CHAPTER—XLI

SPECIAL RULES OF EVIDENCE

509. Deposition of medical witness.—(1) Deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL may be given in evidence in any inquiry, trial or other proceeding under this Code, although the deponent is not called as a witness.

(2) **Power to summon medical witness.** The Court may, if it thinks fit, summon and examine such deponent as to the subject matter of his deposition.

Decisions

13 DLR 521—Arshad Master Vs. The State—Medical witness when easily available for examination, provision of section 509 should not be preferred.

9 DLR 225—Sajaluddin Bepari Vs. The State—Provisions of the section cannot be invoked where the doctor has been called as a witness.

4 DLR 99—Fazar Vs. The Crown—Section 509 Cr.P.C is designed to allow evidence given by medical officer to be put in at the trial in their absence. But if the medical officer is summoned as a witness, he must be examined as other witness and his statement in the lower court should not be put in under section 509 by a Court of Session.

2 DLR 190—Muzaffar Sarker Vs. The Crown—Section 509 clearly applies only when the Civil Surgeon or other medical witness is not called as a witness in the sessions trial. If the doctor is called as a witness in the Sessions Court, then his evidence must be recorded in extenso just as the evidence of any other witness in the case (Ref : 2 DLR 120).

509A. Report of post-mortem examination.—Where in any inquiry, trial or other proceeding under this Code the report of a post-mortem examination is required to be used as evidence, and the Civil Surgeon or other medical officer who made the report is dead or is incapable of giving evidence or is

beyond the limits of Bangladesh and his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such report may be used as evidence.

Scope and application—This section is new. The provisions of this section are in the nature of exceptions and the onus of establishing circumstances that would bring the post-mortem report within any of the exceptions contemplated by this section lies clearly upon the prosecution. If the post-mortem is sought to be given in evidence under the provisions of this section, the prosecution seeking to tender the report in evidence has to show that the maker of the report is dead, or that he cannot be found within Bangladesh or that he can not be called and produced as a witness without unreasonable delay or expense. In a murder case, the application of this section must be confined within the narrowest limit. Where a man is being tried for his life and the post-mortem is a signal importance, the court must insist on strict proof before holding that the conditions requisite for admitting post-mortem has been satisfied. A mere petition by the Public Prosecutor that the witness cannot be found is insufficient. It is impossible to lay down any hard and fast rule for the application of this section and the matter is essentially one for the exercise of discretion on the part of the trial Judge. Since the doctor who prepared post-mortem report is material, justice requires that he should, if possible, be examined at the trial in the presence of the accused. The provisions of this section should be resorted to only in extreme cases of delay and expense (16 Cr.LJ 754). Where the charge against the accused is a serious one, the delay of an adjournment for one month is not in itself unreasonable and unless there is anything of a special nature to stand in the way, the case should be adjourned to be duly tried on viva-voce testimony and warrant issued. and further attempt made to enforce the attendance of the witness (30 Cr. LJ 623).

56 DLR 69—Jalaluddin & Others VS. State—The case is the outcome of admitted enmity between the parties-The failure to examine the doctor who held post-mortem

examination on the body of the deceased to together with absence of any alamat justify the defence case.

46 DLR 160—State Vs. Fulu Mohammad—This section is an exception to the requirement of law that the evidence of the doctor who prepared the post-mortem report is materials. Its condition there must be strictly fulfilled by the prosecution.

44 DLR 441—Abdul Quddus Vs. State—Report of post-mortem examination—As the doctor concerned who held the post-mortem examination was not examined although he was available in the country at the relevant time the report was not legally admitted into evidence and as such the conviction based thereon is illegal.

43 DLR 440—Tariq Habibullah Vs. State—Post-Mortem report—For bringing such report in evidence strict compliance of section 509A of the Code is necessary. The report of the Post-mortem examination was neither produced by the doctor who had held the post-mortem examination nor the doctor was examined as a witness in the trial. While producing the report PW-7, an investigating officer, had shown no cause explaining the circumstances under which the doctor could not be produced in court. The doctor's presence could be dispensed with only when he is reported to be dead or incapable of giving evidence or is beyond the limits of the country and his attendance cannot be produced without an amount of delay, expense or inconvenience. In that view the post-mortem report has been used as evidence illegally and the same must be excluded from consideration.

42 DLR 171—Santosh Mia Vs. the State—Medical evidence is not sacrosanct—It may not be accepted when it is contradicted by occular evidence—Two doctors differ regarding the nature of injury No. 1 to be incised wound—The injury No. 1 should be held to be an incised wound as the PW-8 Doctor's finding regarding the nature of injury was considered along with the evidence of other prosecution witnesses.

14 BLD 391—Ataur Rahman Vs. The State—Mere filing of an application by the Public Prosecutor informing the court that the doctor concerned is away from the country cannot be

the permissible substitute for legal evidence as it does not fulfil any or the conditions laid down in Section 509A.

40 DLR 177—Ezahar Sepai Vs. The State—Post-mortem report is an admissible evidence when three requirements laid down in the section are satisfied. Section 509A has been inserted in the Code of Criminal Procedure by Section 31 of Ordinance No. XXIV of 1982. From reading section 509A of the Cr.P.C it becomes clear that post-mortem report is an admissible evidence only when the following requirements are satisfied i.e. to say (1) if the medical officer who made the report is dead (2) or he is incapable of giving evidence (3) or if he is beyond the limits of Bangladesh and his attendance cannot be procured without any amount of delay, expense or inconvenience which under the circumstances of the case, would be unreasonable (Ref : 7 BCR 220, 37 DLR 156, 6 BLD 34 and 4 BCR 204, 7 BLD 328).

40 DLR 97—Md. Ali Haider Vs. The State—The doctor who held the post-mortem on each dead body of the deceased persons was not examined during trial by the prosecution nor any evidence was led to prevent the doctor from appearing in Court. The identity of the dead bodies recovered from the well of the village 3 miles away from the place of occurrence, in the absence of positive evidence on point of identification, remains shrouded in mystery and it cannot be said with certainty that those dead bodies are those of the victims.

37 DLR 156—State Vs. Mokbul Hossain—Post mortem reports when can be used as evidence in a case—When conditions are not fulfilled in a case, the post-mortem report cannot be used in evidence.

8 BCR 174—Forkanul Islam Vs. The State—A post mortem report may be used as an evidence in any inquiry, trial or other proceding without examining the medical officer who made the report only after fulfilment of any of the requirements of law as provided in section 509A. Unless and until any of these requirements is satisfied, there is no sanction of law to use the post-mortem report as an evidence.

6 BCR 220 (AD)—Md. Shah Alam Vs. The State—Civil surgeon was not examined as a witness during the trial— High court Division observed that it would be unecessary to determine the age of the victim girl on consideration of the medical evidence—The statement of the victim girl was recorded under section 164 Cr.P.C by a Magistrate 1st-class who was also not examined during the trial nor the original admission register of the school showing the age of the victim girl was not produced. The High Court Division considering the above circumstances ordered a fresh trial by a different Court so that necessary witness like medical officer could be examined. There was other evidence such as the evidence both father and mother of the victim girl showing that she was minor at the relevant time. The trial court found evidence sufficient but the appellate court did not consider this evidence sufficient. The appellate court was perfect within its jurisdiction to call for additional evidence under section 428 of Cr.P.C. The appellate Division held that the appeal be disposed of by the High Court Division on the basis of evidence on record and if necessary to call for additional evidence only in respect of the medical examination of the girl. The order of remand for fresh trial by the trial Court was set aside.

37 DLR 237—Nayan Vs. The State—Section 509A Cr.P.C was introduced by Ordinance 24 of 1982 on 21.8.82 the post-mortem report by the doctor being of a date earlier thereto it is not admissible in evidence on the basis of provision of section 509A.

5 BLD 202—Siddique Ahmed Vs. The State—Post-mortem report. A mere application on behalf of prosecution was filed that the whereabouts of the doctor could not be traced out but no evidence has been led to support that contention. The report cannot be used as evidence without proper proof that the attendance of the doctor cannot be procured. Medical evidence of the doctor who held post-mortem examination being corroborative of the other incriminating evidence relating to the cause of death of deceased, the court is at liberty to come to a finding regarding the cause of death on the basis of such other evidence.

12 BLT 58 (AD) —Mir Hossain & Ors. Vs. The State—The doctor who examined the victim and gave the report was not examined as witness, even the I.O. did not say anything about the medical examination P.W. 1 stated that the victim was taken to Senbagh Health Complex, he also did not say anything about medical report. We do not understand how the medical report was made exhibit when it was not formally produced before the court and how the courts relied upon it. There is no evidence to show that the medical officer who made the report was dead or was incapable of giving evidence or was beyond the limits of Bangladesh and his attendance could not beocured without much delay. Unless these facts are proved or brought the notice of the court, a medical report cannot be admitted in evidence in view of the provisions of section 509A of the Code of Criminal Procedure. [Para-8].

12 BLT 58 (AD)—Mir Hossain & Ors. Vs. The State—The doctor who examined the victim and gave the report was not examined as witness, even the I.O did not say anything about the medical examination P.W 1 stated that the victim was taken to Senbagh Health Complex, he also did not say anything about medical report. We do not understand how the medical report was made exhibit when it was not formally produced before the court and how the courts relied upon it. There is no evidence to show that the medical officer who made the report was dead or was incapable of giving evidence or was beyond the limits of Bangladesh and his attendance could not beocured without much delay. Unless these facts are proved or brought the notice of the court, a medical report cannot be admitted in evidence in view of the provisions of section 509A of the Code of Criminal Procedure.

7 BLT 337 (AD) —The State Vs. Ful Miah—Post-mortem Report—The Post-mortem Report was filed under section 509A of the Code of Criminal Procedure as the Doctor was not available. Section 509A Cr.P.C. contemplates certain procedure but those were not complied with and for that the post-mortem report could be left out of consideration. As the factum of murder has been proved by four eye-witnesses the post-mortem report as corroborative evidence is not absolutely

essential. The assault on the deceased was proved by the eye witnesses and the same was corroborated by the informant P. W. 1 Nurul Islam who heard from the eye witnesses about the occurrence immediately after the occurrence. The learned Single Judge failed to see that the post-mortem report even if not taken into consideration does not weaken the prosecution case for lack of corroboration of the eye witnesses. [Ref : 5 BLC (AD) 41].

6 BLC 225 (HC) —Abdur Rashid and another Vs. State (Criminal)—The deceased was produced before the Medical Officer for postmortem examination but no Medical Officer has come before the Court to prove the same and no explanation has been offered for such non-examination when section 509A, Code of Criminal Procedure provides for admitting post-mortem report as evidence under certain circumstances but the prosecution did not care to take any steps whatsoever to bring the post-mortem report as an evidence under the law.

510. Report of Chemical examiner, serologist etc.— Any document purporting to be a report under the hand of any Chemical examiner or Assistant Chemical examiner to Government or any serologist, hand-writing expert, finger-print expert or fire arm expert appointed by the Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may without calling him as a witness, be used as evidence in any inquiry, trial or other proceeding under this Code.

Scope and application—Under this section, the report of the Chemical Examiner and others mentioned in this section may be used as evidence without the officer being called as a witness. The intention of the legislature is that the reports should have the same value as they would have if they were formally proved by sworn testimony. The object of this special dispensation of the examination of experts as a witness may be to avoid expense, delay and inconvenience of the parties. This section does not include the report of Chemical analyst as such it cannot be admitted in evidence without the

examination of analyst. The report of hand writing expert, fingerprint expert, fire-arms expert have been bracketed with the report of Chemical Examiner and the Serologist so far as its admissibility is concerned, without the necessity of calling the aforesaid experts. In cases where the opinion does not contain reasons, prosecution is required to produce the expert for cross-examination (1980 P.Cr.LJ 257). This section contemplates the production of the orignial report of the expert (AIR 1963 Orissa 58. AIR 1954 Pat 13). The accused is entitled to get copy of the report (AIR 1957 Mad 508). The reports of experts cannot be considered unless tendered it in evidence by prosecution and chance should be given to accused persons to question it (26 Cr. LJ 200). Opinion is merely an inference which a person draws from certain facts : and the correctness of this inference depends upon an accurate observation of the facts and deducing correct conclusions from them. The opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons founded on facts. The Serologist is a highly responsible officer and his opinion is entitled to great weitght (AIR 1933 Oudh 265). This section says nothing as to the weight attached to expert's report.

