time for disposal of cases.—(1) A Magistrate shall conclude the trial of a case within one hundred and eighty days from the date on which the case is received by him for trial.

(2) A Sessions Judge, an Aditional Sessions Judge or an Assistant Sessions Judge shall conclude the trial of a case within three hundred and sixty days from the date on which the case is received by him for trial.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2) where a person is accused in several cases and such cases are brought for trial before a Magistrate or a Court of Session the time limit specified in sub-section (1) or sub-section (2) for the trial of such cases shall run consecutively.

(2B) Notwithstanding the transfer of a case from one Court to another Court, the time specified in sub-section (1) or sub-section (2) shall be the time for concluding the trial of a case.

(3) omitted.

(4) If a trial cannot be concluded within the specified time, the accused in the case, if he is accused of a non-bailable offence, may be released on bail to the satisfaction of the court, unless for reasons to be recorded in writing, the court otherwise directs,

(5) Nothing in this section shall apply to a trial of a case under section 400 or 401 of the Penal Code, 1860 (Act XLV of 1860) or to the trial of a case to which provision of chapter XXXIV apply.

(6) In this section, in determining the time for the prupose of a trial–

(a) Omitted.

(b) the days spent on account of the absconsion of an accused after his release on bail, if any, shall not be counted.

Scope and application–This section is new. Introduction of time-limit for disposal of criminal cases is absolutely new in this sub-continent. According to law, criminal action must be commenced within the period of limitation. This section may be read with section 167 Cr. P. C. It is true that an accused in a criminal case is entitled to get a speedy trial but sometimes speedy remedy brings injustice. There is no time limit for disposal of gang cases.

55 DLR 33 (AD)—Captain(Rtd) Nurul Huda Vs. State—Even in a non-bailable offence the accused is entitled to be enlarged on bail unless the Court decides otherwise assigning reasons which are relevant to the fact of the case.

47 DLR 24–Abdul Motaleb Shaque Vs. State–Non-working days of a particular judge for reasons beyond his control like unsuitable working condition in the Court room should be excluded while computing the working days. The days on which the case was adjourned due to default of the accused should not be considered as working days, otherwise it will be easy for the accused to stretch the trial beyond the statutory period.

45 DLR 610—Abu Sufian Vs. The State—Provisions of this section is not merely a procedural law. It is a law vesting the accused with a right which could not be taken away by a subsequent amendment of the law (Ref : 19 DLR 242 (SC); 20 DLR 315 (SC) 38 DLR 240 (AD)).

15 BLD 88—Babul Vs. The State—Section 339C(3) provides that if the trial of a case cannot be concluded within the specified and extended time i. e. within 270 working days, further proceedings in respect of the trial stand stopped and the accused persons released. The provision of section 339C(4) meant for stopping further proceedings in respect of the trial of a case and releasing the accused persons is a mandatory provision. The subsequent amendment of law cannot take away the right of release of the accused persons before the amendment of law.

38 DLR 166—Ruhul Amin Vs. The State—"Pending Case" what is. A case becomes a pending case as soon as cognizance is taken by a competent court (Ref : 37 DLR 183, 37 DLR 252, 36 DLR 335).

36 DLR 111—Ali Hossain Vs. The State—If trial has already begun (i. e. before the amendment) it shall be disposed of as if no amendment has taken place.

4 BLD 65—Moklesur Rahman Vs. The State—This new law is not retrospective but prosepective.

3 BLD 168—Muzammel Hoque Vs. The State—Time limit for investigation by police officer in a pending case is not mandatory but merely directory. Accused is not entitled to be released if investigation is not completed within the time limit.

16 BLD (HC) 9—Motiar Rahman and others Vs. The State and another—Section 339C Cr.P.C. does not make any provision for exclusion of the days of adjournments secured by the defence or for non-production of the accused in the Court on the ground of their illness. Days of adjournments obtained by the defence or adjournments granted for non-production of the accused for their illness or for any such similar reason cannot therefore be excluded from 'total working days'.

16 BLD (HC) 198—Rafiq Hassan alias Biplob Vs. The State—Section 339C (4) of the Code makes it incumbent upon Special Tribunal to allow bail to the accused if he fails to complete the trial within the stipulated period envisaged by this Section unless for special reasons it directs otherwise.

17 BLD (AD) 35—Master Giasuddin and others Vs. The State—It required the trial Court to conclude trial within the statutory period from the date the case was received by it and not from the date of framing of the charge. [2 BLC (AD) 87]

18 BLD (HC) 163—Md. Aslam Vs. The State—Bail to an under-trial prisoner—In view of the fact that the appellant has been in custody for about 2 years and as things stand the conclusion of the trial is going to be delayed, the appellant is entitled to get the benefit of section 339C of the Criminal Procedure Code in securing bail.

48 DLR (AD) 6—Abdul Wadud Vs. State—The whole purpose of unamended section 339C was to whip up the prosecution and activise the trial Court so as not to delay the trial of a case unnecssarily.

48 DLR (AD) 6—Abdul Wadud Vs. State—The Sessions Judge made a mistake in holding that after receipt of records of the case for trial in December 1988 by his predecessor, a fresh period of 270 days will start for him to complete the trial since he had taken charge of the Sessions Division in January 1991. Section 339C referred to an office, not a person.

48 DLR 274—Rafiq Hasan alias Biplob Vs. State represented by the Deputy Commissioner—It was incumbent upon the Special Tribunal to allow the accused to go on bail when it could not complete the trial within the time provided.

1 MLR (AD) 66—Abdul Wadud Vs. The State—Application of Act No XLII of 1992 to Pending Cases— The purpose of section 339C (4) was not to give the accused a right not to be tried any more on the same charge or a clean bill of acquittal. Stoppage of trial did not mean an absolute vested right of release of the accused because such right was equally attended with the right of the prosecution to revive the proceedings. With the repeal of sub-section (4) of section 339C

both the rights of release and revival are gone. Section 6 of Act XLII of 1992 is only applicable to proceedings which were stopped before 1-11-1992. The newly amended procedural law will be applicable to pending cases although instituted when the old provision was in force. Ref : 3 BLT (AD) 236.

4 BLT (HC) 89—Abul Khayer & Ors. Vs. The State—Working days mean the working days of the trial judge and not of the Court and as such if the concerned Judge is on leave that period of leave must also be excluded in compuling the statutory of period of the working days for holding the trial of the case as contended by the learned Advocate for the State.

Held : The Principle regarding calculating of working days settled in the decision reported in 40 DLR (AD) 97 is very clear on the point urged before us and the same is binding on this Court.

3 BLT (AD) 139— Naayan Chandra Gowasmi Vs. B. N. Chakrabaty—The order of conviction and sentence could not be set aside on a mere technicality and further that the respondents not having availed of the benefit under section 339C at the trial stage, they could not be allowed the said benefit after the conclusion of the trial and that also at the revision stage as contended by the informant petitioner's Advocate.

Held : If the trial was held in contravention of the prescribed procedure as laid down, it can not be said to be a trial in accordance with law and the consequence as provided in the procedure itself must follow.

3 BLT (AD) 236—Abdul Wadud Vs. The State—Section 339C (4)—The question that arises in the instant case is that during the pendency of the criminal revision before the High Court Division a new provision introduced by Act No XLII of 1992 came into force and this being a procedural law whether it will apply to a pending case.

Held : In view of the repeal of sub-section (4) of section 389C Cr. P. C. followed by re-enactment of the said sub-section the new procedural law will be applicable in the pending cases although instituted when the old provision was in force and

the pending cases are to be governed by the new procedure under the amended law----In our considered opinion the provision of sub-section (4) of section 339C of the Code of Criminal Procedure as amended by Act No. XLII of 1992 will be applicable to the pending cases.

4 BLT (HC) 283—Sohel Vs. The State—Section-339C—Bail—in Nari-o-Shishu Nirjatan Case—It appears that the Court adjourned the trial of the case on every fixed date with direction to issue summons or W. W. against the witness. The trial of a case under the Nari-o-Shishu Nirjatan Daman Ain, 1995, should not be delayed in the manner as is being in this case although the informant appeared and filed several application for cancellation of bail of the accused Shamsunnahar. He being the informant is the first witness in this case but the first witness, although being present in Court, has not been examined till today. We depricate this kind of delaytory tactics by keeping the accused in hajat for an indefinite period without knowing when the trial can be concluded. In such facts and circumstances, we find that the accused appellant is entitled to get the benefit of section 339C Cr. P. C. for the purpose of bail.

339D. omitted.

340. Right of person against whom proceedings are instituted to be defended and his competency to be a witness.—(1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by an advocate.

(2) Any person against whom proceedings are instituted in any such Court under section 107, or under Chapter X, chapter XI, Chapter XII or Chapter XXXVI, or under section 552, may offer himself as a witness in such proceedings.

(3) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial.

Provided that–

(a) he shall not be called as a witness except on his own request in writing; or

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any persons charged together with him at the same trial.

Scope and application–The right of the accused to consult his legal adviser and to be defended by him has been put at the highest footing under Article 33 of the Constitution and it is realy not necessary to derive it new from other enactments (AIR 1954 Raj 241). This section has been expressly made applicable not only to person accused of an offence but to any person against whom proceedings are instituted under the Code in any Criminal Court (27 Cr. LJ 1169). The Government is entitled as of right to be heard by counsel or advocate in support of the prosecution whether in original or in appellate court. The accused is entitled to be respresented by an advocate. This is a privilege given to him. The only duty cast on the court is to afford him the necessary opportunity (AIR 1951 (SC) 441). When a person is not defended, the Judge should make arrangement for his defence in serious cases. In cases where a lawyer has been engaged to defend the prisoner at the expense of the Government, the trial Judge must see that a greater experienced advocate is appointed to cross-examine the witness. This section implies that the accused shall have a reasonable opportunity, if in custody, of getting into communication with his advocate and preparing for his defence (AIR 1935 Lah 230). Full opportunity should be afforded to the accused to get proper legal advice and assistance before he is called upon to cross-examine the prosecution witnesses (AIR 1916 Mad 933). No court has any authority to force upon an accused person the services of a counsel if he is unwilling to acept them (31 Cr. LJ 977). A court is bound to hear arguments offered in any criminal trial or proceeding. Court cannot arbitrarily fix a brief period for the defence to complete its arguments (45 Cr. LJ 1045).

Right of accused to be defended by advocate—The right conferred under this section does not extend to right in an accused person to be provided with a lawyer by the State. This is a privilege given to him and it is his duty to ask for a lawyer, if he wants to engage one himself or get his relations to engage one for him. There is no objection to an advocate who is accused of a criminal offence or is a party in a civil court conducting his own defence or his own case.