36 DLR 151 (AD)—Dr. Md. Azizul Haque Vs. The State—Doctor held guilty of misconduct as a public servant, for willingly making incorrect report with intent to injure one by preparing two inconsistent post-mortem reports. Petitioner who is an M.B.B.S was a demonstrator in the Dhaka Medical College Hospital in 1970. He held a post-mortem examination on the dead body of one Nurjahan and submitted his report on November 10, 1970 stating the opinion that death was caused by drowning and was suicidal in nature. Subsequently, he prepared another post-mortem report on the same dead body stating that the death was caused by strangulation and was homicidal in nature. In these two reports petitioner made out remarks about the condition of the same body of the deceased. Petitioner thus intentionally prepared a false report knowing it to be false with intent the help the father of the deceased to falsely prosecute the

husband and father-in-law of deceased under section 302 of the Penal Code, He, therefore, committed forgery, falsification of record and criminal misconduct as a public servant punishable for the aforesaid offences.

4 BLD 17—Shafizuddin Vs. The State—The Science of identification of foot-prints is at an elementary stage and much reliance cannot be placed on the result of examination of foot prints.

30 DLR 282—Monoruddin Vs. The State—Report of Chemical Examiner. Its Evidentiary value in a case of charge of murder by poisoning. In a charge of murder by poisoning it is essential for the prosecution to prove, firstly, that the person alleged to have been murdered died of poisoning and secondly, that the accused person or persons administered poison with intent to commit murder. Evidence of the Chemical Examiner is of little value unless there is clear proof of the identity of the matters examined by him. Prosecution must lead clear evidence to show the identity of the matters meant for Chemical Examiner so that there may not be any scope to doubt the identity of the matters at any stage. It is of the greatest importance in a case of poisoning that the substance found by the Chemical Examiner must be connected with or traced back to the articles removed or taken from the dead body of the person in the case. It is well settled that if a fact is intended to be relied on by the prosecution. it must be proved with reasonable certainty and if such fact can only be established by proof of some subordinate facts each of these subordinate facts must be proved with the same degree of certaintly as is required for the proof of main fact. The omission to prove the necessary link may break the whole chain and thus deprive the prosecution of the opportunity of proving a valuable circumstantial evidence.

27 DLR 1 (SC)—Abdus Rashid Vs. The State—In a case of murder the age of injuries is an important fact to determine the approximate time of occurrence.

22 DLR 620—Ekabbar Ali Vs. The State—Opinion of doctors when differed on a particular point, the one which is favourable to the accused should be accepted.

19 DLR 791—Eskander Ali Vs. Musammat Alhamara Begum—The science of the study of calligraphy is inexact and has not yet attained any degree of accuracy. Hence, the opinion of hand-writing expert should be received with great caution and it is unsafe to base a decision purely on expert opinion without sufficient corroboration.

18 DLR 216—Mashiur Rahman Amin Vs. The State—If a court wishes to rely upon the report of an expert he should be produced and his evidence tested by examination and cross-examination in open court; and unless this is done the report does not by itself become evidence in the case.

12 DLR 453—Rahimuddin Vs. The State—The report of finger-print expert where 18 ridges of one impression were found identical with those of others, it could conclusively follow that opinion given by the expert is reliable.

9 DLR 564—Montazuddin Vs. The State—Chemical Examiner's report should not be accepted as proof of the death of a person in this case by arsenic poisoning or in the case of a lesser charge when not tendered on oath and not tested by cross examination.

8 DLR 40 (FC)—Khan Beg Vs. The Crown—From the report of the Chemical examiner in the case, the court fund, that the report which is evidence of its own contents under section 510 Cr.P.C proved that the parcel of the hatchet related to the present case which contained that number and the date of the FIR of the case and that the sealing of the parcel was done in compliance with the rules. Held : This was sufficient to establish the indentity or the hatchet.

510A. Evidence of formal character on affidavit.—(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

Scope and application—This important section proceeds on the analogy of Order XIX C.P.C. It empowers the court to allow evidence of a formal character to be given by affidavit and may be read in any inquiry or trial as evidence. The court may in its discretion summon the deponent for examination, but it shall do so if either the prosecution or the accused desires it. Courts and persons before whom affidavit may be sworn is silent in this section. So, there is a lacuna in it. Affidavit evidence saves time and expense in interlocutory applications, i. e. for examination of a witness on commission, exemption of accused from attendance, transfer of a case, application for bail, testing sufficiency of surety. When affidavit evidence is given the other party may file a counter affidavit. An affidavit does not cease to be evidence of facts alleged merely because they are verbally denied without any counter affidavit or without a request for examination of deponent (1960 All. 65). Affidavit may be filed to contradict the statement in the report of a Magistrate in transfer application. Affidavit of witness not of a formal character but going to the root of the matter cannot be admitted in evidence under section 510A.

7 BCR 6 (AD)—Md. Hadiuzzaman Vs. The State—Corroborative evidence (Medical Certificate) cannot be considered without the substantive evidence unless the substantive evidence is dispensed with under section 510A of the Code of Criminal Procedure.

511. Previous conviction or acquittal how proved.—In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force—

(a) by an extract certified under the hand of the officer having the custody of the records of the court in which such conviction or acquittal was had to be a copy of the sentence or order; or

(b) in case of a conviction, either by a certificate signed by the officer-in-charge of the jail in which the

punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered :

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or accquitted.

12 BLD 726—Ameer Ali Vs. the State—The methods of proof indicated in clauses (a) and (b) or section 511 regarding previous conviction are not exclusive methods of proof; but they are merely in addition to the other ordinary methods provided by law for the proof of a fact (Ref : 12 DLR 27 (WP)).

10 DLR 69 (WP)—Quimuddin Vs. The State—Where the accused pleads guilty to the charge of previous conviction, that amounts to admission of guilt and therefore the previous conviction need not be proved under section 511.

10 DLR 41 (WP)—Alif Din Vs. The State—Enhanced sentence for previous conviction is not legal unless previous conviction is legally proved. Mere admission by the accused is not enough.

512. Record of evidence in absence of accused.—(1) It is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may be given in evidence against him on the inquiry into, or trial for the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable. (amended by Ord LX dated 30.12.82.)

(2) **Record of evidence when offender unknown.** If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court Division may direct that any Magistrate of the first class shall hold an inquiry and

examine any witnesses who can give evidence concerning the offence. Any deposition so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of Bangladesh.

Scope and application—This section may be read with section 339B (1) and (2) Cr.P.C. Due to incorporation of section 339B Cr. P.C; the provision of this section has lost all importance. Under the provisions of section 339B (1) and (2) Cr. P.C the accused may be tried in absentia after following the procedure prescribed in the section.

28 DLR 128—Kitab Ali Talukdar Vs. The State—Non compliance with the provisions of section 512 is not a mere omission, error or irregularity, but is a serious illegality which goes into the very root of trial (Ref : 22 DLR 25, 20 DLR 62 (WP)).

12 BLD 650—Hamez Ali Vs. State—In case of application of Section 512 of the Code of Criminal Procedure whether there must be a finding of the trial court. Held : in case of application of section 512 Cr.P.C. there must be a finding of the trial court that the accused person has absconded and that there is no immediate prospect of his arrest.

47 DLR 61— Bahar Uddin 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.

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CHAPTER—XLII

PROVISIONS AS TO BONDS

513. Deposit instead of recognizance.—When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or Officer may except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond.

1 BCR 30—R.K.M. Reza Vs. The State—Section 513 is an enabling provision. The court may permit an accused to deposit a sum in lieu of executing personal bond of giving surety in certain circumstances. It does not authorise a court to ask for cash security. In granting bail a condition impossible to be complied with tentamounts to refusal of bail (Ref : 33 DLR 147, 1 BLD 66).

4 DLR 352—Lakshmi Narayan Vs. The Crown—The provision of section 513 to the effect that 'when any person.....in lieu of executing such bond' was enacted in the interest of person who, because they may be strangers in the locality or for some other reasons are not in a position to arrange for bail or able to offer sureties. In the case of these persons offer a cash deposit, the court is allowed in its discretion to accept that deposit in lieu of a bond.

514. Procedure of forfeiture of bond.—(1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Metropolitan Magistrate or Magistrate of the first class.

or, when the bond is for appearance before a Court, to the satisfaction of such Court.

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall authorise the attachment and sale of any movable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Metropolitan Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant to imprisonment in the civil jail for a term which may extend to six months.

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in party only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(7) When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the condition of his bond, or of a bond executed in lieu of his bond under section 514B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.

Scope and application—This section lays down the procedure for forfeiture of bonds. It deals with two classes of bonds : (i) When a bond under this Code has been taken by any court, it is that court alone or the court of the Metropolitan Magistrate or of a Magistrate of the first class that can initiate a proceeding under section 514, (ii) When a bond is for appearance before a particular court it is only again that court which can start a proceeding for forfeiture. Bonds of this class include those taken by the police for appearance before a court. If a bond has taken by a Magistrate

or police and no court is mentioned therein for appearance, no proceeding can be taken under section 514. A surety is not discharged on transfer of a case to another court, where there is an arrest under an illegal warrant, the bond of the surety has no legal force and cannot be forfeited (19 Cr. LJ 443). When a bond is executed before a Magistrate for appearance before the Sessions Court, it is the latter court which alone can start proceeding for determining whether or not the bond has been forfeited. A bond for 'appearance' is forfeited when default in appearance is made at the time and place specified (AIR 1947 Cal 120). Where a bond requires the accused to appear before a 'particular court' the failure to appear before 'another court to which the case has been transferred, does not cause forfeiture of the bond unless the appearance before the latter court is specified in the bond (PLD 1954 Dac. 175). A bond cannot be forfeited where the failure to appear is due to causes beyond the control of the parties, as in the following cases; (i) Act of Allah, e.g., the death of the accused; (ii) Act of parties; (iii) Other causes e.g., the arrest of the accused. Sub-section (1) and (2) of section 514 contemplates two stages. The first stage is for the court to satisfy itself that a bond has been forfeited. The second stage relates to realisation of the forfeited amount of the bond. It has to give him notice either to pay the penalty or to show cause why it should not be paid. Where the surety does not appear to show cause, the court has no alternative but to forfeit the bail bond. Under the section, the court is empowered to remit the penalty or reduce its amount for sufficient reasons.

5 BCR 125—Rafiqul Akbar Vs. The State—Surety not to do impossible things to produce the accused before Court but he must complain of impossibility of performance. A trial cannot be held up only to allow an accused to do mango business. Surety to continue to incur the liability as before even after the cancellation of bail and arrest of the accused. Opportunity given to the Sureties to show cause against the forfeiture of the bond is sufficient compliance with section 514 Cr. P.C. Penalty to be realised has been lowered down to TK. 100/- as the accused had since been arrested by the police and

presented before Court. Difference between a bond for keeping peace and a bond for personal appearance. In case of a bond for personal appearance the very non-appearance would be an evidence for Court's satisfaction that the bond has been forfeited. Non-appearance of the accused on a fixed date for trial will entail forfeiture of the bond. Prima facie finding as to the forfeiture followed by a show cause notice upon the surety. A Court cannot straightway finally declare forfeiture of bond and take steps for realisation of penalty—Intention of the Legislature that a person cannot be condemned unheard.

30 DLR 166—A.K.M. Abdur Rashid Vs. The State—Before an order of forfeiture of bond is passed it is necessary to give notice to the executant why the amount mentioned in the bond should not be paid and if he fails to show sufficient cause, only then the court can proceed to recover the money. When no opportunity has been given to a surety to show cause why he should not be made to pay, the proceedings cannot be said to be in accordance with law and should therefore be quashed.

22 DLR 175 (WP)—Haji Abdul Gani Vs. The State—On the forfeiture of bond, immovable property cannot be attached in lieu of penalty. General warrant for attachment and sale of property of the surety is improper and invalid. Simultaneous order for attachment of property and arrest of surety is illegal.

20 DLR 4 (WP)—Wilayat Hossain Vs. The State—Three stages are contemplated for a proceeding under section 514. Firstly a declaration of forfeiture, secondly the order of payment or to show cause, and thirdly steps be taken for the recovery of the amount.

15 DLR 38 (SC)—Dilder Vs. The State—Balance is to be kept between under leniency and under severity (Ref : 8 DLR 34 (WP)).

13 DLR 726—Syed Moazzem Hossain Vs. The State—The court taking the bond can forfeit for violation of bonds of any kind whereas if the bond is only for appearance before a court it is the satisfaction of that court that is necessary. Court should regulate the imposition of penalty in cases of default

from the point of view, not so much of assessing the guilt of the sureties in terms of money, but with the object of maintaining the system in its integrity (Ref : 5 DLR 195).