When can accused be a witness in disproof of the charges made against him—The court should inform the accused person in clear words that he has right to give evidence though failure to so inform does not necessarily invalidate the trial. An accused giving evidence has the same status as any other witness and he should give evidence from the witness-box and not from the dock. The obvious intention of this provision is that an accused shall have an opportunity of giving evidence on his own behalf in the same way and from the same place as the witnesses for the prosecution and it is not wise to deprive him of the benefit of the statute without sufficient cause. An accused in a competent witness for the defence and may give evidence on oath in disproof of the charges made against him. He will not be compelled to be a witness. If he voluntarily gives evidence, he can do so. An accused can appear only as witness for the defence and never for the prosecution. It is not legal to examine the accused as a court witness. When the case of an accused jointly charged with another is separated so that he can be examined as a prosecution witness in the case of other accused, he cannot be denied the benefit of section 132 of the Evidence Act. The words of sub-section (3) do not appear to have any special significance other than that the accused has the right to examine himself as a defence witness for himself or his co-accused at the same trial. When an accused examines himself as a defence witness, he does not so, of course, with the object of clearing himself of the charge. In many cases in trying to disprove the charge against him, an accused may throw the entire blame on the co-accused by electing to give evidence like any other witness, then he impliedly waives his right as an

accused and he must take the consequences of his action if the statements in his evidence are self-criminative. An accused call for a co-accused may be cross-examined to show his own guilt of the offence charged. When a person, accused along with others, voluntarily goes to the witness-box a witness in the defence, he is in the same position as an ordinary witness and is, therefore, subject to cross-examination by the of prosecution advocate and the evidence brought out in such cross-examination can be used against him and the co-accused, His position as an accused is quite distinct from his position as a witness. Questions containing imputations that the accused had committed offence other than that he was charged cannot be asked. Ordinarily the character of an accused is not subject to attack unless he himself opens the question. In order to secure a fair trial by affording protection to the accused against any prejudice. Judges have in their wisdom ruled out cross-examination affecting his bad character which is highly prejudicial to the fair trial. Failure of the accused to give evidence shall not be made the subject of any comment by the prosecution or any of the parties or the court or give rise to any presumption against the accused and co-accused.

55 DLR 547 (HC)—Babu Khan Vs. State—Right of an accused to be defended by a lawyer in a case charged under section 302 of the Penal Code being punishable with death in an inalienable right guaranted in the law of our land and if any trial takes place refusing such fundamental right the trial is a misnomer and the judgment passed convicting an accused is no judgment in the eye of law.

45 DLR 400—State Vs. Hanif Gani—An advocate to defend an undefended accused charged with capital offence should be appointed well in time to enable him to study the case and the lawyer should be of sufficient standing and able to render assistance. He should be provided with papers which are ordinarily allowed to the accused.

36 DLR 333—State Vs. Imdad Ali Bepari—Conviction of a person charged with committing an offence punishable with death, without his being represented by a lawyer is illegal.

Court's responsibility to see that in such a case a lawyer is appointed to defend the accused.

33 DLR 79—State Vs. Abdul Gazi—Section 340 Cr. P. C confers a right on every accused person brought before a criminal court to be defended by a lawyer. The accused must be afforded full opportunity to be properly defended and he has a right to be defended by a lawyer of his choice. The denial of this right must be held to have rendered the trial as one not according to law and necessitated a fresh trial. Failure to comply with accused's prayer to recall prosecution witnesses for cross-examination on material points by the newly engaged lawyer after the withdrawal of the previous defence lawyer accused prejudice to the accused.

27 DLR 1 (AD)—Abdur Rashid Vs. The State—Last moment appointment of a defence lawyer to defend an accused on a murder charge, deprecated—Elaborate provisions made in the first paragraphs of Chapter XII of Legal Remembrancer's Manual 1960, must be kept in view when a defence lawyer to represent an undefended accused is appointed. Advocate appointed (at Government's expense) to defend an accused of capital offence—Duty which he should be careful to observe. Criminal trial—Committing Magistrate's duty to formally communicate whether the accused is or is not in a position to engage a lawyer in his defence. Sessions Judge's duty—When an accused charged with an offence of capital punishment, is before him not being in a position to engage his own defence lawyer (Ref : 32 DLR 254, 24 DLR 18).

16 DLR 388—Abdul Gani Vs. The State—Accused has right to be defended at the state's cost. Brief must be supplied and proper opportunity be given for the lawyer to make himself ready. Responsibility is of court to engage lawyer for undefended accused.

14 DLR 667—Abdul Manan Vs. The State—Accused has got the legal right of advancing arguments before the trying Magistrate. The right of being defended by an advocate means the right of making such representations or submissions to the court as may be avilable to an accused person for meeting the charges levelled against him.

6 DLR 127 (WP)—Iftekharuddin Vs. The Crown—Counsel appointed by court on behalf of the accused. Court should inform the accused that if representation arranged by it is acceptable to him he should conduct his case himself. Failure to give proper opportunity to accused to engage lawyer of his choice and its effect.

50 DLR 10—Mobarak Ali Vs. Bangladesh—The requirement of law is that irrespective of whether the accused is absconding or not he is as of right entitled to be represented and defended by a lawyer appointed by the court and the trial Court must ensure that it has been done before the commencement of the trial or else and sentence would be vitiated.

48 DLR 95—Hossain Mohammad Ershad {former President Lieutenant General (Rtd) Vs. State—Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.

The law has not given any authority to the learned Sessions Judge to limit the appointment of lawyer by each accused. The order limiting the appointment of lawyer by each accused is absolutely without jurisdiction. Section 352 of the Code of Criminal Procedure provides that the learned Judge of the Court will consider the accommodation of the general public in the Court room. If one accused engages for himself one hundred lawyers, the lawyers are entitled to defend the acused and as regards sitting arrangement the Judge will control, but he cannot pass any order limiting the appointment of lawyer.

51 DLR 268—Ali Akbar (Md) Vs. State and ors.—As the accused has right to know about the prosecution's evidence so the prosecution should have right to know about the accused's evidence before trial.

52 DLR (HC) 370—State Vs. Rabiul Hossain alias Rob—The condemned prisoner was in custody and he was produced before the Court from time to time but he was not represented by any lawyer of his choice. So it was the duty of the court to

appoint a lawyer at the cost of the state to defend the condemned prisoner as the offence was punishable with death.

8 BLT (HC) 245—Yunus & Ors. Vs. The State—The intention of the legislature for inserting such provision enabling the accused to adduce evidence on oath, in our opinion, is to prove the plea of alibi specifically set up by the accused for absolving him from criminal liability particularly when the wife has been killed in the house of the husband or vice versa.

3 BLT (HC) 10—Abdus Sabban Vs. Ali Akbar & Ors—(a) Aggrieved Persons----- Petitioner being the full brother of the deceased victim and a Charge-sheeted Prosecution witness is an aggrived person.

(b) Cogent grounds for revival of the case---- with the creation of a new Session Division, the learned Senior Judges posted there, could not remain present regularly and consquently he could not attend court regularly inspite of his efforts, the application by the accused for stopping the Proceeding was heard exparte only on accused petitioners, the wrong calculation of the working days could not be brought to the notice of their lordships while disposing of the said Criminal Revision case, these are cogent and reasonable grounds for revival of a case.

7 BLT (AD) 17—Md. Nur Israil Talukder Vs. The State—If the provisions of the Criminal Law Amendment Act 1985, the Prevention of Corruption Act, 1947 (Act II of 1947) and Section 8(a) of the aforesaid Criminal Law Amendment (Amendment) Act, 1987 are read thogether it clearly appears that the instant case, where the charge has been framed under Section 409 of the Penal Code and Section 5(2) of Act II of 1947, which is triable under the Criminal Law Amendment Act 1958, in view of the provision of Section 5(2) Cr. P.C. and in the absence of any provision for revival of the case on the expiry of the period of 2 years provided in Section 8(a) of the aforesaid Criminal Law Amendment (Amendment) Act, 1987 there was no legal authority of the learned Divisional Special Judge to revive the case under the provision of the Code of Criminal Procedure.

5 BLC 1—State Vs. Firoj Miah and another—When State defence lawyer got 14 days time to get prepared and no prayer for adjournment was made by him for making preparation of the defence case it is decided that learned Advocate got reasonable time to get ready to conduct the case. In the absence of any evidence it cannot be said that the concerned Advocate was not a senior lawyer.

341. Procedure where accused does not understand proceedings.—If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than High Court Division, if such proceedings result in a conviction, the proceedings shall be forwarded to the High Court Division with a report of the circumstances of the case, and the High Court Division shall pass thereon such order as it thinks fit.

Scope and application—The provisions of this section applies to persons who are unable to understand the proceedings from deafiness or dumbness or ignorance of the language of the country or other similar cause (AIR 1943 Sind 237). Before section 341 can apply the following things must exist (a) that the accused is not insane; (b) that though not insane the accused cannot be made to understand the proceeding to which he is a party (PLD 1954 Lah 569); (c) the inquiry or trial must result in conviction (AIR 1964 Mys 182). It is the court's duty to make a proper endeavour to see whether the accused can be made to understand the proceedings (1957 Cr. LJ 447).

Duty of the Magistrate who cannot pass sentence—Where accused is deaf and dumb some means of communication with him should be adopted. The Magistrate can convict the accused and upon conviction should refer the case to High Court Division, but cannot pass sentence. In making a reference under this section the Magistrate should state his view on the conduct of the accused and must take some evidence regarding the previous history and habit of the accused (AIR 1947 All 301).

16 DLR 664 (SC)—Alam Khan Vs. The State—Session Judge forwarding a case to the High Court should record whether the accused was capable of understanding that the act he was doing was wrong. Where a deaf and dumb person is convicted and a reference is made under section 341 Cr. P. C the High Court should first satisfy itself if there had been a fair trial and if the accused has sufficient intelligence to understand the criminal character of his act, and then it would proceed to pass such sentence as the circumstances of the case would require (Ref : 15 DLR 23 (WP)).

6 DLR 133 (WP)—Mohammed Aslam Vs. The Crown—The powers which the High Court possesses on a reference made to it with regard to the case of an accused who though not insane, cannot be made to understand the proceedings are given in section 341 Cr. P. C. When case comes before the High Court under that section it is open to the High Court to pass any order it considers fit in the circumstances of the case.

342. Power to examine the accused.—(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such question, or by giving false answers to them; but the Court may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.

Scope and application—The first portion of this section as to putting questions to the accused is an enabling

provision but the second portion as to the examination of the accused is imperative. This section requires the accused to be examined for the purpose of enabling him "to explain any circumstances appearing in the evidence against him". It seems to be extremely unfair for a Judge to rely upon a circumstance as being incriminating without giving the accused any notice of it and without giving him an opportunity of expiaining the circumstances. The real importance of this section lies in that in imposes a duty on the court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby an opportunity is given him to explain any such point (AIR 1972 (SC) 535). Examination under this section is not intended to be an idle formality, it has to be carried out in the interest of justice and fair play to the accused. It is intended for the protection and benefit of the accused persons and not in order to enable the prosecution to find out materials to support the prosecution case. By a slipshood examination, which is the result of imperfect appreciation of the evidence, idleness or negligence, the position of the accused cannot be permitted to be made more difficult that what it is in a trial for an offence. The Appellate Court must always consider whether by reason of failure to comply with the procedural provision of this section, which does not affect the jurisdiction of the court accused is materially prejudiced. The object of this section is to enable the accused to explain each and every circumstance appearing in the evidence against him. This cannot be done by such a general question as 'what have you to say'? or 'what is your defence'? The specific point or points which weigh against the accused must be mentioned. For if this is not done, he cannot be reasonably expected to be able to explain those points. The accused is to be examined after the evidence for the prosecution has been recorded. The accused must be examined after the examination, cross-examination and re-examination of all the prosecution witnesses are over. The failure to obtain the signature of accused after his examination under section 342 is nothing more than an irregularity. Non-compliance with the provisions is curable

under section 533 Cr. P. C. Though written statements can be put in and accepted by the court, still they cannot be allowed to take the place of the examination of the accused as required by this section (50 Cr. LJ 469 Cal). No oath can be administered to an accused while he is examined under this section. The silence of the accused must never be allowed to any degree to become a substitute for proof by the prosecution of its case. No presumption arises ipso facto from the silence of an accused person (AIR 1942 All 47). Accused cannot be convicted on the basis of his statement under section 342 which is not in the nature of confession.

56 DLR 185 (HC)—State Vs. Ershad Ali Sikder & ors.—A Self-confessed accused may be treated as an approver but the accused who does not participate in the criminal act along with others cannot be accepted as an accomplice.

56 DLR 223—Jashimuddin Vs. State—Since the petitioner has admitted his guilt no examination under section 342 of the Code of Criminal Procedure is required while convicting and sentencing the accused on the basis of the same.

55 DLR 557 (HC)—Noor Hossain Vs. State—The dying declaration, if be treated as true, cannot form the basis of conviction, as it was not referred to the accused while examined under section 342 of the Code.

54 DLR 60 (AD)—State Vs. Monu Miah & ors.—Incriminating evidence or circumstances sought to be proved by the prosecution must be put to the accused during examination under section 342 Cr.P.C otherwise it would cause miscarriage of justice.

53 DLR (AD) 268 – The accused appellant took same alibi in retraction petition but when he did not adduce any evidence in support of his alibi he did not discharge his burden to prove the alibi [Ref : 43 DLR (AD) 63].

46 DLR 77—Abul Hossain Vs. State—Nothing was put before the accused about the alleged confessions while examining them under section 342 Cr. P. C and for this non-compliance of the mandatory provision, the accused persons have been seriously prejudiced.

15 BLD 37 (AD)—Hasan Ali Vs. The State—Reduction of sentence on compassionate ground-When the age of appellant No. 1 was recorded to be 90 years in his statement under section 342 Cr. P. C. and when there is no material to hold to the contrary, his sentence of R. I for one year is reduced to the period already undergone.

46 DLR 212—Abul Khayer Vs. State—When confessional statement is found to be true and voluntary and it gets corroboration from some other evidence, the appellant had not been prejudiced for non-mentioning of his confession in his examination under section 342 Cr. P. C. This irregularity or omission is curable under section 537 Cr. P. C in the facts of the case and the same has not vitiated the trial.

45 DLR 578—Abdul Karim Vs. Shamsul Alam—The provision of this section is meant for giving the accused an opportunity to explain the circumstances appearing against him. There is no merit in the contention that the appellate Court acted illegelly in relying on his statement under section 342.

45 DLR 755—Kabir Vs. State—There being nothing on record to show that the main aspects of the confessional statement of the accused was not brought to his notice he was certainly prejudiced and as such the statement could not be used against him.

45 DLR 521—Subodh Ranjan Vs. State—The trial court failed to take into consideration along with evidence on record the accuseds written reply giving vivid description of the highhandedness of BDR personnels in support of their defence that they were implicated in the case at the instance of their rival businessmen-appeal allowed.

45 DLR 400—The State Vs. Hanif Gani—An advocate to defend an undefended accused charged with capital offence should be appointed well in time to enable him to study the case and the lawyer should be of sufficient standing and able to render assistance. He should be provided with papers which are ordinarily allowed to the accused.

43 DLR 62 (AD)—A Gafur Vs. Jogesh Chandra Ray—Omission to examine the accused under this section is not curable under section 537 Cr. P. C. After the prosecution closes its evidence the Court shall examine the accused and ask them whether they will adduce any evidence in defence. Omission to do so vitiates the conviction if such omission has prejudiced the accused in their defence. The conviction is set aside and it is directed that the accused be examined under section 342 Cr. P. C by the Trial Court and thereupon the case be disposed of according to law (Ref : 11 BLD 108 (AD), 39 DLR 437, 72, 7 BLD 380, 8 BLD 425, 21 DLR 377).

42 DLR 31 (AD)—Shah Alam Vs. The State—All other PWs. as suggested by the defence are bargadars of Abdul Karim and some of them had also personal grudge against the accused, in view of these facts the defence suggested that Abdul Karim Chowdhury was the main architect of this case as filed against them. These suggestions are not just aimless shots in the wilderness, but are real facts substantiated almost wholly by evidence. A statement of the accused under section 342 Cr. P. C is meant for giving him an opportunity to explain the circumstances appearing against him in the evidence adduced by the prosecution—This is entirely for the benefit of the accused and the accused only—This statement cannot be used by the Court against him, nor is the prosecution permitted to use it to fill up any gap left in the prosecution evidence. A statement under section 342 Cr. P. C is not evidence within the meaning of section 3 of the Evidence Act (10 BLD-25 (AD)).

42 DLR 177—Hazrat Ali Vs. The State—Allegation of torture made in statement recorded under 342 Cr. P. C—No reliance can be placed on the belated allegation of torture by police in obtaining confession in the absence of materials on record to substantiate the same.

14 BLD 167—Abdul Karim Vs. Shamsul Alam—This Section is intended for giving the accused an opportunity to explain the circumstance appearing against him in the evidence and this is entirely for the benefit of the accused. The Prosecution can get no benefit out of it.

14 BLD 280—Zafar Vs. The State—This Section has been provided for the protection and benefit of the accused and it imposes a duty upon the Court to examine the accused properly and fairly by bringing all the incriminating materials to the notice of the accused for enabling them to furnish reasonable explanations. Failure to comply with this requirement of law prejudices the accused persons.

13 BLD 461—Hafez Munshi Vs. State—Omission or defect in the examination of the accused persons under section 342 Cr. P. C, whether occasions any miscarriage of justice.

Held : Omission or defect in the examination of the accused persons under section 342 Cr. P. C does not occasion any miscarriage of justice and the same is mere irregularity and curable under section 537 Cr. P. C.

11 BLD 80 (AD)—Abu Taher Vs. The State—Scrappy examination of accused under section 342 Cr. P. C by the trial Judge is neglect of his duty. In this case the trial Judge neglected his duty to make a proper examination of the accused under section 342 Cr. P. C. He did not at all draw the attention of the accused to their confessional statements nor even to the evidence of PW 4 the only eye-witness in this case. Scrappy examination-non prejudice to accused persons-When? The accused persons do not however, appear to have been prejudiced by the scrappy examination under section 342 Cr. P. C. They submitted a joint wiritten statement giving their defence.

24 BCR 109 (HC)—The State Vs. Fakir Ahmed—The examination under section 342 Cr.P.C has to be done in right manner failing which there is a chance to mislead the accused by such perfunctory examination which may result in miscarriage of justice. The prosecution has to prove the charge beyond reasonable doubt otherwise the circumstances are capable of establishing other hypothesis other than of his guilt.

10 BCR 224 (AD)—Mizazul Islam Vs. State—To link up the accused with the crime the Sandal was not put to the appellant as a circumstances while he was examined under

342—The recovery of sandal and the dagger not having been proved, the prosecution story based merely for oral evidence cannot be relied upon.

41 DLR 349—Abdul Khaleque Vs. State—No hint having been given to her during her examination under section 342 of the Code of Criminal Procedure as to the disappearance of evidence of crime she was prejudiced in her defence and her conviction under section 201 Penal Code is not sustainable.

41 DLR 239—Abu Taleb Vs. State—The accused appellant was asked questions during his statements under section 342 Cr. P. C with the preconceived notion that he was already found guilty under section 395/397 of Penal Code. This type of questions being against all norms of procedure of Criminal Jurisprudence are highly prejudicial to the accused. The accused appellant having been not placed on trial under section 397 P. C. his conviction under section 397 not sustainable in law (Ref : 6 BLD 402).

41 DLR 69—Angur Vs. State—Appellant's attention having been not drawn to the confessional statements, the confessional statement cannot be used against him. No material available to conclude that T. I. parade was conducted legally, appellant entitled to benefit of doubt (Ref : 28 DLR 103, 26 DLR 350, 6 DLR 526, 23 DLR 58).

41 DLR 11—State Vs. Badshah Mollah—No question relating to blood-stained cloth or injury in the hand was put to the condemned-prisoner. This circumstance has no basis to base conviction.

6 BCR 189 (AD)—Shahiddullah Vs. The State—Robbery allegedly committed by two Honda riding appellants who took away Taka 7,100/. Not a single witness from the place of occurrence was examined. Honda number was not given in F. I. R., but given in evidence being 9898 Yamaha. Currency not is currency note. It does not show ownership of it. The prosecution appears to be suspicious and doubtful. It is significant to notice, however, that the investigation officer was not as all challenged in cross-examination as to recovery of money from the appellants. Nor is there any assertion by the

appellants under section 342 that no money was recovered from them. The appeal is dismissed with reduction of sentence (Ref : 6 BCR 63 (AD), 5 BLD 294 (AD)).

37 DLR 113 (AD)—Joynal Abedin Vs. The State—The record shows that he was simply asked as to what he got to say about the evidence he heard but it was not mentioned in the examination sheet 342 Cr. P. C that he was facing trial under section 304 of the Penal Code in addition to the charge under section 147 and 148. The appeal is allowed (Ref : 5 BCR 272 (AD), 5 BLD 257 (AD)).

36 DLR 185—Safar Ali Vs. The State—While examining the accused under section 342, his attention as to his confession should be drawn by the Court. While recording the statement of the accused under section 342 of the Code of Criminal Procedure none of the accused appellants has referred to the confessional statement though conviction was based on it. The appeal is allowed.

3 BLD 240—The State vs. Abu Bakkar—Judicial statement of witness incriminating the accused put to the accused in his examination under section 342 Cr. P. C. Such evidence having been put in the witness for the purpose of contradiction no illegality committed by the court in drawing attention to the same.

33 DLR 191—Karim Vs. The State—Non-recording of accused's statement under section 342 should be treated prejudicial to the accused. As such re-trial of the accuseds from the stage of examination under section 342 Cr. P. C is necessary (Ref : 1 BLD 302).

29 DLR 250 (SC)—K. M. Zaker Hossain Vs. The State—Questions under this section may be put to the accused at any stage of inquiry or trial offering an opportunity to explain any matter affecting him. After examination of prosecution witnesses and before the accused enters into his defence the court shall examine him for the said purpose (Ref : 12 BLD 609, 21 DLR 62 (WP), 12 DLR 274, 7 DLR 123 FC).

28 DLR 35 (SC)—Abdur Razzak Vs. The State—Examination of accused under section 342 is mandatory. Failure to

duly comply with the provisions of section 342 may vitiate the trial only when such failure has prejudiced the accused in his defence. (Ref 30 DLR 421, 28 DLR 13, 16 DLR 224, 12 DLR 818, 11 DLR 296, 8 DLR 63 (WP), 8 DLR 154, 5 DLR 521, 4 DLR 244, 29 DLR 388.