13 DLR 275—A.L. Zahirul Huq Khan Vs. The State—Issue of distress warrant to the surety without asking him to show cause is illegal. Courts should not be too hard to the lawyer surety.

11 DLR 491—Birendra Chowdhury Vs. The State—Magistrate has no power to forfeit a bond when further hearing of a case pending in his court has been stayed by the Higher Court.

9 DLR 433—Sharfuddin Ahmed Vs. The State—Provisions of section 514 Cr. P. C are to be complied with before an order for forfeiture can be made. Magistrate must record evidence and finding that bond has been forfeited before issue of notice. He must have before him sufficient proof based on good reasons (Ref : 9 DLR 424, 379, 5 DLR 488).

5 DLR 28 (WP)—Hashan Din Vs. Government Azad J & K—Bond filed before District Magistrate cannot be forfeited by Additional District Magistrate. Opportunity not given to surety to prove allegations, forfeiture is bad (Ref : 8 DLR 184).

4 DLR 33—The Crown Vs. Abdus Sobhan—When a bond is executed before a Magistrate for appearance before the Sessions Court, it is the latter court which alone can start proceedings under section 514 Cr. P. C for determining whether the bond has been forfeited. When proceedings to forfeit a bond are started against the sureties under section 514 Cr. P.C it is necessary that the person affected should be called upon to comply strictly with the terms of the bond.

Appeal and Revision—The High Court Division has power to revise an order under this section (13 Cr. LJ 31). Where no appeal against the order of forfeiture of bond for appearance under section 514 is preferred, a revisional application against the order is not maintainable (AIR 1959 All 751). All orders passed by the subordinate Magistrate shall be appealable to the District Magistrate under section 515 Cr. P.C.

514A. Procedure in case of insolvency or death of surety or when a bond is forfeited.—When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 514, the Court by whose order such bond was taken, or a Metropolitan Magistrate or Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and, if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.

514B. Bond required from a minor.—When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.

515. Appeal from, and revision of, orders under section 514.—All orders passed under section 514 by any Magistrate other than a Metropolitan Magistrate or District Magistrate shall be appealable to the District Magistrate, or, if not so appealed, may be revised by him.

Scope and application—There is no separate procedure provided for appeals under section 515. Therefore the provision contained in sections 419, 421 to 431 should apply. The appellate court is not entitled to dismiss the appeal for default of the appellant (AIR 1957 MP 216). Since under this section the District Magistrate himself has the power of revision where there is no appeal, the High Court Division should not be troubled directly by revision.

Appeal—An Appeal, under this section, cannot be dismissed for default, but it must be decided on merits. The appellate court can only uphold or quash the order, but it has no power to remand (AIR 1969 All 557).

516. Power to direct levy of amount due on certain recognizances.—The High Court Division or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court Division or Court of Session.

CHAPTER—XLIII

OF THE DISPOSAL OF PROPERTY

516A. Order for custody and disposal of property pending trial in certain cases.—When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold, or otherwise disposed of.

Scope and application—Sections 516A to 525 Cr. P.C deal with powers of courts in the matter of disposal of property. Any order to be passed by a criminal court must come under one or another of the sections. It has to pass orders only if the property regarding which any offence appears to have been committed, is produced before it, Section 516A enables a Magistrate to provide for interim custody of goods. Before an order is made under this section, three conditions must be fulfilled.—(i) Existence of reason to suppose that an offence has been committed. (ii) Production of property before court and (iii) Pendency of inquiry or trial.

45 DLR 217—Shahabuddin Vs. Abdul Gani Bhuiyan—Where the offence is not committed regarding particular property the court has no authority to pass order directing sale of such property and deposit the sale price in Court's account.

44 DLR 230—Mitali Shipping Lines Vs. Bhuiyan Navigation Agency—Custody of property pending trial for theft and cheating—Jurisdiction of Civil Court over such property—Order passed by the Criminal court giving custody of a vessel, the subject matter of the criminal case, to the local Upa-zila Chairman was subject to revision and the application under section 151 Cr. P.C made before the civil court by the complainant as the plaintiff in his suit for injunction is misconceived.

40 DLR 268—Siddique Ahmed Sawdagar Vs. The State—Section 516A empowers a criminal court to pass an order for custody and disposal of property during any inquiry or trial and it does not empower an investigating Officer to give any property in the custody of any person.

21 DLR 807—Nurul Huq. Vs. Ahmed Kabir—Physical production of the property in court is not always necessary.

20 DLR 84 (WP)—Lahore Race club Vs. The State—Propety was not used for committing any offence, such property cannot be given in custody under section 516A and if the possession of the property was by a bonafide purchase the question that the seller had no right to sell it is irrelevant.

19 DLR 522—Mono Ranjan Das Vs. The State—Property contemplated under this section is a movable property (Ref : 15 DLR 498).

3 DLR 86—Ali Bepari Vs. Nowsher Ali Bepari—The action of the police officer leaving the Jute in the custody of defdt. nó. 2 without informing the Magistrate forthwith and without having his order to do so is unwarranted by law, though there may be such practice prevalent in the Police Department, under section 523 read with section 516A Cr. P.C.

49 Cr. LJ 604—Matadin Sharma Vs. The King—Where a truck had been taken in custody under section 516A an order for its release was passed upon security which was furnished. But the Magistrate refused to release the truck on the ground that it was required as an exhibit in another case under the Arms Act. Held : That the truck of a business man should not be detained in this way for more than nine months on this ground. Refusal to release the truck is improper.

Revision—Order under section 516A is not appealable as it is not a final order. The Sessions Court and High Court Division are competent to revise the order of the Magistrate in appropriate case.

6 MLR 372-376 (SC) —Omar Ali (Md.) Vs. Abdul Malek and another—Custody of seized article-Power of Magistrate- The article here the vessel seized should be given to the custody of

the person who was in possession thereof when the offence was committed in relation thereto. Magistrate cannot decide ownership of the vessel.

6 BLC 93 (AD) —Parvez Alam Khan Shapan Vs. State and another (Criminal)—It is contended on behalf of the petitioner that the allegations made in the petition of complaint disclose a Civil dispute and the allegations do not attract the ingredients of section 420 or 406 of the Penal Code and hence the proceeding is liable to be quashed. Since a prima facie case has been disclosed in the petition of complaint, as has been found by the High Court Division, the proceeding cannot be quashed.

6 BLC 135 (AD) —Jalaluddin Choudhury and others Vs. State & another (Criminal)—In view of the consistent decision of the Appellate Division on the matter of taking cognizance of the offence and framing of charge are found to be wholly unsustainable in view of the provisions of section 6 of the Criminal Law Amendment Act. But the accused persons should not be let off on such a technical ground.

21 BLD 590 (HC)—Md. Omar Ali Vs. Abdul Malek—Under section 516A Magistrate has no power to investigate or to decide the ownership of rival claimants of the property. The only consideration while examining the power under this section is the question of possession by the property at the time of commission of the alleged offence. The Magistrate instead of entering into investigating the title of the rival claimants, should decide expeditiously who is the person prima facie entitled to possession thereof and hand-over its possession to him for avoiding great loss that has been sustained when it was kept unused. No property should be given to a person who is not entitled to its possession at the time of its recovery in respect thereof.

517. Order for disposal of property regarding which offence committed.—(1) When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation; or delivery to any person claiming to be entitled to possession

thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) When High Court Division or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the Chief Metropolitan Magistrate or District Magistrate.

(3) When an order is made under this section such order shall not, except where the property is livestock or subject to speedy and natural decay, and save as provided by sub-section (4), be carried out for one month, or when an appeal is presented, until such appeal has been disposed of.

(4) Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provision of sub-section (1) to any person claiming to be entitled to the possession thereof, on his executing a bond with or without sureties to the satisfaction of the Court, engaging to restore such property to the Court if the order made under this section is modified or set aside on appeal.

Explanation—In this Section the term 'property' includes in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchance, whether immediately or otherwise.

Scope and application—This section applies to disposal of property after the conclusion of an inquiry or trial by acquittal or discharge. It refers to property or documents; (i) which can be produced before the court, (ii) which is in its custody, (iii) regarding which an offence is committed, and (iv) which has been used in the commission of an offence. The Court cannot order delivery of property where there is neither an inquiry nor a trial. If an order as to disposal of the property is made sometime after the conclusion of the trial, notice to be

given to the party affected, 'Entitled to possession' does not mean the owner but a person who came into possession in a lawful manner of articles seized from him. And this property may be disposed of in any of the four ways : (i) destruction; (ii) confiscation; (iii) delivery to a person entitled to its possession; or (iv) otherwise. Once the property is there, it does not matter how it reached the hands of the court. The moment the inquiry or trial is at an end, the right to dispose of it under this section at once arises. Cash is not strictly speaking, property except in so far as it is capable of being possessed and identified in species. But coins which have been put into circulation and passed on to other persons cannot be treated in the same way as stolen coins actually remaining in the possession of thieves (26 Cr. LJ 1315).

9 MLR 252-254—Omar Sharif Khan (Md.) Vs. The State—Confiscation of goods/property connected with the offence by court or tribunal on conclusion of trial—Customs Act, 1969—Section 15 and 16-Custom Authority is empowered to confiscate goods brought into Bangladesh in contravention of prohibition—Since the Customs Authority is empowered to detain and confiscate goods brought into Bangladesh in contravention of prohibition he is not required to obtain permission of the Court or tribunal, as the case may be, for such confiscation pursuant to the relevant provisions of the Customs Act, 1969.

45 DLR 110 (AD)—Sompong Vs. State—Disposal of seized goods—It is for the trial Court to consider all the relevant facts and hear all the necessary parties before making an order for disposal of goods under section 517 Cr. P.C if called upon (Ref : 13 BLD 121 (AD)).

15 BLD 440—S.A. Hasnat Khan Vs. State—Under the provisions of section 517 of the Code a Special Tribunal may pass necessary order for disposal of a property seized during investigation after the disposal of the case. After the discharge of the accused on submission of Final Report duly accepted by the court, it cannot be said that the property seized has been used in connection with any offence and as such the said

property cannot be confiscated and it must be returned to the person from whose possession it was seized.

40 DLR 280—Hajera Khatoon Vs. The State—Stolen necklace—Whether the possession of the same should be restored to the petitioner who was acquitted of charge of retention of stolen property due to incomplete evidence and also upon benefit of doubt-Stolen necklace cannot be restored to the petitioner under such circumstances.

40 DLR 485—Sree Monoranjan Das Vs. The State—The Court has a very wide discretion as to the mode of disposal of the property produced before it or in its custody. Since no offence was committed as found by the Special Tribunal in respect of the goods seized from the petitioner, the petitioner's possession of the property must be deemed to be lawful. The Special Tribunal's failure to make an order for return of the property has resulted in a miscarriage of justice.

2 BCR 161—Shahidullah Patwary Vs. The State—The power of the criminal court being very wide, there is no illegality in the exercise of the jurisdiction by the Magistrate in initiating a criminal proceeding under section 406 of the Penal Code.

35 DLR 230—Md. Hossain Khalifa Vs. Kala Chand—Sub-section (4) of section 517 provides that it would be competent for the court to deliver any property under section (1) to any person claiming to be entitled to the possession thereof on his executing a bond with or without sureties under taking to restore such property to the court, the order made under section 517 (1) is modified or set aside on appeal. Property ordered to be delivered to the person found entitled thereto includes the property exchanged or in converted form.

29 DLR 277—Satish Chandra Biswas Vs. Mainuddin Dai—An order under section 517 is an independent order although it might have been passed in the same judgment. No appeal or revision lies against the order of the trial court to the Sessions Judge. Sessions Judge can pass any order under section 517. There is no provision to award cost to a respondent by court of appeal in a criminal appeal.

28 DLR 250—Korban Ali Vs. The State—Restoration of stolen property can be ordered by the High Court.

22 DLR 292 (SC)—Central Co-operative Bank Ltd. Vs. Ahmed Baksh—In a proceeding under section 517 (1) Cr. P.C it is hardly desirable to decide the question of title to the property concern, nor is the criminal court competent to decide it either. The question of title, if any, should be left to be decided by the ordinary civil court of competent jurisdiction (Ref : 14 DLR 782).

17 DLR 628—Nizamuddin Ahmed Vs. The State—Sessions Court in appeal while acquitting on a charge under section 411 P.C failed to pass an order of disposal of property under section 517 which he could have done. High Court in exercising of its inherent power passed the order.