27 DLR 35 (SC)—Jamdar Khan Vs. The State—Incriminating piece of evidence alone is to be mentioned while examining the accused under section 342 (Ref : 9 DLR 73, 12 DLR 586, 9 DLR 40).

21 DLR 688—The State Vs. Hossain—Many things should not have been put all together and simultaneously to the accused persons while examining them under section 342 of the Code and that such examination was likely to confuse the accused persons. The matter should be split up and put to the accused in a convenient form so as not cause any confusion (Ref : 4 DLR 307).

21 DLR 549—Bande Ali Vs. The State—Occurrence took place on the first Poush, 1973 B. S. but Magistrate wrongly put the date of first Baisak, 1373 B.S. while examining the accused persons under section 342. Wrong putting of date by the Magistrate has prejudiced the accused person. Several accused persons in a case should be examined separately. Recording of joint statement of several accused persons by the Magistrate is illegal.

9 DLR 374—Mohajan Ali Sarker Vs. The King—Court witnesses examined after examination of accused under section 342. Accused should be examined under section 342 once again where the court witnesses deposed to something important.

8 DLR 157 (FC)—Munawar Ahmed Vs. The State—Confession being sole support for conviction was not put to the accused. Prejudiced the accused. Conviction was set aside (Ref : 10 DLR 61, 4 DLR 53 FC. 8 DLR 75 (short note), 18 DLR 66).

7 DLR 87 (FC)—Abdul Wahab Vs. The Crown—The real object of section 342 is not to subject the accused to detail cross-examination. It is as a matter of fact, inviting his

attention to the point or points in the evidence which are likely to influence the mind of the judge in arriving at conclusions adverse to the accused, and before such an adverse inference can be drawn the accused should be afforded an opportunity to offer an explanation if he has any (Ref : 6 DLR 141, 5 DLR 142, 3 DLR 505, 3 DLR 518 FC).

16 BLD (AD) 293— Mezanur Rahman and others Vs. The State— The trial Court should draw the attention of the accused to the main incriminating evidence against him, particularly the confessional statement, while examining him under section 342 Cr. P.C. But mere omission to specifically draw the attention of the accused to such evidence does not always prejudice him.

When the accused did not retract his confession either by application from jail or by directly filing such application in the Court at any time, no grievance on the unsubstantiated allegations of inducement and torture can be entertained at the last stage of the trial. [2 BLC (AD) 27].

16 BLD (HC) 580—Md. Nizamuddin Dhali Vs. The State—Examination of accused. The purpose of examination of the accused under this section is to enable him to explain his position with reference to the incriminating pieces of evidence brought against him. It is, therefore, necessary that all incriminating pieces of evidence and circumstances upon which the prosecution relies must be brought to the notice of the accused.

18 BLD (AD) 695—Nurul Islam alias Nur Islam Vs. The State—Provision of section 342 of the Code being a mandatory provision of procedural law, the departure from the fundamental principles of the said section causes grave prejudice to the accused appellant. Since the accused-appellant was not given any opportunity to explain the circumstances, the order of conviction appears to have been vitiated and it is liable to be set aside.

19 BLD (HC) 411—Abu Jamal and others Vs. The State—It is settled law that exculpatory statement uncorroborated by any other evidence, cannot be the basis of conviction. Since

attention was not drawn while the appellant examined under section 342 of the Code either to his confessional statement or to the statement of Dulal, the appellant is obviously prejudiced and as such the trial have been vitiated. Such defect is not curable under section 537 of the Code. (Ref : 51 DLR 57).

44 DLR 83—Mizanur Rahman (Md) Vs. State—Non-mentioning of memo of TI parade, the basis of conviction of the accused appellant in his examination under section 342 Cr. P.C, has definitely prejudiced him inasmuch as in absence of the same he could not explain the matter showing his innocence. [Ref. 17 BLD (HC) 580; 49 DLR 83; 2BLC 79]

49 DLR 573—Abul Kashem and others Vs. State—The only evidence of involvement of the accused appellants comes from their confessional statements, but during their examination under section 342 Cr. P.C the confessional statements were not put up before them and they were denied the opportunities of offering any explanation on the same. This has prejudiced the appellants in their defence.

49 DLR 573—Abul Kashem and others Vs. State—The only evidence of involvement of the accused appellants comes from their confessional statements, but during their examination under section 342 Cr. P. C the confessional statements were not put up before them and they were denied the opportunities of offering any explanation on the same. This has prejudiced the appellants in their defence.

51 DLR 125—Nurul Alam Chowdhury and another Vs. State—The trial Court is under an obligation to properly comply with the requirement of law so as to avoid any possible prejudice to the accused on this Court.

51 DLR 22—Shahidul Vs. State—The provision of section 342 Cr. P. C has been codified providing opportunity to the accused to make out his case of innocence. As he was denied the right to present his case for no fault of his own, the accused was seriously prejudiced in his trial. The order of his conviction is quashed.

3 MLR (HC) 137—আব্দুর রাজ্জাক তালুকদার বনাম রাষ্ট্র—আদালত কর্তৃক অভিযুক্তের পরীক্ষা করণ—বিচারকালে গৃহীত ও লিপিবদ্ধকৃত সাক্ষ্য ও অভিযুক্তের সংশ্লিষ্টতা ব্যাখ্যা পূর্বক অভিযুক্তের বক্তব্য লিপিবদ্ধকরণ ফৌজদারী কার্যবিধির ৩৪২ ধারার বিধানানুযায়ী বিচারকের অবশ্য পালনীয় কর্তব্য। অভিযুক্ত মিথ্যা বক্তব্য প্রদান করিতে পারেন অথবা কোন প্রকার বক্তব্য প্রদান হইতে বিরত থাকিতে পারেন, সেই কারণে অভিযুক্তের বিরুদ্ধে আদালত কর্তৃক কোন বিরূপ ধারণা পোষণ করা যাইবে না। কোন অপরাধ সম্পর্কে অভিযুক্তের বিরুদ্ধে কোন অভিযোগ প্রণয়ন করা হয় নাই এইরূপ কোন অপরাধের জন্য কাহাকেও শাস্তি প্রদান করা যায় না।

4 MLR (HC) 81—Jyoti Prakash Dutta Vs. The State—Examination of accused under section 342 Cr. P. C is not an idle formality or a mere round duty is cast upon the court by this section to bring to the notice of the accused incriminating piece of evidence for affording him an opportunity to offer his explanation defence.

7 BLT (HC) 252—Abu Jamal & Ors. Vs. The State—It is settled law that exculpatory statement uncorroborated by any other evidence, since the attention was not drawn to the confessional statement of the confessing accused when he was examined under section 342 he is obviously prejudiced and his trial therefore has been vitiated. Such defect is not curable under Section-537 of the Code of Criminal Procedure. [Para-26]

20 DLR 87—Nibash Chandra @ Chinu Vs. Dipali Rani and another (Criminal)—Incriminating circumstances appearing in the evidence of PW-I complainant having not been pointed out to the accused he likely to be gravely prejudiced in his defence.

4 BLT (HC) 89—Abul Khayer & Ors. Vs. The State—The confessional statement on scrutiny has been found to be true and voluntary and the same gets corroboration from some other evidence also, appellant had not been prejudiced for non mentioning of his confession in his examination under section 342 Cr. P. C is curable under section 537 Cr. P. C. in the facts and circumstances of the case and the same can not and has not vitiated the trial as alleged.

6 BLC (HC) 335—Kala Miah & others Vs. State (Criminal)—The learned Sessions Judge has totally failed to bring the

dying declaration to the notice and knowledge of the convict appellants under section 342, C.P.C whereby the appellants have been seriously prejudiced.

6 BLC (HC) 402–State Vs. Monu Meah and others (Cri.)–Incriminating evidence or circumstances sought to be proved by the prosecution must be put to the accused during examination under section 342, Cr.P.C which having not been done by the trial Court, the examination of the appellants under section 342 Cr.P.C has been done in a perfunctory manner causing serious prejudice to the accused persons resulting in miscarriage of justice.

53 DLR 268–Nannu Gazi Vs. Awlad Hossain ref. Shahjahan (Md Vs. State (Criminal)–The accused-appellant took some alibi in retraction petition but when he did not adduce any evidence in support of his alibi he did not discharge his burden to prove the alibi. 43 DLR (AD) 63.

8 MLR 70 (HC)–Khokon Mridha & ors Vs. State–Section 164-342–Confessional statement of an accused when found true and voluntary can form basis of conviction of the maker. Ascertainment of age is a mixed question of fact and law. Age of an accused as stated during her examination under section 342 Cr.P.C is more reliable than that disclosed during recording her confessional statement.

6 MLR (AD) 166-170Minhaz and another Vs. The State–Examination of accused-Legal implications-Delay in lodging FIR-When satisfactorily explained-not fatal-Alibi taken during trial-Proof thereof-Section 342 Cr.P.C provides for an opportunity to the accused to explain his position in relation to the evidence brought on record against him. He may file documents which form part of his statement. He is not required to prove those document. Such statement of accused is not evidence within the meaning of section 3 of the Evidence Act, 1872. Neither the prosecution nor the court can use such statement against the accused except for his benefit.

21 BLD (AD) 103–Minhaz & anr. Vs. The State–Section 342 of the Code provides for an opportunity to the accused to explain the circumstances against him in relation to the

evidence brought on record. Document filed by the accused during his examination under section 342 of the Code merely forms part of his statement thereunder, which does not require any formal proof nor such statement can be treated as evidence within the meaning of section 3 of the Evidence Act.

21 BLD (AD) 103—Minhaz & anr. Vs. The State—When alibi is taken by an accused as a defence, the burden of proof heavily lies upon the accused, which the petitioners in the instant case failed to discharge.

4 BLC 559—Babu Mollah and ors Vs. State—While examining the accused persons under section 342, Code of Criminal Procedure the evidence against them were not placed for which the trial as a whole will not be vitiated, only the case may be sent for fresh trial from the stage of examination under section 342 of the Code.

5 BLC 210—State Vs. Jashimuddin @ Jaju Mia—Although the extra-judicial confession of the condemned prisoner and recovery of the dead bodies on the basis of his extra-judicial confession and the judicial confession made by him were not referred to during his examination under section 342, Cr.P.C but if the facts and circumstances of the case the condemned prisoner had knowledge of the prosecution case for which no prejudice has been caused to him and hence the trial is not vitiated.

5 BLC 230—State Vs. Abul Kalam—Now-a-days it is well settled that the accused remaining present following the proceeding of the trial hearing the evidence recorded against him and cross-examination the witnesses, even if detailed narration of the evidence is not given under section 342, Cr.P.C, no prejudice is caused to accused kalam who appears to be a literate person when the accused in such examination replied to the questions duly and refused to adduce any evidence.