11 DLR 54—Ramranjan Chowdhury Vs. The State—The Magistrate having found the accused not guilty of the offence of smuggling acquitted him of that charge but ordered that the seized articles in respect of which the offence was alleged to have been committed be confiscated. Held : After acquitting the accused of the offence of smuggling, the order of confiscation of goods cannot be maintained in law (Ref : 11 DLR 71 (WP)).

9 DLR 633—Abdul Noor Vs. The State—Confiscation of the goods in respect of which an offence is committed can be ordered under section 517 when there is no provision in the Act under which the offence is tried.

Review—The Magistrate cannot review his order once passed under section 517.

Revision and appeal—The Sessions Judge and the High Court Division have jurisdiction to interfere with an order of the Magistrate passed under this section. An order passed by a Magistrate under this section is a judicial order and is open to revision (32 Cr. LJ 847). Under section 517 there is no limitation prescribed by law for filing an application. It could have been made within a reasonable time from the date on which the final decision had been given in the case (11 DLR 71 (WP)). No appeal lies to the Sessions Judge under section 520

Cr. P.C against an order passed under section 517 Cr. P.C. But where the case is one in which an appeal lies, any party aggrieved by an order as to the disposal of property must go to the court of appeal. In such a case, a court of revision has no jurisdiction to interfere with an order as to the disposal of property.

518. Order may take form of reference to District or Sub-divisional Magistrate.—In lieu of itself passing an order under section 517, the Court may direct the property to be delivered to the Chief Metropolitan Magistrate, District Magistrate or to a Sub-divisional Magistrate who shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

519. Payment to innocent purchaser of money found on accused.—When any person is convicted of any offence which includes, or amounts to theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing or having reason to believe, that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

520. Stay of order under section 517, 518 or 519.— Any Court of appeal, confirmation, reference or revision may direct any order under section 517, section 518 or section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annual such order and make any further orders that may be just.

Scope and application—It is only the purchaser who can be granted relief under this section. A seperate application must be made by the purchaser on conviction or acquittal of the accused. A court which has the powers of hearing appeal

confirmation, reference or revision from the order of the trial court can modify, alter or annual an order passed under section 517 to 519 although the substantive case is not before the court by way of appeal. There appears to be some difference of opinion as to the exact meaning of the section. It appears section 520 which is not in Chapter XXXI dealing with appeal does not give any right of appeal or revision. All that can be done is that if the substantive case comes before a court as a court of appeal or revision it can substitute its own order which could be passed by the trial court. Opposite party should be given notice before an order is passed under this section.

5 BLD 181 (AD)—Northern Engineers LTD. Vs. Moklesur Rahman—Disposal of property. Appellate Court's power to make orders. To make the orders the appellate Court must be in seisin of the matter involving an order passed by a subordinate court. It cannot be said that after passing the judgment and order on July 29, 1980, the court was any longer in seisin of the matter. The order passed by the learned Magistrate was no longer pending consideration by the learned Additional Sessions Judge who had therefore no jurisdiction to pass the impugned order in September, 1980.

11 DLR 14 (WP)—Golam Akbar Vs. The State—No appeal or revision would lie against orders with regard to disposal of property. Powers under section 520 may be invoked on an ordinary application. Jurisdiction under section 520 is of a special kind which is neither appellate nor revisional. Courts can order restitution of property to rightful person even where property had already been delivered to some other party (Ref : 29 DLR 277).

1950 PLD 97 (Lah)—The words 'Court of Appeal' occuring in section 520 are not necessarily limited to a court before which an appeal is pending. A plain reading of section 520 would involve no limitation to the competency of a court, to which ordinarily an appeal or revision would lie, to interfere with an order passed under section 517, by the trial court even without the substantive case having come before the court, in appeal or revision. Property not proved to be the subject matter

of offence should be restored to the person from whom it has been taken.

Revision—An order of the lower court can be set aside by the Sessions Judge. The High Court Division can interfere either under this section or under section 439 in revision (18 CWN 959).

521. Destruction of libellous and other matter.—(1) On a conviction under the Penal Code, section 292, section 293, section 501 or section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under the Penal Code Section 272, section 273, section 274 or section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had to be destroyed.

522. Power to restore possession of immovable property.—(1) Whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation and it appears to the Court that by such force or show of force or criminal intimidation any person has been dispossessed of any immovable property, the Court may, if it thinks fit, when convicting such person or at any time within one month from the date of the conviction order the person dispossessed to be restored to the possession of the same.

(2) No such order shall prejudice any right or interest to or in such immovable property which any person may be able to establish in a civil suit.

(3) An order under this section may be made by any Court of appeal, confirmation, reference or revision.

Scope and application—This section relates to restoration of possession of immovable property. Its object is to prevent any person from gaining wrongful possession of land by his unlawful acts. The conditions precedent to an order under this section are : (i) some persons must have been convicted of an offence atterded by criminal force or show of

force or by criminal intimidation. and (ii) it must appear to the court that by such force and by some person has been dispossessed of immovable property (23 Cr. LJ 260). An order under section 522 binds only the parties and their representatives. An order under this section should not be made where the accused person has not been convicted of an offence attended by criminal force. An order of restoration would not be bad if some of the accuseds are convicted and others are acquitted. There must be a clear finding by the Magistrate that criminal force was in fact used by the accused, and that the complainant was dispossessed by such force (36 Cr. LJ 1161). To justify an order under this section, it must be shown that a party has been dispossessed by criminal force. Where there is no evidence of such dispossession an order under this section cannot be sustained (18 Cr. LJ 898). The object of the provisions of this section is to enable the criminal court by a summary order to restore the state of things which existed at the time of the dispossession by the convicted person or persons. it cannot go behind the state of affairs existing at the time of forcible dispossession leading to the criminal prosecution. Under this section a Magistrate can make an order while convicting the accused or at any time within one month from the date of conviction. The order cannot be made after the expiry of one month from the date of conviction and when the party is guilty of undue delay he is not entitled to any relief.

43 DLR 60—Dr. Md. Abdul Baten Vs. State—Power to restore possession of immovable property. Provision of section 522 of the Code cannot be made applicable to the accused persons by filing a separate application to the Trial Court after disposal of the appeal and revisional application arising out of the case against him under section 447 P.C.

43 DLR 233—Sheikh M.A. Jabbar Vs. A.K.M. Obaidul Huq—Restoration of possession of immovable property—The order of the Court restoring possession must be passed within one month from the date of conviction. The Magistrate having passed the order of restoration beyond 30 days of the order of conviction acted without jurisdiction. The provision of section

522 cannot be availed of if the dispossession is not by means of criminal force or show of force or criminal intimidation. In the instant case the accused petr. wrongfully entered into the shop at 10.30 P.M but at that time the Complt-O. P or his wife, who was the tenant was not upon the scene. There was neither assault nor any resistance or use of criminal force in the act of dispossession by the accused petr. The Magistrate's order is bad on this count also.

8 BLD 157 (AD)—Samiruddin Vs. The State—House-trespass—Effect of civil court's order of injunction in favour of the accused—In the face of such an order of injunction criminal court cannot accept the claim of possession made by a party who is obliged to get the order of injunction vacated—Had the courts below been keen enough to take notice of the injunction the finding that the informant party were in possession of the disputed holding could not have been made—In any case the appellant could not be legally convicted for criminal trespass—Order of conviction and sentence as also that of restoration of possession are set aside. Possession—Effect of Civil Court's finding on possession—When the decree for permanent injunction was passed it should be taken as a decision as to possession on the date of institution of the suit—If the appellant was in possession in 1978 as found by the civil Court, then for the purpose of criminal case (for alleged occurence in 1982) the prosecution evidence as to possession could not be accepted (Ref : 8 BCR 25 (AD)).

29 DLR 161—Ambia Khatun Vs. Raja Meah—Court is not bound to restore possession to a convicted person merely because of his subsequent acquittal.

20 DLR 855—Monoara Begum Vs. The State—An order of restoration of possession of property cannot be questioned by a person who was not a party to the proceeding. Restoration must be made to the dispossessed person of the property (Ref : 20 DLR 1108).

24 DLR 162—Jogamaya Kundu Vs. Sudhir Kumar Kundu—Restoration order vacated by appellate court in an appeal—Such order upheld by the High Court.

22 DLR 734—Sachindra Chandra Das Vs. T.H. Khan—Appeal against conviction was dismissed but no order for evicting the trespassers was passed. Appellate court's subsequent order for evicting trespassers is illegal.

15 DLR 498—Abdus Samad Vs. Hajee Moniruddin Khan—Order of restoration of possession of property can be made while convicting the accused and within one month thereafter and not at the initial stage of the trial (Ref : 15 DLR 29 (WP), 2 BCR 99).

15 DLR 72—Quader Meah Vs. Quader Ali—Trial court on evidence accepted the allegation of use of force though did not record a factual finding to that effect. Evidence on record about the use of force being present, order under this section is justifiable (Ref : 2 DLR 82, 7 DLR 522).

13 DLR 30—Bashiruddin Meah Vs. Modhu Lal Somani—Appellate court failed to reverse order regarding restoration of possession while reversing the judgment of trial court cannot do so after the judgment was pronounced. High Court can interfere under section 439 Cr. P.C.

7 DLR 60 (WP)—Qaribullah Vs. Md. Ismail Khan—Section 522, does not authorise the court to restore the possession of the land to the accused, if the latter is acquitted by the higher court. In case of acquittal, on revision by the High Court, possession of land may be restored to the accused by the High Court in the exercise of its inherent power under section 561A Cr. P.C.

1950 PLD 154 (Lah)—No logical consideration can compel a court to put back into possession of any immovable property to a person who was convicted of an offence involving use or show of criminal force or criminal intimidation in respect of such property, and who was deprived of its possession following such conviction, by an order under section 522 merely by reason of such person having been acquitted of the offence.

Court of appeal, confirmation or revision—The orders contemplated by section 522 (1) is an original order by the court of appeal, confirmation, reference or revision. The words

'court of appeal or revision mean the court to which an appeal or application for revision is preferred against the original order of conviction, and not court to which an appeal or revision petition may be made against the order of restoration (33 Cr. LJ 191). One month is the time limit fixed for the trial court in sub-section (1), but there is nothing to show that this limitation applies to a court of appeal. Under this section, a month after the date of conviction the trial court becomes functus officio in the matter of delivering possession. There is a provision for appeal from an order of restoration under section 522 (3) Cr. P.C. Sub-section (2) applies to the court which deals with the original matter.

Appeal or revision—Since an appellate court can pass an incidental or consequental order, as such order under this section is also subject to appeal and is similarly subject to the revision under section 439 Cr.P.C before the High Court Division.

19 BLD (AD) 260—Mohammad Ali Member Vs. Abdul Fazul Mia & ors—Power to restore possession of immovable property.

It provides that whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation and it appears to the court that by such force or show of force or criminal intimidation any person has been dispossessed of any immovable property, the court may, if it thinks fit, when convicting such person or at any time within one months from the date or the conviction order the person dispossessed to be restored to the possession of the same.

The use of force, show of force or criminal intimidation at the time of criminal trespass upon the case land had not been held proved in the trial court or in the appellate court. The High Court Division has found no illegality in the said concurrent findings. In the circumstances the said Court has acted beyond jurisdiction in passing the order for restoration of possession of case land to the complainant. [Ref : 4 BLC (AD) 259]

4 MLR 373 (HC)—Mohammad Ali Member Vs. Abdul Fazal Mia. Md. Mazedul Huq and another— Restoration of

possession of immovable property in a case of criminal trespass—Order for restoration of possession of immovable property under section 522 of the Code of Criminal Procedure may be made following conviction in a case under section 447 of the Penal Code when the dispossession was caused by use of force, show of force or criminal intimidation. (Ref : 8 BLT Ad 96).

523. Procedure by police upon seizure of property taken under section 51 or stolen.—(1) The seizure by any police officer of property taken under section 51, or alleged or suspected to have been stolen, found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate who shall make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or, it such person cannot be ascertained, respecting the custody and production of such property.

(2) **Procedure where owner of property seized unknown.**—If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within one month from the date of such proclamation.

Scope and application—This section provides for the disposal of property by Magistrate seized by police by virtue of their own powers—(a) under section 51 by search of an arrested person, (b) under suspicion of being stolen, or (c) under suspicion of being connected with an offence under section 165, 166, 550 Cr.P.C but property seized by a warrant under section 96 comes under section 517 and not under section 523. Section 523 is the relevant section under which an order for the interim custody of the property seized by the police can be made during the pendency of the investigation (1970 P. Cr. LJ 875). If the police does not report a seizure made by it to the Magistrate, the seizure is illegal and the

thing seized should be returned to the owner. The Magistrate does not decide a question of title but merely decides the question of a right or possession (AIR 1952 All 470). When a Magistrate once passes an order it is not open to him nor to any other Magistrate subsequently to vary the order he has made. The court may pass an order that property should be kept in the malkhana pending a decision by a civil court. It is incumbent on a Magistrate to make an enquiry to find out who is the person entitled to possession of the property seized (AIR 1936 Bom 171).

40 DLR 268—Siddique Ahmed Sawdagor Vs. The State—The Police who seized any property is under legal obligation to report forthwith the same to a Magistrate who empowered under section 523 (1) to pass an order for its disposal or delivery to the person entitled to possession thereon. The act of the Investigation Officer to give custody of the property on the basis of the practice in vogue in the Police Department without any support of the statutory provisions of law to that effect in violation of section 523 Cr. P.C is without any lawful authority add is illegal.

30 DLR 219—Jogesh Chandra Dutta Vs. Bangladesh—Section 167 of S.C. Act allows confiscation while section 523 of the Cr. P.C empowers returns of goods to the rightful owner.

29 DLR 26—Kanan Rani Paul Vs. The State—Section 523 Cr. P.C provides a procedure of dealing with the seized goods which says that the seizure of property suspected to have been stolen or found under the circumstances which create suspicion of the commission of any offence shall be forthwith reported to Magistrate who shall make such order as he thinks fit regarding the disposal of such property or the delivery of the such property to the person entitled to the possession thereof.

19 DLR 10 (WP)—Bashir Ahmed Vs. The State—In order to decide which party is entitled to the possession of a propety under section 523 Cr. P.C the Magistrate shall hold inquiry which should not be understood to mean a judicial inquiry. All that the Magistrate is to do is to examine the police file, and other materials placed before him by the contestants.

12 BLT (HC) 19—Abdul Muntakim Vs. The State—The Petitioner is the real owner of the Seized Private Car—Undisputedly Car No. Raj. Metro. Metro "Ka" 11-0027 was seized in connection with GR Case No. 241(2) 2003 arising out of Jamuna Setu East P.S. Case No. 1 dated 15.06.2003 under section 25B(2) of the Special Powers Act on the allegation of recovery of 591 bottles of Indian phensedy 1 from the car. The petitioner who was not an accused of the case claiming himself as the owner of the car filed an application in that case before the Magistrate for giving the car in his custody which was rejected on the plea that the application ought to have been filed before the Special Tribunal as the case was triable by the Tribunal.—

Held: Under section 52391) of the Code the Magistrate at that stage of the case was empowered to dispose of the seized car or deliver the same to the person entitled to possession thereon. So the ground of rejecting the application of the petitioner given by the learned Magistrate that the application ought to have been filed before the Special Tribunal is erroneous. [Para-7].

7 BLT 256 (AD) —Islami Bank Bangladesh Ltd. Vs. Al-Baraka Bank Bangladesh Ltd. & Ors—The Provision of Section-523 Cr. P. C. empowers the concerned Magistrate to decide himself as to the entitlement of possession of the seized goods by either of its claimants namely, the informant-Islami Bank Bangladesh Limited or the 3rd party-petitioner Al-Baraka Bank Bangladesh LTd. [Para-9]

Revision—The Sessions Judge, High Court Division can in revision set aside an order and direct restoration of property to the person entitled to get it.

Appeal—There is no appeal against a decision under this section.

524. Procedure where no claimant appears within six months.—(1) If no person within such period establishes his claim to such property, and if the person in whose possession such property was legally acquired by him, such property shall be at the disposal of the Government, and may be sold under

the orders of the Metropolitan Magistrate, District Magistrate or sub-divisional Magistrate, or of a Magistrate of the first class empowers by the Government in this behalf.

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appears against sentence of the Court passing such order would lie.

Scope and application—It is open to the parties to adduce evidence to establish their respective titles to possession (AIR 1938 Cal. 17). Where no offence is found to have been comitted, the property should be returned to the accused or should be forfeited to the Government (16 Cr. LJ 29).

Appeal and revision—The appeal allowed by sub-section (2) is an appeal in the full sense of Chapter XXXI and is governed by its provision. If the aggrieved person does not prefer appeal, it will be improper to entertain a revision.

525. Power to sell perishable property.—If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than ten taka the Magistrate may at any time direct it to be sold : and the provisions of sections 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale.

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CHAPTER—XLIV

Of the transfer of Criminal Cases

525A. Power of Appellate Division to transfer cases and appeals.—(1) The Appellate Division may direct the transfer of any particular case or appeal from one permanent Bench of the High Court Division to another permanent Bench of the High Court Division, or from any Criminal Court within the jurisdiction of one permanent Bench of the High Court Division to any other Criminal Court of equal or superior jurisdiction within the jurisdiction of another permanent Bench of the High Court Division, whenever it appears to it that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses.

(2) The permanent Bench of the High Court Division or the court, as the case may be, to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such Bench or Court, as the case may be.

Decision

5 BLD 278 (AD)—Kalipada Shaha Vs. The State—Offence under the Drug Ordinance Forum for investigation and trial. The proceeding before the Magistrate was without jurisdiction in as much as special procedure has been provided for investigation of the offence by designated class of officer and a special court has been set up for the purpose. The case can only be tried by a Drug Court situated at Dhaka and not by the Upa-zila Magistrate. The Case is accordingly transferred to the Drug Court at Dhaka for trial.

526. High Court Division may transfer case or itself try it.—(1) Whenever it is made to appear to the High Court Division :-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto : or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or

(d) that an order under this section will tend to the general convenience of the parties or witnesses, or

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code; it may order—

(i) that any offence be inquired into or tried by any Court not empowered under section 177 to 183 (both inclusive) but in other respects competent to inquiry into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction ;

(iii) that any particular case or appeal be transferred to and tried before itself ; or

(iv) that an accused person be sent for trial to itself or to a Court of Session.

(2) When the High Court Division withdraws for trial before itself any case from any Court, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

(3) The High Court Division may act either on the report of the lower Court, or on the application of a party interested or on its own initiative.

Provided that no application shall lie to the High Court Division for transferring a case from one Criminal Court to another Criminal Court in the same session division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall except when the applicant is the Attorney-General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section, the High Court Division may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court Division may under this section award by way of compensation to the person opposing the application.

(6) **Notice to Public Prosecutor of application under this section.** Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together, with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty four hours have elapsed between the giving of such notice and the hearing of the application.

(6A) Where any application for the exercise of the power conferred by this section is dismissed, the High Court Division may if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand taka as it may consider proper in the circumstances of the case.

(7) Nothing in this section shall be deemed to affect any order made under section 197.

(8) **Adjournment on application under this section.** If in any inquiry under Chapter VIII or any trial, any party interested intimates to the Court at any stage before the defence closes its case that he intends to make an application under this section, the Court shall, upon his executing, if so required, a bond without sureties, of an amount not exceeding two hundred taka, that he will make such application within a reasonable time to be fixed by the Court, adjourn the case for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon ;

Provided that nothing herein contained shall require the Court to adjourn the case upon a second or subsequent intimation from the same party, or, where an adjournment under this sub-section has already been obtained by one of

several accused, upon a subsequent intimation by any other accused.

(9) Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it.

Explanation—Nothing contained in sub-section (8) or sub-section (9) restricts the powers of a Court under section 344.

(10) If, before the argument (if any) for the admission of an appeal begins, or, in the case of an appeal admitted, before the argument for the appellant begins, any party interested intimates to the Court that he intends to make an application under this section, the Court shall, upon such party executing, if so required, a bond without sureties of an amount not exceeding two hundred taka that he will make such application within a reasonable time to be fixed by the Court, postpone the appeal for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon.

Scope and application—The right to move the High Court Division or Sessions Judge given by section 526 is an independent right which is not controlled by any condition other than those mentioned in section itself, namely, that he should furnish a bond in proof of his bonafide before the trial court. The basis of all application for transfer of criminal cases must be that the accused must have a reasonable apprehension that he will not receive a fair trial (18 Cr. LJ 95). Before the High Court Division or Sessions Judge would take into consideration an apprehension, it must be satisfied that the apprehension is not fanciful one (37 Cr. LJ 436). Confidence in the administration of justice, is an essential element of good government, and reasonable apprehension of failure of justice in the mind of the accused person should, therefore, be taken into serious consideration on an

application for transfer (33 Cr. LJ 1183). In such cases the test is not whether in fact a bias has affected the judgment, the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a court might have operated against him the final decision of the court. When there are circumstances existing to create a reasonable apprehension in the mind of the accused that he will not receive a fair trial, a transfer should be directed, though there is really no bias in the mind of the court from which the transfer is sought and though the circumstances may be capable of explanation. A transfer of the case would not be justified on the ground that the case caused a sensation in the district (52 Cr. LJ 106). A person injured or aggrieved by the crime, a witness in the trial, an informant or a complainant on whose information the machinery of law is set in motion, would, under certain circumstances, come within the description of 'any party interested' within the meaning of section 526 (3) (8). The provisions of the section is not exhaustive (48 Cr. LJ 721). Provisions to sub-section (3) provides that no application for transfer of a case from one court to another in the same sessions division shall lie to the High Court Division unless it has been first made to Sessions Judge and rejected by him. This section does not apply to proceedings instituted in a court without jurisdiction. Every person, whether accused or not, who makes the application for transfer must support his application by an affidavit (34 Cr. LJ 1035). It is necessary for a person who claims a transfer to prove by an affidavit, fully and strictly all the facts on which he rests his claim (AIR 1938 Rang 454). An application for transfer which is not supported by an affidavit, cannot be entertained (37 Cr. LJ 510). An accused person is competent to make an affidavit in support of his application for transfer, when a case has already been transferred on very strong grounds and required to transfer it for a second time. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. It is a matter of public policy that justice should not merely be done but should appear to be done (AIR 1945 PC 38).

54 DLR 457 (HC)—Shahjahan Faraji and another Vs. State—For transfer of a criminal case from one court to another or from one District to another, there must exist a reasonable apprehension in the mind of the applicant that he will not get a fair and impartial trial in the court concerned. Allegation of bias in the court may provide a good ground for transfer, provided there is some factual basis to substantiate it.

47 DLR 64 (AD)—Sirajul Islam Vs. Keramat Ali Bhuiyan—Transfer of a criminal case—Conditions for transfer—The High Court Division may withdraw a case to itself without issuing any notice upon either party when some question of law or unusual difficulty is involved therein. Neither of these situation is present here. There is no justification for the impugned transfer (Ref : 15 BLD 1 (AD), 35 DLR 118 (AD)).

46 DLR 524—State Vs. Auranga @ K. M. Hemayatuddin—When the Additional Sessions Judge has already observed that he entertains doubt as to whether the State will succeed in proving the case against the accused, the State has every reason to think there will be no fair trial in this court and the case needs be transferred to some other Court of competent jurisdiction.

15 BLD 33 (AD)—M. M. Nurul Hoque Mollah Vs. Sree Radheshyam Saha—In determining the venue of trial of a criminal case in a transfer petition, the general conveniences of the contending parties is to be taken into consideration. Since the central point in dispute in the 4 Criminal Cases in question relates to three transaction by cheques and dishonour of those cheques and non-supply of jute against payment and one of those cases being criminal case No. C-144 of 1993 having already been transferred to the Court of Magistrate at Dhaka, the reasons for not allowing the transfer of 3 other cases from Kotchandpur to Dhaka is not based on proper exercise of the discretion by the High Court Division. The 3 criminal cases are therefore transferred from the Court of the Thana Magistrate. Kotchandpur to the Court of the Magistrate at Dhaka (Ref : 1 BSCD 120, 121).

43 DLR 347—Hussain Mohammad Ershad Vs. The State—Transfer of case—Plea of bias—The question of admissibility or non-admissibility of evidence should be left to be agitated when the case is argued. Merely because a court acted illegally in allowing some evidence to go into the record or disallowing some evidence as irrelevant or took a wrong view of the law in passing an order would not by itself be a ground for bias (Per Anwarul Huq. Chowdhury. J).

12 BLD 166 (AD)—The State Vs. The Divisional Special Judge. Khulna Division—The High Court Division, whether has got power to transfer a case from one Criminal Court to another Held : Under Section 526, the High Court Division has got power to transfer a case from one criminal court to another criminal court situated anywhere in the country, and under section 526B (which was inserted by Ordinance No. XLIX of 1978) a Sessions Judge has got power to transfer a case from one criminal court to another criminal court in his sessions division. There is no conflict between these two sections.