5 BLC 475—Abdur Rahim (Md) Vs. State—Section 342 and 537—Examination of the accused and curing irregularities Section 537 of the Code is an enabling provision to cure irregularities and insignificant illegalities cropping up in a

Criminal trial but it is never intended to cure any illegality causing prejudice to the accused. It has been consistently held by the High Court Division in no uncertain terms that the examination of the accused under section 342 of the Code gives a valuable right to he accused to have his full say about the evidence and circumstances appearing against him at the trial to gear up his defence as it suit his convenience.

343. No influence to be used to induce disclosures. Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withold any matter within his knowledge.

Scope and application—The section prohibits influence in two ways, in the making of the disclosure and in the withholding of the disclosure. The only prohibition against the use of accomplice testimony exists in the rule of caution about corroboration.

344. Power to postpone or adjourn Proceedings.—(1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable and may by a warrant remand the accused if in custody :

Remand—Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than High Court Division shall be in writing signed by the presiding Judge or Magistrate.

Explanation : Reasonable cause for remand—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Scope and application—The object of this section is to avoid hardship of the parties and witnesses. The policy of law is that criminal cases should be disposed of with the least possible delay (AIR 1945 Sind 32). The longer the period allowed to elapse from the time of the arrest to the time the witnesses giving evidence, the greater is the probability of confusion and of the truth being obscured (27 Cr. LJ 129). A postponement sine die is not in accordance with the provisions of this section. There is no hard and fast rule that a criminal case should be stayed pending the disposal of a civil suit in relation to the same subject matter. Each case must be decided upon its own facts (33 CWN 99). This section relates to proceedings in inquiries or trials and has nothing to do with police investigation. This section enables a Magistrate or Judge to postpone or adjourn any inquiry or trial which is being held in his own court. Adjournment should not be made except upon strong and reasonable grounds. The correct method is for the court to postpone the case for fixed and definite periods pending the disposal of the connected case (34 Cr. LJ 139). There is no provision in the Code for enforcing the accused to give the complainant adjournment costs. Impostition of costs is illegal and without jurisdiction (1962 Cr. LJ 828, AIR 1971 (SC) 186).

56 DLR 324—Saifuzzaman (Md) Vs. State—Matistrate could make the order of remand in the absence of the accused if he is seriously ill and cannot be produced in Court.

56 DLR 324—Saifuzzaman (Md) Vs. State—The custody spoken of is jail custody. The Magistrate can remand an accused person to custody for a term not exceeding 1 days at a time provided that sufficient evidence has been collected to raise a suspicion that the accused may have committed an offence.

56 DLR 622—Tareq Shamsul Khan alias Himu & ors Vs. State—It is desirable that for ends of justice as well as to avoid any future complication all the counter-cases be tried by same Judge one after another which may not prejudice the parties.

44 DLR 116—Hossain Md. Ershad Vs. State—Power to postpone proceedings—Applicability of such power to postpone

judgment in a criminal case pending disposal of a civil suit. The Application under section 344 Cr. P. C had been moved at a belated stage after the evidence was closed and the trial came to an end. Only because the judgment remains to be delivered, the application does not appear to be one as contemplated under section 344. In fact the petr. knew of this and prayed for adjournment of the judgment, not of the trial. The application at this stage does not appear to be maintainble (Ref : 1 BSCD 108. 12 DLR 53 (WP)).

43 DLR 66—Sharif Md. Vs. Md. Obaidur Rahman—Stay of Criminal Proceedings-Remand. A case and counter case over the self-same occurrence are to be tried by the same Court one after another. The judgment in both the cases is to be pronounced on the same date by the same Magistrate so that there is no conflicting decision and the parties are not prejudiced. The impugned judgment and order is set aside and the case remanded back to the Magistrate with direction to try CR Case No. 155 of 1989 and Cr. Case No. 152 of 1989: by the same Magistrate giving opportunity to the parties to adduce their evidences and keeping the evidence already recorded in CR Case No 155 of 1989 intact.

43 DLR 102 (AD)—Zakir Hossain Vs. State—Stay of proceeding—In the facts of the case as in point of time the civil suit was instituted before the filing of the FIR and the questioned documents in their originals are yet to be produced and examined by the civil court. The criminal proceeding where the documents are claimed as forged, may, in the interest of justice, be tayed till the disposal of the civil suit (Ref : 10 BLD 287 (AD))

39 DLR 303—Rafique Ahmed Vs. Badiul Alam—Power to stay criminal proceeding pending in the subordinate court is derivable from section 561A Cr. P. Code. Indefinite adjournment sine die against the policy of criminal law. No stay may be granted sine die or for indefinaite period. Pending the decision of a civil suit, no stay for an indefinite period of sine die can be given in respect of a criminal proceeding. It is of great public importance that an accused should be brought to trial as early as possible (Ref : 11 DLR 127 (WP), 4 BLD 319, 4 BCR 214).

7 BCR 165 (AD)—Noor Alam Vs. The State—Mere pendency of an earlier civil suit is no ground to stay proceedings in a subsequent criminal case. The Court is to take into consideration all the relevant facts and circumstances including the nature of allegations and the points involved in the cases while staying further proceedings.

38 DLR 132—Mrs. Shahar Banoo Ziwar Sultana Beyad Vs. Mrs. Wahida Khan—Indefinite postponement of a criminal case is against the policy of law. If the criminal case which is a case of forgery of document and cheating is kept stayed indefinitely that will certainly prejudice the complainant as well as the criminal case itself. Indefinite adjournment of a criminal case is against the policy of law. When there is no knowing when the suit will be heard the stay of the cirminal proceeding would mean a stay for an uncertain and indefinite period and the criminal proceeding will be prejudiced and upon lapse of unlimited time it will be difficult to ascertain the truth. Civil Court will take time in the disposal of civil suit and therefore indefinite postponement of criminal case is undesirable, particularly when it is uncertain how long the civil court will take to dispose of this suit. (Ref : 22 DLR 502, 25 DLR 331, 22 DLR 37, 21 DLR 702 and 6 BLD 315).

37 DLR 107—Md Taheruddin Vs. Abul Kashem—If prosecution witnesses are absent on the date fixed for the examination of witnesses, the Sessions Court has to see whether an adjournment is necessary or adviseable. Section 344 Cr. P. C enables the Sessions Court to postpone or adjourn the proceedings. Public prosecutor is under no obligation to procure P. Ws attendance in Court.

3 BCR 265—Abdur Rab Meah Vs. The State—In the interest of justice where stay of criminal proceeding is expedient and desirable in view of the pendency of a dispute between the parties in the civil court on the same subject-matter, the criminal court may adjourn the criminal case till the disposal of the civil suit.

20 DLR 363—Dr. Manzoor Hossain Vs. The State—Adjournment cost should not be awarded to place obstacle on the defence (Ref : 12 DLR 53 (WP)).

13 DLR 215—Dhirendra Chandra Chakraborty Vs. Nani Gopal Chakraborty—Where, the decision in the civil suit is likely to have a direct and vital bearing upon the alleged guilt or otherwise of the accused in the criminal case or render his prosecution, for all practical purposes, infructuous, the proper course is to keep the criminal case stayed. Where there is the chance of prejudice to the accused if the criminal case against him were allowed to proceed and be disposed of before the civil suit, and should the case thus and unfavourably to him that adverse decision is likely to prejudice him in his defence in the civil suit as well. It is proper to stay criminal case.

2 BLT (AD) 185—Mantasir Billah Vs. Bepari Abdur Rab & Ors.—The hearing of case No. 33 was concluded and 25. 9. 1993 was fixed for judgment but the delivery of judgment has remained pending, on the ground of pendency of the counter case No. 34 which it appears, is still in the midst of examination of witnesses --- long thereafter the informant in case No. 33 moved the Sessions Judge in revision on 8.3. 1995. The learned Sessions Judge rejected the revision petition informant came upto the High Court Division with an application under section 561—A Cr. P. C which was summarily rejected by a Division Bench.

Held : The Sessions Judge of the High Court Division ought to have given a direction to the Magistrate for concluding the trial in case No. 34 quickly as the other case No. 33 was awaiting judgment for nearly two years---- it does not give credit to the Sessions Judge to have ingored the aforesaid facts and to have disposed of the revision petition wrongly by a mere fiat that it was hopelessly time-barred.

3 BLT (AD) 64—A.B. Siddikur Rahman Vs. A.M. Harunur Rashid & Ors.—The question of stay is one of judicial discretion of the court having regard to the facts and circumstances of a given case--- if the finding of the civil suit is likely to prejudice the accused then the question of stay should be given favourable consideration--- The Principle governing the stay of proceeding of civil suit vis-a-vis criminal cases is that the criminal matters should be given precedence. [Para-5]

Revision—The Sessions Judge has power of interference under section 435 and 439A Cr. P. C. with an order under section 344 passed by Magistrate.

345. Compounding offences.—(1) The offences punishable under the sections of the Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table :—

Offence	Sections of the Penal Code applicable	Persons by whom offence may be compounded.
Uttering words, etc; with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded
Causing hurt	323,334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	the person restrained or confined.
Assault or use of criminal force	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour.	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	Person to whom the loss or damage is caused.
Criminal trespass. House trespass.	447 448	The person in posession of the property trespassed upon.
Criminal breach of contract of service.	490, 491, 492	The person with whom the offender has contracted.

Offence	Sections of the Penal Code applicable	Persons by whom offence may be compounded.
Adultery. Enticing or taking away or detaining with criminal intent a married woman.	497 498	The husband of the woman.
Defamation.	500	The person defamed.
Printing or engraving matter, knowing it to be defamatory.	501	The person defamed.
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	The person defamed.
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation except when the offences is punishable with imprisonment for seven years.	506	The person intimidated.
Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the offence was committed.

(2) The offences punishable under the sections of the Penal Code specified in the first two columns of the table next following may, with the permission of the court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table :—

Offence	Sections of the Penal Code applicable	Persons by whom offence may be compounded.
Rioting.	147	The person against whom force or violence has been used.
Rioting armed with deadly weapon.	148	Ditto
Voluntarily causing hurt by dangerous weapons or means	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt.	325	Ditto
Voluntarily causing grievous hurt on grave and sudden provocation.	335	Ditto
Act endangering human life or the personal safety of others.	336	Ditto
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Ditto
Wrongfully confining a person for three days or more.	343	The person confined.
Worngfully confining for ten or more days.	344	Ditto

Offence	Sections of the Penal Code applicable	Persons by whom offence may be compounded.
Wrongfully confining a person in secret.	346	Ditto
Wrongfully confinement to extort property or constrain to illegal act.	347	The person wrongfully confined.
Wrongful confinement to extort confession or compel restoration of property.	348	Ditto
Assault or criminal force to women with intent to outrage her modesty.	354	The woman assaulted, or to whom the Criminal froce was used.
Assault or criminal force attempt to commit theft of property worn or carried by a person.	356	The person assaulted or to whom criminal force is used.
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Theft.	379	The owner of the property stolen.
Theft in dwelling house.	380	Ditto
Theft by clerk or servant	381	Ditto
Dishonest misappropriation of property.	403	The owner of the property misappropriated.
Criminal breach of trust	406	The owner of the property in respect of which the breach of trust has been committed.