40 DLR 282 (AD)—Alauddin Molla Vs. The State—Two versions of the same occurrence—Simultaneous hearing and disposal of both cases desirable, appellant's gross laches in approaching the High Court Division for simultaneous trial of both the cases. Purpose of holding a simultaneous trial is lost if there is long gap between the two trials.

8 BCR 204—Abdus Sukkur Vs. The State—Sessions Judge's Jurisdiction to Transfer Cases—Sessions Judge has got jurisdiction to transfer a case from one Criminal Court to another in his Session Division whenever he thinks it expedient for the ends of justice within the period of limitation under section 339C(4) Cr. P.C. Limitation on Transfer of a Case—Limitation shall run afresh from the date on which the case is transferred by the transferee trial court (Ref : 8 BLD 340).

4 BCR 92—Mahbubur Rahman Khan Vs. Azizur Rahman Chowdhury—Case of bias was not made against the Additional District Magistrate. For quieting the mind of the

accused petitioner who is restless because his father was asked about a question thrown in by the complainant opposite Party No. 1 making reflections on his antecedents so that he may feel that he would get the justice he deserves, the case in question be transferred from the Court of the said Additional District Magistrate to any other appropriate Court for trial for the ends of justice.

14 DLR 573—Sayed Kanchan Ali Vs. Shahjahan—Public Prosecutor's view opposing a transfer petition is entitled to great respect but not always the deciding factor.

12 DLR 458—Jagabandhu Bhowmik Vs. The State—A court of justice is not justified in exercising any pressure upon an accused person before it which the object of coercing him to produce persons who are fugitives from justice. The circumstances set forth above are enough to show that the Magistrate is baised against the accused persons and that fair justice cannot be expected in his court.

10 DLR 12 (WP)—Bashir Ahmed Vs. The State—Impression that a Judge has developed an attitude towards convicting an accused is a ground of transfer (Ref : 11 DLR 42 (WP), 11 DLR 9 (WP), 10 DLR 3 (WP), 8 DLR 117 (WP)).

2 DLR 80—Nadira Begum Vs. The Crown—The fact that the Magistrate followed the provisions of the law in dealing with the contempt committed in his presence is no ground whatever for transferring a case from his file. Proceedings under section 228 P. C follow the procedure laid down in Cr. P. C and the provisions of that sections have to be applied by the court then and there before its rising.

2 PLD 64 BJ—The provisions of section 526 (8), as they stand, are absolutely imperative in terms. The Magistrate is bound to adjourn the case on the application for transfer by the accused, when the accused are within their rights, till such period as would afford a reasonable time for the application for transfer to be made. Where the Magistrate without granting the adjournment proceeds with the case, the trial becomes illegal (Ref : 1 PLD 12 B Bal).

51 DLR 88 (AD) —Jahir Gazi and others Vs. Belal Hossain, Advocate and other—The High Court Division can suo motu

transfer a sessions case. The informant and his victim brother by preferring the application has merely informed the High Court Division about the state of the circumstances surrounding the sessions case.

16 BLD 24 (AD)—Md. Khalequzzaman Vs. Md. Illias and others—Although under specified conditions the High Court Division has power to transfer on its own motion any criminal case from any subordinate Court to any other Court or to itself even without issuing any notice upon the parties the impugned order of transfer in the absence of any of those conditions and without giving an oppotunity to the informant to refute the allegations for transfer is not contemplated by law. [Ref. 48 DLR (AD) 52].

17 BLD 591 (HC) —Suman Alias Faysal Ahmed Vs. The State and another— Petitioner alleged that he has been threatened by the other side in the open Court to be picked up from the Court with no hope to return and there is also pressure on his lawyer not to defend him. In the circumstances, there is a reasonable apprehension in the mind of the accused that he will not get a fair trial or that he may be denied the right to defend himself in the trial though his lawyer. In the interest of justice the case should be transferred. [2 BLC 578]

19 BLD 103 (HC) —Sohali Thakur and ors Vs. The State— There is an apprehension in the mind of the accused-petitioners in the matter of getting fair and impartial trial in the hands of any Sessions Judge under the Sessions Division, Dhaka. Since they lost confidence, the case is required to be transferred from the Sessions Division, Dahak to Narshingdi and it will be convenient for both the parties if the case is transferred to the Narshingdi and trial is concluded there. [Ref. 4 MLR (HC) 28; 4 BLC 69].

19 BLD 103 (HC) — Sohali Thakur and ors Vs. The State— Confidence in the administration of justice is an essential element of good government and reasonable apprehension of not getting justice in the mind of the accused person should be taken into serious consideration in an application for transfer.

19 BLD 247 (AD) —Mohd. Moslem Uddin Vs. The State & anr— In an application under section 526 of the Code filed by the informant a Division Bench of the High Court transferred Sessions Case No. 83 of 1998 from the Court of Additional Sessions Judge to the Court of Sessions Judge, Nawabganj for the trial. The said order was passed exparte without any notice either to the accused or to the State and without calling for any report from the Court concerned. The alleged ground of transfer were not even noticed in the impugned order but even then transfer was allowed by merely saying that "without accepting or rejecting the grounds for the transfer, we think justice will be met if the case is disposed of by the Court of Sessions Judge, Nawabganj."

Such kind of order is far from a judicial order. If that be the way of disposing an application for transfer by throwing all procedures and norms to the winds, then, arbitrariness will rule the field and not 'justice' which was said to be the concern of the learned Judges for passing the impugned order. It seems the learned Judge has a pathological disposing for passing such summary order which is absolutely wrong.

4 MLR 295 (HC) — Ali (Md.) Md.Amir Hossain and others— Code of Criminal Procedure 1898— Section 526— Transfer of Case—Where the complainant who hails from distant place is under threat from the accused in connection with the appearance in the Court of Magistrate in whose jurisdiction the accused are permanent residents, the case may be transferred to the Court of different magistrate in other district.

52 DLR 50 (AD) —Moslem Uddin (Md) Vs. State and another (Criminal)— Order of transfer of a case passed ex-parte without any notice either to the accused or to the State and without calling for any report from the Court concerned by merely saying that without accepting or rejecting the grounds for the transfer the Court thinks justice will be met if the case is disposed of by the Court of Sessions Judge cannot be legally sustained. (Ref. 5 MLR (AD) 61-62).

20 BLD 85 (AD) —Md. Nurul Alam Vs. Sohail Thakur and others— Mere fact of taking into custody of the accused during

trial can never be a basis of making a prayer for transfer of the case unless there is other convincing and reasonable grounds for apprehension in the mind of the accused. [5 BLC (AD) 111].

5 MLR (HC) 235—Anisur Rahman and others Vs. The State and another—Transfer of case from one Sessions Division to another—Where the accuseds and their lawyers are under threat from the side of the informant and the lawyers declined to conduct their defence and returned the brief one after another, the case is a fit one for transfer from one Sessions Division to another.

3 BLT (AD) 66—Mr. Serajul Islam & Ors Vs. Keramat Ali Bhuyan & anr— One of the accused appellant had been on custody for a long time during which period he unsuccessfully filed application for bail up to the Appellate Division. But at the last state he filed another application for bail on the ground of illness supported by a medical certificate. This time his prayer for bail was not opposed by the Public Prosecutor--- apprehension of the informant about the propriety of the Public Prosecutor is groundless-- impugned transfer order of the High Court Division is set aside.

3 BLT (HC) 254—Azad Sarder Vs. The State— Only because of awarding cost the prayer for transfer of the case cannot be substantiated by any reason-- this is no ground of transfer of a case that cost was given adjournment.

7 BLT (AD) 123— Jahir Gazi & Ors. Vs. Belal Hossain & Ors— Victim and the informant as Petitioners filed an application praying for transfer of the case from the Court as Sessions Judge at Barisal to the Court of Sessions Judge at Dhaka. Held: The High Court Division can suo motu transfer a sessions case. The informant and his victim brother by preferring the application has merely informed the High Court Division about the state of the circumstances surrounding the concerned Sessions Case and the High Court Division had complete jurisdiction to exercise its discretion in the matter.

7 BLT (AD) 362—Md. Shahid Mia Vs. Liton & Ors— The Court can not shirk its responsibility from giving a finding as to the truth or otherwise of the allegations stated in the

petition. In this case, no finding has been given by the learned Judges of the High Court Division. The appellant or the State was given no opportunity of being heard to refute the allegations made in the petition, which is against the principle of audi alteram partem. [Ref : 5 BLC (AD) 74].

4 BLT (AD) 235—Md. Bazlur Rahman Sikder Vs. Mrs. Tahera Begum & Anr— C.R. case under section 6 (5) of the Muslim Family Law Ordinance pending in the court of Magistrate. 1st class 'Ka' Region Bogra—Respondent No. I resides at Bogra in the house of her father and that most of the witnesses are residents of Bogra—A transfer under section 526 of the code is a discretionary matter and the learned Judge having exercised that discretion judicially the same calls for no interference.

4 BLT (AD) 157—Nurul Amin Vs. The State— Bail— on 5.11. 92 charge-sheet was submitted against the petitioner and 8 other under section 366A of the Penal Code read with section 4 (b) of the cruelty to women (Deterrent Punishment) Ordinance, 1983— No Charge has yet been framed in the case. Holding of trial is being unnecessarily delayed without any fault on the part of the Appellant. The other co-accused persons have been enjoying the privilege of bail, granted by the Special Tribunal— the appeal is allowed.

5 BLT (AD) 61—Nazrul Islam Sk. Vs. The State—A party making allegation against a court must take full responsibility by making an affidavit or affirmation. It cannot just make any allegation glibly without taking the risk of Prosecution for making a false statement on oath.

7 BLT (HC) 16—Soheil Thakur & Ors.Vs. The State—Reasonable apprehension—The Accused petitioners were on bail granted by the Learned Session Judge when case was transferred by him to the Third Court of Additional Session Judge on 19.3.98 there had been no materials before the Learned Additional Session Judge which prompted him cancel the bail of the accused petitioners. As a transferee Court before it there had been no allegation of any type against the accused petitioner even at the instance of the state— Held: The facts

circumstances and materials brought on record undoubtedly lead a suggestion that the apprehension in the mind of the accused petitioners that they will not get fair and impartial trial and treatment in the hands of the Additional Session Judge or any other Judge of the Sessions Division of Dhaka got a basis and the apprehension cannot be ruled out.

6 BLC (AD) 47—Nizamul Huq Tarun Vs. Subash Chandra Chakraborty and another—Whenever an allegation is made against a court it is necessary to give a finding as to the truth or otherwise about it. This presupposes notice, although section 526 of the Code does not clearly speak of notice. In such a case the principle of audi alteram partem comes into play and hence the appeal is allowed setting aside the impugned order of the High Court Division.

54 DLR (HC) 457—Shahjahan Faraji and another Vs. State (Criminal)—For transfer of a criminal case from one Court to another or from one District to another, there must exist a reasonable apprehension in the mind of the applicant that he will not get a fair and impartial trial in the Court concerned. Allegation of bias in the Court may provide a good ground for transfer, provided there is some factual basis to substantiate it.

22 BLD (HC) 354—Shahjahan Faraji & anr. Vs. The State—For transfer of a criminal case from one Court to another or from one District to another, there must exist a reasonable apprehension in the mind of the applicant that he will not get a fair and impartial trial in the Court concerned. Allegation of bias in the Court may provide a good ground for transfer, provided there is some factual basis to substantiate it.

The transfer of a criminal case from one District to another District is a matter of grave consequence and such a transfer can only be made when it becomes imperative in the interest of justice, clearly dictated by exigencies.

4 BLC 234—Emran Ali (Md) Vs. Md Amir Hossain and Ors—The submission that the petitioner is a stranger in the Gazipur district and he is a permanent resident of a distant district of Nawabganj and he finds it difficult to attend the

Court at Gazipur as the accused persons were threatening him for which he had to lodge a GD entry with Joydebpur police station are just and expedient to transfer the case from Gazipur District to Dhaka District.

526A. Omitted.

526B. Power of Sessions Judge to transfer cases.—(1) Whenever it is made to appear to a Sessions Judge that an order under this section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division.

(2) The Sessions Judge may act either on the report of the lower Court, or on the application of a party interested, or on his own initiative.

(3) The Provisions of sub-sections (4) to (10) (both inclusive) of section 526 shall apply in relation to an application to the Sessions Judge for an order under sub-section (1) as they apply in relation to an application to the High Court Division for an order under sub-section (1) of section 526.