Offence	Sections of the Penal Code applicable	Persons by whom offence may be compounded.
Criminal breach of trust by a carrier, wharfinger, etc.	407	Ditto
Criminal breach of trust by a clerk or servant.	408	Ditto
Dishonestly receiving stolen property, knowing it to be stolen.	411	The owner of the property stolen.
Assisting in the concealment or disposal of stolen property knowing it to be stolen	414	Ditto
Cheating.	417	The person cheated.
Cheating a person whose interest the offender was bound, by lay or by legal contract, to protect.	418	Ditto
Cheating by personation	419	Ditto
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	420	Ditto
Fraudulent removal or concealment of property etc. to prevent distribution among creditors.	421	The creditors who are affected thereby
Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	422	Ditto

Offence	Sections of the Penal Code applicable	Persons by whom offence may be compounded.
Fraudulent execution of deed of transfer containing false statement of consideration	423	The person affected thereby
Fraudulent removal or concealment of property.	424	Ditto
Mischief by killing or maiming animal	428	The owner of the animal.
Mischief by killing or maiming cattle. etc.	429	The owner of the cattle or animal.
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person.	430	The person to whom the loss or damage is caused.
House-trespass to commit an offence (other than theft) punishable with imprisonment.	451	The person in possession of the house trespassed upon.
Using a false trade or property mark.	482	The person to whom loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another.	483	The person whose trade or property mark is counterfeited.
Knowingly selling or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with a counterfeit trade or property mark.	486	Ditto

Offence	Sections of the Penal Code applicable	Persons by whom offence may be compounded.
Cohabitation caused by a man deceitfully including a belief of lawful marriage.	493	The woman with whom cohabitation was caused.
Marrying again during life time of a husband or wife.	494	The husband or wife of the person so marrying.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.	509	The woman whom it is intended to insult or whose privacy is intruded upon.
Attempting to commit offences punishable with imprisonment.	511	The person against whom such attempt was made or committing the offence.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence.

(5) When the accused has been sent for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is sent or, as the case may be, before which the appeal is to be heard.

(5A) The High Court Division acting in the exercise of its powers of revision under section 439, and a Court of Session so acting under section 439A, may allow any person to compound any offence which he is competent to compound under this section.

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(7) No offence shall be compounded except as provided by this section.

Scope and application—The law makes a difference between various classes of offences and allows compromise in some and no compromise in other (3 CWN 5). When an offence with which a particular person is charged is compoundable, he is at liberty to come to a settlement with the prosecution and the settlement so arrived at, be considered to be legal (AIR 1942 Mad 173). The word 'compound' means to withdraw for a consideration. A complaint can be withdrawn only by the complainant, who may not necessarily be the person injured. The court cannot allow the compounding of on offence which is not compoundable under section 345. It is only the person specified in Section 345 who can compound an offence (AIR 1937 Nag 72). A compromise once affected cannot be withdrawn (AIR 1940 Nag 181). The filing of a compromise petition verified by both the parties in respect of an offence mentioned in sub-section. (1) has the effect of an acquittal even though no order of acquittal is actually passed and the court has no power subsequently to amend the charge at the instance of the complainant (AIR 1952 All 366). The powers under section 345 Cr. P. C in granting permission for the compounding offences is a specific power under the Code of Criminal Procedure applicable to a pending proceeding. This power can not be exercised under section 561 A Cr. P. C after an appeal has been heard and decided. A case may be compounded at any time before the sentence is pronounced. Therefore, petition of compromise filed by the parties when the judgment was actually being written should be accepted (29 Cr. LJ 1058). The court should require proof of the

composition. The compromise may be in court or out of court (74 Cr. LJ 242). An offence created by a special law is non-compoundable. Compromise with one accused does not affect an acquittal of others.

38 DLR 38 (AD)—Abdus Sattar Vs. The State—Conviction under section 379 Penal Code—Appeal on special leave pending before the Appellate Division against conviction when a petition was moved for permission to compromise the dispute between the complainant and the accused (the parties being inter related) Compromise petition allowed as law encourages compromise. We have no hesitation in allowing the composition and as a result, this composition shall have the effect of acquittal of the accused (Ref : 1985 BCR 454 (AD), 6 BLD 105 (AD), 8 DLR 54 (WP), 7 BCR 92 (AD)).

36 DLR 240 (AD)—Md. Joynal Vs. Md. Rustam Ali Meah—Compounding of certain class of offence. Law encourage compounding of such offence. Law encourage settlement of dispute either by Panchayt or by arbitration or by way of compromise and if it is a criminal offence the offence can be compounded within the limit of section 345 Cr. P. C. The category of offence compoundable have been enlarged by the Law Reform Ordinance and at the moment offences under sections 380/148/448/143 and 379 of the Penal Code are compoundable. It is improper for a person to disown his act after having taken some advantage. A person in pari delicto cannot seek any relief before any court of law. Law does not encourage a person to take advantage of his own wrong. Withdrawal of a case as distinguished from composing an offence. Withdrawal and composition are distinct concepts. Withdrawal is the act of the complainant whereas the composition of an offence requires the co-operation of both parties. Whether a petition is one for withdrawal or compromise, is to be judged from the fact of each case. Offence compoundable (i. e. one under section 325 Penal Code) with the permission of the court was compounded by the parties for settling a long starding dispute, valid in law, nothing wrong (Ref : 4 BLD 86 (SC)).

6 DLR 28—Sahar Ali Vs. Samad Ali—If the Judge permitted the case to be compromised, then under section 345 (6) he had no alternative but to acquit the accused and set aside the conviction and sentence.

16 Cr. LJ 81 FB—If a charge is framed in respect of a compoundable offence, and the proper person files a petition of compromise, the Magistrate cannot alter the charge into one of a non-compoundable offence, to prevent composition. He must give effect to the petition and acquit the accused.

Appeal—Appeal lies by the Govt. under section 417 from an order according sanction to compound as it has the effect of an acquittal.

Revision—Sub-section (5A) explicitly confers power on the High Court Division and Sessions Court, acting in the exercise of its powers of revision, to allow any person to compound offences which may lawfully be compounded (1968 P. Cr. LJ 820).

6 MLR (HC) 352-353—Yusuf Ali and others Vs. The State and another—Compounding of offence-As provided under section 345 of the Code of Criminal Procedure offence under section 325 of the Penal Code may be compunded by the person to whom hurt is caused.

346. Procedure of Magistrate in cases which he cannot dispose of.—(1) If in the course of an inquiry or a trial before a Magistrate in any district, the evidence appears to him to warrant a presumption that the case is one which should be tried or sent for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted, may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or send the accused for trial.

Scope and application—This section applies only when the Magistrate is of opinion from the evidence that the offence

committed in one which he is not competent to try or is otherwise incompetent to deal with and also cases of absence of local or territorial jurisdiction (69 CWN 436). A Magistrate who finds that he has no jurisdiction to try a case cannot discharge an accused on that ground but should proceed under this section. Where a first class Magistrate trying a complaint finds, though at a very late stage of trial and after taking some evidence, that he has no territorial jurisdiction to try it, the Magistrate must return the complaint under section 201 of the Code and cannot proceed under section 346 of the Code.

8 DLR 21 (WP)—Md. Hanif Vs. The Crown—Where a case concurrently triable both by the court of Session and a Magistrate the Code gives the latter the power to decide whether the case should or should not be sent to a Court of Session for trial and he is not bound by any provisions in the Code to act in one way or the other.

347. Procedure when higher punishment should be inflicted on accused.—Notwithstanding anything contained in this Code, whenever a Magistrate of the first class is of opinion, after, recording the evidence for the prosecution, that if the accused or, where more accused than one are being tried together, any of such accused is convicted he should receive a punishment more severe than that which such Magistrate is empowered to inflict, he may record his opinion and submit his proceedings, and forward the accused, or all the accused, to the Court of Session to which he is subordinate, whereupon the Court of Session shall try the case as if the case were exclusively triable by it under this Code.

Scope and application—This section applies only when after commencing trial with a view to disposing it of himself a Magistrate comes to the opinion from the facts disclosed that the case should be sent to the session either because he is incompetent to try or because he cannot inflict adequate punishment or for any other reason. Therefore, it is the mere oppinion of the Magistrate that must prevail. The discretion should be exercised with care and on some proper ground (AIR 1956 Andh 17). The following are good grounds for sending up

a case before that Court of Session, (1) the gravity of the case : (2) facts constituting the offence forming part of the same transaction with another offence triable by session (21 Cr. LJ 719) : (3) the fact that in respect of the same transaction another party of accused is being tried by sessions (18 Cr. LJ 524). When the Magistrate holds an opinion that the accused committed offence triable by the Court of Session, he should not acquit the accused on suspicion that the case has been exaggerated. He should have sent the case to the Court of Session for trial.

348. Trial of persons previously convicted of offences against coinage stamp-law or property.—(1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards shall if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for sending the accused be sent to the Court of Session or unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted :

Provided that, if any Magistrate in the district has been invested with powers under section 29C the case may be transferred to him instead of being sent to the Court of Session.

(2) When any person is sent to the Court of Session under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly sent unless the Magistrate discharges such other person under section 241A.

Scope and application—This section has been enacted in order to aid the requirements of section 75 of the Penal Code. The object is that an old offender should be tried by a court,, which can inflict such adequate punishment as the circumstances of the case demands (AIR 1957 MP 213). For application of section 348 previous conviction should have been one for an offence under Chapter XII of XVII of the Penal Code (AIR 1923 Lah 286). A previous conviction under any

local or special law is not a conviction for an offence under the Penal Code and will not count for the purposes of this section. This section pre-supposes that the Magistrate has power to send the accused for trial to the Court of Session, if the conditions of this section are satisfied (AIR 1949 Pat. 317).

349. Procedure when Magistrate cannot pass sentence sufficiently severe.—(1) Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

(1A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

Provided that he shall not inflict a punishment more servere than he is empowered to inflict under section 32 and 33.

Scope and application—When a Magistrate on finding an accused guilty is of opinion that the punishment should be (a) different from that which he can inflict or (b) should be more severe than he can inflict he should submit the case to the Sub-divisional Magistrate or to the District Magistrate to whom he is subordinate for his order. A Magistrate has no power to refer under this section a case which he has no

jurisdiction to try. A Sub-divisional Magistrate to whom a case is submitted under this section, can send the case to a Court of Session or transfer it to a District Magistrate who can act under this section. But he cannot transfer it to a Magistrate who is not empowered to act under this section (AIR 1914 Bom. 217). When a case is sent up under this section to a Sub divisional Magistrate such Magistrate is not competent to inflict a punishment more severe than what he is empowered to inflict under the Code.

349A. Conviction on evidence partly recorded by one Sessions Judge, etc; and partly by another.—(1) Whenever any Sessions Judge, Aditional Sessions Judge or Assistant Session Judge after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction therein, and is succeeded by another Sessions Judge. Additional Sessions Judge or Assistant Sessions Judge, as the case may be, who has and who exercises such jurisdiction, the Judge so succeeding may act on the evidence so recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the trial;

Provided that if the succeeding Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge, as the case may be, is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) When a case is transferred under the provisions of this Code from one Court of Session to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1).

Scope and application—

49 DLR (AD) 32— Martial Law Court. State Vs. Golam Mostafa and others—Sessions Judge acted illegally in deciding the case upon the evidence recorded by the Special Martial law Court.

This was the precise argument made on behalf of the respondents in the High Court Division which should have been upheld but the High Court Division misdirected itself in relying upon paragraph 4 of the Proclamation of Withdrawal of Martial Law dated 10-11-86. Although the reason was wrong but its conclusion was right that the order of conviction and sentence was illegal and without Jurisdiction.

5 BLT (AD) 3—The State Vs. Golam Mostafa & Ors.—Whether the Provision of Section 349A of Code of Criminal Procedure are applicable for saving the Judgement of the learned Session Judge which was admittedly based on the evidence not recorded by him but by the special Martial Law Court.

Held : It will remain a matter of regret that inspite of recording the evidence of as many as 50 witnesses there could not be a legal conclusion of the trial for an offence of murder which will be shelved without a Judgment being delivered, one way or the other, by a competent Court of law. [Para-18]

1 MLR (AD) 320—The State Vs. Golam Mostafa and others—Conviction may be passed on the evidence partly recorded by one Sessions Judge and partly by another Sessions Judge. A Sessions Judge is not successor court of Special Martial Law Court and as such the Sessions Judge cannot pass conviction on the basis of evidence recorded by Special Martial Law Court. After getting back the case record from the Special Martial Law Court, the Sessions Judge ought to have resummoned the witnesses for exmination after framing charge.

350. Conviction on evidence partly recorded by one Magistrate and partly by another.—(1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and recommence the inquiry or trial.

Provided that if the succeeding Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) Nothing in this section applies to cases in which proceedings have been stayed under section 346 or in which proceedings have been submitted to a superior Magistrate under section 349.

(3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub section (1).

Scope and application—It is a general principle of law that only a person who has heard the evidence in the case is competent to decide whether the accused is innocent or guilty (AIR 1962 (SC) 690). This section gives the succeeding Magistrate jurisdiction to decide the case on evidence recorded by his predecessor, but it cannot give him jurisdiction to deliver a judgment written by his predecessor. The object of this section is to prevent delay and harassment and to save the costs of a fresh inquiry or trial when a Magistrate goes out of office on account of transfer, removal, retirement etc. after hearing it in part. The section provides that the Magistrate to whom the case is transferred or the Magistrate who succeeds the prior Magistrate may pronounce judgemet on the evidence recorded by his prodecessor, evidence recorded by himself or he may in his discretion re-summon or re-hear any of the witnesses already examined by his predecessor if he thinks necessary in the interest of justice. In any case the trial is to be a continuation of the earlier trial and there is no question of a fresh or denovo trial under this amended section. The Magistrate will proceed from the stage where it was left off and he may re-summon only such witnesses as he thinks necessary, but no party has any right to claim it. This section applies not only when one Magistrate is succeeded by another

but also where the second Magistrate is succeeded by another. The power given by this section is confined to Magistrate. This section does not apply where the previous records have been lost or destroyed. The court is bound to reconstruct such records (12 DLR 96 (WP)). The section is wide enough to cover any inquiry or trial under the Code. Where there is an order for further inquiry in revision, the Magistrate can summon the witnesses afresh in exercise of his discretion under section 350. It is entirely in the discretion of the Magistrate to re-summon witnesses alrready examined by his predecessor if he feels it necessary in the interest of justice or to proceed upon the evidence already on record. An order for a re-trial from a particular stage does not exclude the section. When a case has been remanded and it returns to a succeeding Magistrate this section applies. This section is applicable to proceedings under section 145. Where in the course of such proceedings one Magistrate is transferred, the succeeding Magistrate can act upon the evidence already recorded (37 Cal 812) even though one of the parties demanded a denovo hearing (25 Cr. LJ 89). This section would not apply to a sessions case (48 Cr. LJ 81).

3 BLD 187—Surat Kumar Biswas Vs. Cecil Sudin Baroi—Proviso to section 350 (1) read with section 250E (3) Cr. P. C gives the trying Magistrate discretion to recall and resummon any witness for further cross-examination by the defence if he thinks it necessary in the interest of justice. The defence cannot ask the Court to recall a witness already cross examined and discharged for further cross examination as of right. The defence has to satisfy the trying Magistrate regarding the necessity for recalling and resummoning a prosecution witness for further cross-examination so that the Magistrate may decide whether he should recall and resummon any prosecution witness for such prupose. Points submitted by the defence should not be shown to the prosecution by the Magistrate (Ref : 34 DLR 305).

30 DLR 175—Abul Mollah Vs. Alauddin Ahmed—High Court ordered for retrial of the case. Since the High Court did not indicate the stage from which retrial was to commence, it

must be presumed that re-trial was ordered to commence form the beginning (Ref : 13 DLR 842, 11 DLR 19 (WP)).

16. DLR 174 (SC)—Mrs. Akhter Mumtaz Vs. The State—The accused has the statutory right under section 350 of the Code of Criminal Procedure to recall any of the prosecution witnesses for cross examination and he could not be deprived of the right by an order of the High Court.

350A. Changes in constitution of Benches.—No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.

351. Detention of offenders attending court.—(1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial or any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place after a trial has been begun the proceedings in respect of such person shall be commenced afresh and the witnesses re-heard.

Scope and application—The language of this section makes it clear that an order under this section can be made only after cognizance of the offence has been taken by a Magistrate and he is seized of the case. After cognizance of the offence has been taken by a Magistrate he cannot be deemed to get divested of the cognizance merely because of his passing an order under section 351. The initial act of taking cognizance is complete and cannot be undone by the mere arrangement of another person as an accused consequent upon the making of the order under section 351 of the Code and the reason for that is when a Magistrate takes cognizance he takes cognizance of the offence as a whole and not merely in respect of the person who for the time being is put in the

dock as an accused (AIR 1967 Punj 35). Once an order is made becomes an accused at the trial of that very case in which the order is made.

6 BLC (HC) 604—Sahera Khatun Vs. State and others (Criminal)—Section 351, 369 and 439A—Learned Magistrate has accepted the report submitted by the police against the first information report-named accused and discharged the witnesses who were illegally transposed in the category of accused. Subsequently, he rejected the prayer for further investigation made by Criminal Investigation Department on assigning reasons and in making such order, learned Magistrate has committed no illegality.

352. Courts to be open.—The place in which any Criminal Court is held for the prupose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them :

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

Scope and application—There is nothing in the Code of Criminal Procedure that prevents a Magistrate from holding court anywhere within the territorial jurisdiction so long as it is an open court. But as a rule of prudence it should be held at proper place (AIR 1967 Tri. 18). This section gives power to the court of ordering that any particular person shall not remain in the room used by the court. It makes no exception in the case of a police officer. When the accused person objects to the presence of a police officer or other person the Magistrate has to decide whether the accused's fear of prejudice to his case is reasonable, considering the intelligence and susceptibilities of the class to which he belongs and not merely whether the presence is convenient or helpful to the court of the prosecution (1966 Cr. LJ 1445). Trial can be held in jail premises provided the Magistrate passes a formal order directing that the trial should be held in jail premises.

Magistrate owes a duty to see that proper facilities given to the members of the bar to defend their clients. It is open to the court to direct that entire proceedings of a trial should be held in camera provided that it is necessary for ends of justice.

21 DLR 310—Ataur Rahman Vs. The State— Magistrate can hold trial in places other than court room. But a formal order declaring the place of trial is essential.

18 DLR 154 (WP)—Abdul Rashid Chowdhury Vs. The State—Court's order debarring the public as well as the lawyers (not engaged in the case) cannot be objected to in view of the provisions of the section.

2 DLR 80—Nadira Begum Vs. The Crown—A trial in jail is not illegal under section 352. The Magistrate who tries the case has a discretion to prescribe the place in which the trial shall be held. There can be a complaint of illegality if it is shown that admittance was refused to lawyers or other persons connected with the case who desired admittance.

1 MLR (HC) 3—Hussain Muhammad Ershad Vs. The State—Does not authorise the Sessions Judge to limit the appointment of lawyers by each accused. Order limiting the appointment of lawyers by the accused is absolutely without jurisdiction.

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CHAPTER–XXV

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS

353. Evidence to be taken in presence of accused.– Except as otherwise expressly provided, all evidence taken under Chapters XX, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his advocate.

Scope and application–According to section 353 Cr. P. C the presence of the accused at the time of recording evidence is necessary but there is an exception engrafted on this section as is clear from the words "except as otherwise expressly provided" when his personal attendance is dispensed with under some other provisions contained in the code. This section does not confer upon a Judge or Magistrate any power to dispense with the personal attendance of the accused during the trial. The wordings of the section are merely descriptive and do not create any power in favour of a Judge or Magistrate. This section enjoins upon the court recording of evidence in the presence of the accused or in the presence of his advocate when his presence is dispensed with under certain provisions in the Code (1963 Cr. LJ 155). The evidence includes both the evidence for the prosecution as well as for the defence. If the witnesses are examined in the absence of the accused and there is nothing to show that his personal attendance has been dispensed with, the trial is invalid and the conviction will be set aside. Evidence can be recorded in absence of accused if he is tried under section 339B Cr. P. C.

14 DLR 355–Nalini Kanta Sen Vs. M. Siddique–Section 353 cannot be invoked to show that it empowers the court to dispense with the attendance of the accused.

354. Manner of recording evidence.–In inquiries and trials (other than summary trials) under this Code by or before a Magistrate or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

355. Record in trials of certain offences by first and second class Magistrate.–(1) In case tried under Chapter XX

or Chapter XXII by a Magistrate of the first or second class and in all proceedings under section 514 (if not in the course of trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such Memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inabillity to do so, and shall cause such memorandum to be made in writing from his dictation in open court and shall sign the same, and such memorandum; shall form part of the record.

Scope and application—The word "in summons cases and" omitted by ord. No. XXIV of 1982. In cases, the deposition may be recorded in the form of a memorandum; but it is not necessary that the recorded deposition should be read over to the accused. Where a case is tried by Sessions Judge, this section has no application (51 Cr. LJ 1022). A mere statement that on witness deposed exactly as another, is not proper compliance with this direction. Under Sub-section (2) the Magistrate must sign the record; if he omits to do so; the illegality vitiates the trial (28 Cr. LJ 114). This section may be read with section 358 Cr. P. C.

356. Record in other cases.—(1) In all other trials before Courts of Session and Magistrate and in all inquiries under Chapter XII the evidence of each witness shall be taken down in wirting in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge.

(2) **Evidence give in English.** When the evidence of such witness is given in English the Magistrate or Sessions Judge may take it down in that language with his own hand and unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such

evidence in the language of the Court shall form part of the record.

(2A) When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.