Scope and application—Section 526 to 528 deals with the transfer of cases from any criminal court subordinate to Sessions Court as well as High Court Division to another criminal Court. This section applies to the High Court Division and the Sessions Court. The High Court Division and the Sessions Court may act—(i) suo motu, or (ii) on the lower court's report, or (iii) on the application of a party. To enable a party to apply and obtain a transfer, one or more of the five grounds in clause (a) to (e) of sub-section (1) of section 526 and section 526B must be alleged and substantiated. The application shall be supported by an affidavit and the opposite party and the Public Prosecutor are entitled to have notice before the hearing together with the copy of grounds. Application for transfer unsupported by an affidavit cannot be entertained. The object is to discourage the making of false and scandalous statements. An affidavit can be made by an accused (23 Cr. LJ 399). Amended section 526B also makes an

adjournment compulsory when a party intends to apply to the Sessions Judge for transfer. The transfer is effective from the moment the order is passed and not when it is communicated to the lower court (39 Cr. LJ 987). Applications for transfer based upon the alleged prejudice and unfairness of the Magistrate or Judge have developed to an extent which is a scandal. An advocate is not the mouth piece of his client. His duty is a very serious one. It is professional misconduct for an advocate to make such imputation on the instruction of his client without taking steps to verify the truth. Court should not fail to remember that it is their duty no less to preserve an outward appearance of impartiality than to maintain the internal freedom from bias (9 Cr. LJ 251). The basis of all applications for transfer of criminal cases, must be that the accused must have a reasonable apprehension that he will not receive a fair trial. In considering the expediency of directing a transfer for ends of justice, the court has deemed it necessary to decide not merely the question whether there has been any real bias in the mind of the Magistrate or Judge, but also the further question whether incident may not have happened, which may be susceptible to create, in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial (48 Cr. LJ 721). Unnecessary delay in the disposal of petty case is a good ground for transfer. While it is true that convenience and expedition are factors to be considered in the trial of a case, it must be remembered that justice should be done, and the necessity for expedition should not be allowed to deprive the accused of reasonable opportunity to call evidence in defence on charge of an offence of which, at the outset of the proceedings, he had no knowledge, he would be called upon to meet.

45 DLR 57—Lutfar Rahman Vs. Mosammat Aleya Begum—Counter case, what it is—The case which arose out of the same occurrence or when the time, place and manner of occurrence are the same and similar and the witnesses or one case are the accused in another case and vice versa it could be said that one case is the counter case of another. Counter cases, trial of—It is desirable that counter cases be tried by the

same judge simultaneously—by such trial the court will get opportunity for looking to all the aspects of both the cases which is necessary for arriving at a correct decision and to avoid conficting findings.

37 DLR 62—Arjuman Ali Vs. Abdus Samad—Before the High Court is moved under sub-section (3) of section 526B Cr.P.C for transfer of a case from one Criminal Court to another the applicant, prior to that, must move the Sessions Judge as is provided by the proviso to sub-section (3) of section 526 Cr. P. Code. Sub-section (3) of section 526B Cr.P.C provides that the provisions of sub-sections (4) to (10) of section 526 Cr.P.C shall apply in relation to an application made to the Sessions Judge for an order of transfer of cases.

21 DLR 264 (WP)—The State Vs. Yousuf Ali Khan—Scandalisation of court is grossest form of contempt. Legal practitioners may be punished for contempt of court even for language professedly used in discharge of their functions as advocate. Advocate is guilty of contempt in making wild allegations of corruption against the trying Judge without verifying and satisfying himself that the allegations were in fact sustainable. He cannot claim any privilege if not acted in a bonafide diligent manner. Legal practitioners are not agents of persons who pay them but act in the administration of justice.

17 DLR 384 (SC)—Shamsuddin Vs. Gauhor Ayub—Transfer of the case which is pending inquiry before a Magistrate to the High Court is not legal (Ref : 17 DLR 34 (SC)).

17 DLR 233—Abdul Huq Vs. Abdul Motaleb—Transfer of a case to be ordered where apprehension (not necessary reasonable apprehension) exists (Ref : 21 DLR 489 and 5 DLR 32 (WP)).

13 DLR 56—Mahabbat Vs. The State—Court having formed a definite opinion in trying the accused is not fit to try him on remand.

8 DLR 117 (WP)—Haidar Jafri Vs. The Crown—Failure to grant adjournment under the section renders further proceedings invalid.

8 DLR 114 (WP)—Seigried Forstner Vs. Miss Sunno—Expression of opinion by a Magistrate on evidence judicially recorded in one case is not a proper ground for transfer of another case pending before him between the same parties.

527. Omitted.

528. Sessions Judge may withdraw cases from Assistant Sessions Judge.—(1) Any Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Assistant Sessions Judge subordinate to him.

(1A) At any time before the trial of the case of the hearing of the appeal has commenced before the Additional Sessions Judge, any Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(1B) Where a Sessions Judge withdraws or recalls a case under sub-section (1) or recalls a case or appeal under sub-section (1A), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.

(2) **District or sub-divisional Magistrate may withdraw or refer cases.** The Chief Metropolitan Magistrate or any District Magistrate or sub-divisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

(3) **Power to authorise District Magistrate to withdraw classes of cases.** The Government may authorise the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper, or particular classes of cases.

(4) Any Magistrate may recall any case made over by him under section 192, sub-section (2), to any other Magistrate and may inquire into or try such case himself.

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same.

Scope and application—This section empowers the Sessions Judge to withdraw any case or appeal from Assistant or an Additional Sessions Judge for trial by himself or for transfer to any other competent court. Chief Metropolitan Magistrate or Sub-divisional Magistrate now Upa-zila Magistrate are also empowered to withdraw or recall case from any Magistrate for trial by himself or transfer to any competent Magistrate. This section applies to cases under section 107, 117, 133, 144, 145, 147, 488 Cr.P.C This section does not give power to the Additional Sessions Judge to make the transfer, because the power under section 17 Cr.P.C can be exercised only in urgent cases and only when there is an application, oral or written, preferred by some party (9 CWN 40). Although this section does not provide for the giving of a notice to the opposite party, still on general principles, notice, should be given to the party affected, so as to give him an opportunity of showing cause against an order of transfer (1952 Cr. LJ 1047).

1 BLD 213 (SC)—Md Mofazzalur Rahman Vs. Abdus Salam— Magistrate having received intimation of SDM's order is not competent to dispose of the proceeding under section 145 Cr.P.C finally before transfer application is heard.

32 DLR 247 (SC)—Abdul Jabbar Khan Vs. The State—Section 528 (2) Cr.P.C provides that the District Magistrate or Sub divisional Magistrate may withdraw any case from or re-call any case which he has made to any Magistrate subordinate to him and may enquire into or try such case himself or refer it for enquiry or trial to any other Magistrate competent to enquire into for trial of the same. Section 192 Cr.P.C provides that a District Magistrate or Sub-divisional Magistrate may transfer any case of which he has taken cognizance for enquiry or trial to any Magistrate subordinate to him Sub-section (4) of section 528 Cr.P.C provides that any Magistrate may recall any case made over by him under section 192 (2) Cr.P.C to any other Magistrate and may enquire into or try such cases himself. The reading of these two sections,

namely sections 528 and 192 Cr.P.C clearly reveal that a case which has been transferred to a Magistrate could be withdrawn to the file of the District Magistrate or Sub-divisional Magistrate.

30 DLR 266—Abdul Hakim Bhuiya Vs. Hazrat Ali—Before ordering transfer of a case from a Magistrate's court the O. P in the case as well as the Magistrate before whom the case has been pending should be given notice about the application for transfer of the case from the Magistrate's court. Generally an application under section 528 (2) Cr.P.C is dealt with the principle underlying section 528 of the Cr. P. C.

15 DLR 270—The State Vs. Nani Gopal Basak—Transfer of a case from the file of one Magistrate to that of another without notice to the opposite side and without hearing him and giving no reason for transfer is illegal.

14 DLR 38 (WP)—Golam Sarwar Vs. Md. Akhter—Notice should be given to other party and afforded him an opportunity to be heard before ordering transfer (Ref : 8 DLR 114 (WP)).

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CHAPTER—XLIVA

OMITTED.

CHAPTER—XLV

OF IRREGULAR PROCEEDINGS.

529. Irregularities which do not vitiate proceedings.— If any Magistrate not empowered by law to do any of the following things, namely :—

(a) to issue a search warrant under section 98 :

(b) to order, under section 155, the police to investigate an offence ;

(c) to hold an inquest under section 176;

(d) to issue process, under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits;

(e) to take cognizance of an offence under section 190, sub-section (1), clause (a) or clause (b);

(f) to transfer a case under section 192;

(g) to tender a pardon under section 337 or section 338;

(h) to sell property under section 524 or section 525; or

(i) to withdraw a case and try it himself under section 528;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

Scope and application—This Chapter contains specific provisions for saving irregularities on certain matters and also irregularities in general. At the same time, there are certain provisions in the Code which are considered so vital that their disregard must vitiate a fair and proper trial and, therefore, destroy the validity of the proceedings. The words 'good faith' in this section import due care and caution (AIR 1931 Pat 389). This section will not protect deliverate negligence and wilful disregard of the clear provisions of the Code and the binding decisions of the High Court Division (AIR 1953 Cal 109). This section is intended to validate proceedings which have been erroneously and in good faith taken and completed

by a Magistrate. Where a Magistrate who is not empowered to transfer a case to a subordinate Magistrate, transfers the case, the irregularity is cured under this section if the transfer is made erroneously and in good faith (AIR 1928 Bom 286).

35 DLR 100—Akhtar Rahim Vs. The State—Village Court's jurisdiction to try cases for theft where the property involved is valued at Tk. 5000/00. Magistrate trying a case of theft the value of the property, involved being less than Tk. 500/00. Magistrate has no jurisdiction. The order of conviction by the Magistrate being illegal, provision of section 529 Cr.P.C cannot be called in and in support of Magistrate's order.

530. Irregularities which vitiate proceedings.—If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely :—

(a) attaches and sells property under section 88;

(b) issues a search-warrant for a letter, parcel or other thing in the Post office, or a telegram in the Telegraph Department;

(c) demands security to keep the peace;

(d) demands security for good behaviour;

(e) discharges a person lawfully bound to be of good behaviour;

(f) cancels a bond to keep the peace;

(g) makes an order under section 133 as to a local nuisance;

(h) prohibits, under section 143, the repetition or continuance of a public nuisance;

(i) issues an order section 144;

(j) makes an order Chapter XII;

(k) takes cognizance, under section 190, sub-section (1) clause (c), of an offence;

(l) passes a sentence, under section 349, on proceedings recorded by another Magistrate;

(m) calls, under section 435, for proceedings;

(n) makes an order for maintenance;

(o) revises, under section 515, an order passed under section 514;

(p) tries an offender;

(q) tries an offender summarily; or

(r) decides an appeal;

his proceedings shall be void.

Scope and application—this section enumerates eighteen kinds of irregularities which render proceedings void. Here no question of error or good faith arises. They are not irregularities but illegalities. Such proceedings have no existence in law and this means the Magistrate has no initial jurisdiction to try the case.

531. Proceedings in wrong place.—No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

35 DLR 118—Kari Palan Meah Vs. The State—Even if the jurisdiction is assumed wrongly or the proceedings are initiated in a wrong place, these are irregularities which do not vitiate the proceedings and are curable under section 529 read with section 531 Cr. P.C.

25 DLR 268—Latifa Akhtar Begum Vs. Md. Abdul Hakim—Objection as to the place of trial as envisaged by section 531 must be taken at the initial stage of trial. It cannot be allowed where the trial has been concluded.

11 DLR 213—Rameswarlal Agarwala Vs. The State—When no prejudice caused to the accused for holding trial, irregularity is curable under section 531.

532. Omitted.

533. Non-compliance with Provisions of section 164 or 364.—(1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has

been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Court of Appeal, Reference and Revision.

Decisions

10 BLD 430— Abdul Hakim Vs. The State— Code of Criminal Procedure section 164 and 533—High Court Division Appellate Side Rules-23 and 84-whether a Magistrate acts without jurisdiction in recording the confessional statement without following strictly and observing the mandatory provision contained in section 164 (3) of the Code—Whether it renders such confessional statement unworthy of credit and inadmissible in evidence— and whether illegality and irregularity curable under section 533 of the Code. Held : illegality-non-complaince with the mandatory provision of section 164 Cr.P.C on material point not curable under section 533 and not admissible in evidence. Section 533 is the curable section but it would not cure a non-compliance if the error injuries the accused in his defence on merit. (Ref : 43 DLR 291).