(3) **Memorandum when evidence not taken down by the Magistrate or Judge himself.** In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes : and such memorandum shall be wirtten and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

Scope and application—This section applies only to cases to which the provision of section 355 do not apply. A narrative form is the usual mode of recording evidence. The entire evidence must be recorded fully. The proper way of recording evidence is to take it down in the first person, exactly as spoken by the witness. Generally speaking, where evidence is given by a witness in his own language, the vernacular record is always more reliable and entitled to greater weight than the memorandum which the Judge makes in English (AIR 1923 Lah 167) The signature of the deponent is not made compulsory though it is desirable that such signatures should be obtained, A refusal to sign a deposition is not an offence under section 180 of the Penal Code. Where the record does not show that an oath was administered to a witness, the reasonable presumption, in the absence of any suggestion to

the contrary would be that proper procedure was followed and the oath was duly administered (15 Cr. LJ 19).

12 DLR 424—Lal Mohammad Sardar Vs. The State—A Special Judge appointed under the provisions of Act XL of 1958 has to follow the provisions of section 356 in recording the evidence (Ref : 11 DLR 9 (WP), 2 PLD 274 Lah).

10 DLR 193 FC—Ali Haider Vs. The State—Failure to keep the memorandum of evidence in the Judge's own hand does not render the trial illegal (Ref : 1 PCR 38).

357. Language of record of evidence.—(1) The Government may direct that in any district or part of a district, or in proceedings before any Court of Sessions or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate and shall form part of the record;

Provided that the Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language or in the language of the Court, although such language is not his mother-tongue.

Scope and application—This section applies only to evidence taken under section 356—Rush of work and saving of time are good grounds for dictating the evidence to the typist rather than writing it in his own hand by the Judge (PLD 1957 Pesh 122).

11 DLR 84 (SC)—Hazrat Jamal Vs. The State—Section 357 (1) apparently covers all cases referred to in section 256 and once a direction has been properly issued under that section, it would serve to displace the provision embodied in section 356

358. Option to Magistrate in cases under section 355.—In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in section 356, or, if within the local limits of the jurisdiction of such Magistrate the Government has made the order referred to in section 357, in the manner provided in the same section.

359. Mode of recording evidence under section 356 or section 357.—(1) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer but in the form of a narrative.

(2) The Magistrate or Sessions Judge may, in his discretion take down, or cause to be taken down, any particular question and answer.

360. Procedure in regard to such evidence when completed.—(1) As the evidence of such witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his advocate, if he appears by advocate and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

Scope and application—The object of this section is to give an opportunity to the witnesses to explain or correct the statements made by them (19 Cr. LJ 166). This section applies to proceedings under section 107 and 145, and the evidence of each witness must be read over to him in the presence of the accused. It is incumbent on the Judge or the Magistrate to

read over the deposition to each witness, even though such a procedure should occupy considerable time (42 Cal 957). A departure from such a practice might lead to considerable embarassment and place a serious impediment in the adminstration of justice (36 Cal 955). The object of this section is to ensure the accuracy of the record, and omission to comply with the provisions of this section is an illegality which vitiates the trial, irrespective of whether the accused have been prejudiced or not, and is not a mere illegality curable by section 537 Cr. P. C (28 CWN 119).

8 DLR 269—Wazed Ali Biswas Vs. The State—Non-compliance with the provisions of section 369 regarding reading over or explaining the evidence to the witness, is merely an irregularity (Reef : 8 DLR 154).

7 DLR 574—Bazlur Rahman Vs. Wasel Molla—Omission to read over the witness deposition cannot be cured under section 537 Cr. P. C (Ref : 3 DLR 279).

7 BLD 80—Mujibur Rahman Vs. The State—Reading over and explaining evidence recorded before obtaining signature of the witness in the deposition sheet—Whether failure to do so is a mere irregularity curable under section 537 Cr. P. C or vitiated the trial—When the witness put the signature in the deposition sheet—So it can be inferred that deposition was read over to the witnesses who being satisfied about correctness of recording of evidence put signature on it—Even if the evidence was not read over to the witness such omission constitutes an irregularlty which is curable under section 537 Cr. P. C.

6 DLR 527—Salimullah Khan Vs. The Crown—Affidavit alleging that the provisions of section 360 were violated, Record shows they were complied with complainant's allegation cannot be given effect to.

361. Interpretation of evidence to accused or his advocate.—(1) Whenever any evidence is given in a language not nuder stood by the accused and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by advocate and the evidence is given in a language other than the language of the Court, and not understood by the advocate, it shall be interpreted to such advocate in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as such thereof as appears necessary.

362. Omitted.

363. Remarks respecting demeanour of witness. When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Scope and application—The object of this section is to give the appellate court some aid in estimating the value of the evidence recorded by the Magistrate. Remarks about demeanour of a witness must be recorded immediately they are observed or a few days after the close of the evidence and before the Judge's recollection become dim (PLD 1983 Kar. 96).

364. Examination of accused how recorded.—(1) Whenever the accused is examined by any Magistrate, or by any Court other than High Court Division, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English; and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be wiitten and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263.

Scope and application—This section prescribes the manner in which the examination of an accused person (under section 342) is to be recorded. This section has got no application where the person examined is not an accused person. By virtue of section 164 (2). a confession recorded under that section is to be recorded in the manner prescribed by this section (AIR 1945 Lah. 105 FB). An accused cannot be sworn when he makes a statement under this section. Therefore a confession recorded under section 164 after he was sworn is illegal (PLD 1956 (SC) 420). It is obligatory on the court to show or read the record of the statement of an accused person to him (AIR 1925 Cal. 575). The examination need not be taken down in Magistrate's own handwriting. It is enough if it is taken down in his presence and hearing. Non compliance with the section does not vitiate the trial (PLD 1958 (SC) 383). The record of confession must be signed by the accused. The signature of the accused to his confession is taken as a voucher of the authenticity of the statement, and not as an admission of its correctness. but in a summary trial, the examination of an accused is not required to be signed by him under sub-section (4) of this section (1970 Cr. LJ 1228). It is not obligatory that confessional statement must be in the form of question and answer (1973 Cr. LJ 781). The Magistrate or Judge has to certify under his own hand that the examination was made in his presence and hearing. The omission to make the prescribed certificate is a serious infirmity; (AIR 1961 Mays 158).

46 DLR 77—Abul Hossain Vs. The State—The provisions under these two sections are mandatory and required to be strictly followed to make the confession voluntary and true and fit for reliance for convicting the accused on his confession.

14 BLD 332—Mosammat Amena Khatun Vs. State—When a confessional statement has been recorded by a Magistrate after complying with the provisions of section 164 and 364 Cr. P. C. the said confessional statement can be admitted into evidence by the trial Court under section 80 of the Evidence Act even without examining the recording Magistrate. The confessional statement of an accused recorded under section 164 Cr. P. C being a matter of serious consideration at the trial of a case involving a murder charge, the learned Public Prosecutor acted in an irresponsible and negligent manner in not utilising the same. The learned Judge was also evidently wrong in hastily rejecting the prosecution's prayer for examining the recording Magistrate. A copy of the judgment was sent to the Bar Council and the Ministry of Law for taking appropriate action against those responsible for bunglings in the case.

41 DLR 62—Md. Azad Shaikh Vs. The state—The recording Magistrate did not make any genuine effort to find out the real character of the confession. Omissions in the paragraphs cast serious doubt upon the voluntary character of confessional statement. Section 164 (3) is a mandatory provisions of law. The requirement of adherence to the provisions of section 164 (3) Cr. P. C is not a mere matter of form, but of substance that has to be complied with (Ref : 8 BLD 505, 3 DLR 505).

40 DLR 58—The State Vs. Mizanul Islam—All the formalities in recording the confessional statement were observed. The Magistrate recording the confessional statement was satisfied that the confession was voluntary and free form taint. Facts revealed in confession substantially corroborate the prosecution story. In evaluating the judicial confession made by the appellant Dablu it appears that it is true and voluntary and stands confirmed by other pieces of evidence produced by the prosecution. The daggar re-coverd by the I. O. from the house of the appellant Dablu on his own showing was stained with blood which was found to be of human

origin by the chemical examiner. Motive is though a piece of evidence and may not be a sine qua non for bringing offence home to accused yet it is relevant and important on the question of intention. The existence of motive has a great significance in a criminal trial. Besides gross illegality was committed by the Magistrate while recording the confessional statement of Jahurul Islam who was kept under the charge of the police when the time for reflection was given to the confessor. The order of conviction and sentence for transporation for life is set aside. Evidence of a witness is to be looked at from a point of law of its credibility. Appreciation of oral evidence depending as it does on such variable inconsistent factor as human-nature cannot be reduced to a set formula. The credit to be given to the statement of witness is a matter not regulated by rule of procedure. The credibility of a witness depends upon his knowledge of fact to which he testifies, his disinterestedness, his integrity and his veracity (Ref : 8 DLR 13 FC).

40 DLR 106 (AD)—The State Vs. Abdur Rashid Piada—Confession—Statement not recorded in the language of the maker but in the language of the Magistrate—Accused admitted nothing. The statement of the accused Joynal to the chairman is of the same nature and as such is not a confessional statement. Accused statement the part of which is incriminating does not connect him with the act of killing (Ref : 37 DLR 1).

8 BCR 3—Rattan Kha Vs. The State—Confession—Whether specific time for reflection of three hour's time is to be given to the accused—No absolute rule—Defect curable. In the present case full three hours time was taken in both reflection and recording of confession which in our opinion is sufficient compliance with the requirement to give the confessing accused time for reflection. T. I. Parade—Identification of accused persons in the T. I. parade by express or implied statement—Whether such statement will be substantive evidence—Where the identity of accused persons is established by the furnishing of name of accused by Magistrate whom the witnesses identified (Ref : 5 DLR 49 (WP)).

7 BCR 376 (AD)— Nausher Ali Sarder Vs. The State—Confession not recorded exactly in the priosoner's own words

is inadmissible. Recognition of the accused by moonlight. The bamboo clump by the side of which the village path lay was found to be 100 cubits from the dwelling hut of Golam Ali from where he claimed to have heard the alarm of Elias who sought his help stating that he was being killed by these three persons. Golam Ali is found to be sickly but he is not suffering from any illness: as such his physical condition could hardly stand in the way of his recongnising known persons in the moonlight and as the incident took place not in the bamboo clump but on the path recognition by moon-light was quite possible.

5 BLD 9—Zaheda Vs. The State—Confessional statement of the accused recorded by the Magistrate on a plain piece of paper and signed by the Magistrate at the bottom. Usual form for recording confessional statement not used. Such confessional statement not admissible in evidence. Defect incurable even by subsequent examination of the recording Magistrate (Ref : 37 DLR 66).

32 DLR 227—Salauddin Vs. The State—When it is established that the Magistrate recording the confession of the accused took due care to ascertain that the confession made was voluntary, the fact that the Magistrate did not fill in col. 8 of the prescribed form does not render the confession inadmissible.

51 DLR 466—Bimal Chandra Das alias Vim and 3 others Vs. State—It was injudicious to rely upon confession without calling the Magistrate as a witness. The Court is required to see not only that the forms under sections 164 and 264 Cr.P.C. were complied with but the substance underneath the law equally adhered to.

365. Record of evidence in High Court Division.—The Supreme Court shall from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the evidence shall be taken down in accordance with such rule.

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