40 DLR 186— Ratan Khan Vs. The State—Any irregularity in recording the confession is curable under section 533 Cr. P.C. Principle of identification of an accused by witness in dock when there was a previous T.I. parade— Circumstances when a witness cannot possibly identify the accused in dock stated (8 BLD 396, 8 BCR 3).

8 BLD 505— Md. Azad Shaihk Vs. The State— The Magistrate did not make any genuine effort to find out the real character of the confession—The omissions to fill up certain paragraphs in the form for the statement are not curable.

5 BLD 95—Md. Emran Ali Vs. The State— Confession— whether non-examination of the Magistrate who recorded

confession renders the confession inadmissible in evidence—Privy Council depricates the practice of examination the Magistrate and Judges except in special circumstances such as those provided by section 533 Cr.P.C Confession of an accused implicating the co-accused—Its effect. It shall not be used as a sole basis of conviction (Ref : 37 DLR 1).

11 DLR 84 (SC)—Hazart Jamal Vs. The State—Failure to keep memorendum of accused's statement. Irregularity is curable under section 533 Cr.P.C (Ref : 20 DLR 48 (WP)).

5 DLR 49 (WP)—Syed Noor Vs. The Crown—The proper course in a case when the statement of the accused has not been signed by him and the strict provisions of section 533 have not been complied with is to exclude such statement from consideration of the case.

51 DLR 43—Syed Ahmed Vs Abdul Khaleque and others—The recording of the statement on a foolscap paper and mere omission of endorsement cannot be considered as fatal defect. The breach of the provision of law, if any, is a technical one and by that the evidentiary value of the confessional statement cannot be blown away. The defect is very much curable under section 533 of the Code of Criminal Procedure.

534. Omitted.

535. Effect of omission to prepare charge.—(1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

Decisions

44 DLR 159—Abul Hashem Master Vs. State—Defect in charge curable—When the F.I.R and the evidence have given the exact time of the occurrence, a mis-statement in the

charge as to the time of the occurrence cannot mislead the accused in his defence and the trial cannot be said to have been vitiated in view of the provision under section 225 and 535 Cr. P.C.

5 BLD 257 (AD)—Joynal Abedin Vs. The State—Omission to frame a charge—Whether conviction of the accused who was not charged with the offence can be maintained. Whether such conviction can be maintained by taking recourse to section 535 Cr.P.C It appears that a failure of justice has been occasioned by the omission and it is too late to direct a retrial. We therefore find difficult to maintain the conviction of this appellant under section 304 P.C (Ref : 37 DLR 113 (AD), 5 BCR 272 (SC)).

4 DLR 364—Saffar Mallik Vs. The Crown—Omission to frame a formal charge in a case which, by virtue of the provision of section 264 Cr.P.C has been tried summarily and in which an appealable sentence has been awarded is an irregularity within the meaning of section 535 and does not vitiate trial unless, in the opinion of the Court of appeal or revision, failure of justice has thereby been occasioned.

536. Omitted.

537. Finding of sentence when reversible by reason of error or omission in charge of other proceedings.—Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or an appeal or revision on account—

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code.

(b). (c), (d)—Omitted.

Explanation—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raaised at an earlier stage in the proceedings.

Scope and application—This is the residuary section in the Chapter which is intended to cure any error, omission or irregularity committed by a court of competent jurisdiction in the course of trial through accident or in advertence or even any illegality consisting in the infraction of any mandatory provision of law, unless such irregularity or illegality has in fact occasioned a failure of justice. The object of this section is to secure Justice by preventing the invalidation of a trial already held, on the ground of technical breaches of any provision in the Code causing no prejudice to the accused.

55 DLR 527 (HC)—Goutam Chandra Das alias Goutam Kumar Das Vs. State—The omission of the expression "যৌতুকের জন্য" which is a vital ingredient of the offence being a major omission makes the charge materially defective and the defect is not curable under section 537 of the code because this omission deprived the accused from taking proper defence and thereby caused prejudice to him.

53 DLR (HC) 125—The sanction order seems to be tro mechanical and is no sanction in the eye of law. Absence to sanctions cuts at the very root of the procecution affecting jurisdiction of the court and this defect is not curable.

47 DLR 47 (AD)—Haider Ali Khan Vs. State—Sentence passed in lump is only an irregularity not affecting the Court's competence to pass order of conviction and sentence.

46 DLR 238—Saheb Ali Meah Vs. State. The alleged admission of guilt was not recorded as nearly as possible in the words accused by the accused Section 243 Cr.P.C is mandatory, the violation of which causes prejudice to the accused and is not curable under section 537 Cr. P. C.

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. The 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.

46 DLR 140—Golam Moula Master Vs. State—This provision of law will also apply to the mandatory provisions of the Criminal Procedure Code including section 155. The prevailing opinion is that section 537 may be taken to cover the error omission or irregularity in the widest sense of these terms provided there has been no failure of justice and there is no restriction in the section itself.

45 DLR 352—Abdul Hakim Vs. State—When sanction for prosecuting a govt. servant is invalid. The trial court would not a court of competent jurisdiction and a defect in the jurisdiction of the court can never be cured under section 537 Cr. P.C.

44 DLR 277 (AD)—State Vs. Constable Lal Meah—Sameness of transaction—Defect—If there is good evidence that the transaction was one and the same, then mere absence of certain links in the accusation will not make the trial illegal if at all it is a defect which is curable under section 537 Cr. P.C.

43 DLR 40—Fazal Vs. State—The remand order amounts to a double jeopardy for the petrs and offers a chance to the prosecution to remedy its lacuna. Such a remand should not be made.

42 DLR 162—Moktar Ahmed Vs. Haji Farid Alam—Interpretation of Statute—Whether expression 'in at least one newspaper' occurring in section 339B Cr.P.C is mandatory or directory. Held : provisions of section 339B is a mandatory and not a directory one and since the sentence was passed without gazette notification, at least in one Bengali newspaper, I have no hesitation to hold that section 537 does not cover the case falling under section 339B Cr.P.C (Ref : 10 BLD 278, 14 BLD 369).

41 DLR 66—Angur Vs. State—Certificate required under section 339 (1) Cr.P.C if not complied with section 537 has no manner of application.

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. Omission in the

paragraphs cast serious doubt upon the voluntary character of confessional statement.

40 DLR 398—Ali Newaj Bhuiyan Vs. The State—Violation of the mandatory requirements of Section 243 in recording the individual statements of the accused either in their language or in words as nearly as expressed by them is not curable by section 537. Conviction and sentence are not substainable in law accordingly.

40 DLR 377—Lal Meah Vs. The State—Lumping together of several distinct charges in one trial is not permissible. Joint trial of separate and distinct offences not in course of same transaction is not permissible. Adoption of a procedure prohibited by Code of Criminal Procedure is not curable by section 537 Cr.P.C (Ref : 23 DLR 91, 13 DLR 213, 10 DLR 49 (SC)).

8 BLD 193 (AD)—Md. Nurul Huda Vs. Bhashanu Sarder—Contents of judgment—Provisions for writing out the judgment were not strictly followed by the Magistrate but the main points in the case under sections 379 & 147 Penal Code are found to have been duly considered by him—High Court Division in the circumstances of the case rightly observed that though Judgment of the Magistrate was not in proper form, some reasons have been given for acquitting the accused person—No miscarriage of justice have been caused by non compliance with the provisions provided for writing a judgment.

39 DLR 437—Majibur Rahman Vs. The State—Procedure laid down in section 103 need not be followed by I. O while seizing alamats. Failure to explain reason for absconding after occurrence favours prosecution. Accused are named in promptly lodged F.I.R. supported by medical evidence. Failure to draw the attention of the accused to the incriminating evidence under section 342 is curable by section 537 Cr. P.C.

8 BLD 425—Harun Sheikh Vs. The State—Examination of the accused—There is no denial that the judge did not mention the place of occurrence in the charge and he simply

asked the accused whether they had anything to say since they had heard statements of the PWS—Such cryptic examination and omission to mention the place of occurrence in the charge will not affect the merit of the case as the accused were not prejudiced by the irregularities (Ref : 1 BSCD 113, 19 DLR 927).

6 BCR 81 (AD)—Md. Shajahan Sheikh Vs. The Sessions Judge. Pirojpur—What the learned Sessions judge did in this case is that he scrutinised the documents of the various parties carefully and came to the conclusion that the matter should be settled in civil court. Such conclusion could have been arrived at by the learned Magistrate himself at that stage of proceeding as contemplated in sub-section (5) of section 145 Cr.P.C Here unfortunately the learned Sessions Judge intervened rather prematurely. But could it be termed as illegal exercise of power. The Barisal Bench came to the conclusion in a cryptic manner, not doubt, that the first party failed to establish prima facie case of their locus standi to initiate a proceeding under section 145 Cr.P.C In view of this conclusion, there is no hesitation in saying that though the Sessions Judge prematurely intervened, passed the order correctly and legally and any such irregularity is curable by the provisions in section 537 Cr.P.C (Ref : 38 DLR 246 (AD), 7 BCR 210 (AD), 3 DLR 202).

15 DLR 279—Dhanu Sk. Vs. Rahim Sk.—Failure to question the person concerned whether he denies the existence of path etc. does not render the trial invalid. Irregularity arising out of non questioning is curable under section 537 Cr. P.C.

8 DLR 277—Phul Chand Vs. Juran Sk.—Distinction between irregularity and illegality is one of decree rather than of kind. Conviction fails only when there is a prejudice to the accused.

7 DLR 87 (FC)—A Wahab Vs. The Crown—Where the accused was literate could very well follow the nature of the proceeding against him and was also aware of the prosecution case and no miscarriage of failure of justice has been proved. Section 537 would cure it.

7 DLR 574—B. Rahman Vs. W. Mollah—Omission to read over the witnesses deposition cannot be cured under section 537 Cr. P.C.

19 BLD (HC) 517—Md Ali Asgar Vs. Md Esrail and others—Section 537 of the Code may now be taken to cover an error, omission or irregularity in the widest sence of those terms provided there has been no failure of justice and that the mere fact that imperative statutory rule of procedure has been broken is not enough to vitiate the trial or proceeding provided there is no failure of justice.

48 DLR 507— Nizamuddin Dhali (Md) Vs. State—A Special Tribunal is not competent to try a case under the Criminal Law Amendment Act, 1958 read with the provision of the Prevention of Corruption Act, 1947. The Assistant Sessions Judge either out of ignorance or due to his callousness signed the judgment as Special Tribunal. But the accused -appellant has not been pejudiced in any manner whatsoever. So on this ground alone there cannot be any question of the trial to be vitiated for want of competence.

48 DLR 507— Nizamuddin Dhali (Md) Vs. State— Defect in framing the charge is curable and that for improper examination of the accused under section 342 the case should be sent back on remand for curing the defect.

50 DLR 291—Shainpukur Holding Ltd Vs. Security Exchange Commission—Though the words "finding, sentence" in this section relate to concluded trial or hearing the word "order" does not relate to only concluded trial or hearing but also to order passed in a pending proceeding. [Ref : 3 BLC 148].

51 DLR 57— Abu Jamal and others Vs. State—Since the attention of the accused was not drawn to his confessional statement when he was examined under section 342, he is obviously prejudiced. Such defect is not curable under section 537 of the Code.

4 MLR (HC) 414—Abul Kalam and others Vs. Abu Daud Gazi and another—Irregularity in mentioning the section curable—When the description of the offence is clearly

mentioned but the section is wrongly noted, that does not cause any prejudice to the accused and is curable under section 537 Cr. P.C. [Ref : 5 BLC (AD) 19].

8 BLT (HC) 323— Afsar Ali Khan & Ors. Vs. Md. Lutfar Rahman & Ors— Before passing any preliminary order Magistrate has no power or jurisdiction to pass an order of attachment before he drew up the proceeding and an omission to pass a preliminary order is not curable under Section 537 of the Code of Criminal Procedure.

4 BLT (AD) 83— Abul Kalam Azad Vs. The State— The charge was framed in violation of the mandatory provision of section 234 (1) read with 222 (1) of the Cr. P.C. and this violation of the mandatory Provision is an illegality not cureable under section 537 of the Cr. P.C.

54 DLR (HC) 378— Karam Ali Vs. State (Criminal)— Although the charge framed under section 399 of the Code is patently defective, there are sufficient materials on record to justify the conviction of accused under section 399, he being a member of the assembly consisting of 8/9 persons.

538. Attachment not illegal, person making same not trespasser for defect or want of form in proceedings.—No attachment made under this Code shall be deemed unlawful nor shall any person making the same be deemed a trespasser, on account of any defect or want of form in the summons, conviction, writ of attachment or other proceedings relating thereto.

—O—