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**LAW UNDER THE ISLAMIC CRIMINAL PROCEDURE.
A COMPARATIVE ANALYSIS**

LAW 6999

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NOTE

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PREFACE

Section 425 of the Criminal Procedure Code gives general power to the Court to examine any person as a witness, *suo motu*, if his evidence is essential for the just decision of the case. The object of this section is to enable the Court to arrive at the truth of the facts under investigation regardless of whether a particular party chooses to summon him or not. This section and section 165, Evidence Act confer jurisdiction on the Court to act in aid of justice.

The section is manifestly in two parts, in the first part gives a purely discretionary authority while the second part is mandatory for the Court to examine any witness if his evidence is essential to the decision of the case.

It is a pity that owing to the Court's continued reliance on English principles and judicial precedents and the acceptance of the view that the system of trial is adversarial, the Court is often hesitant to exercise its powers under Section 425. This is particularly so when a case of capital offence is involved where the inclusion of one small piece of evidence would make a whole lot of difference to the prosecution's case.

A case study on our local cases would reveal that in important cases involving offences such as drug trafficking, offenders are being released merely because of a minor break in the chain of evidence which could be easily rectified by resorting to Section 425.

Perhaps in this context it may be noted that under Islamic Law too it is incumbent upon the Judge to summon important witnesses, *suo motu*, who could shed some light or clarify the main issue or ancillary matter in the case. As a matter of fact under the Islamic Criminal Procedure the argument on the rule of avoidance to fill the gaps cannot stand scrutiny if the evidence is essential for the just decision of the case. I have dealt this extensively in chapter 11. Islam does not permit a Judge to abdicate his function in mistaken zeal of impartiality in favour of the parties as if they have an exclusive domain to engage in inter se fight and argumentation only. He is not a mere mute and blind arbiter to declare

the winner in the fight. He must actively participate in the proceeding in order to uphold justice.

I have endeavoured to analyse and compare the two legal systems with the view to dispel the notion and criticism that this power may be abused or may be used to fill in either prosecution or defence case. In Chapter 10 I have analysed thoroughly the nexus between Section 425 and Section 165 of the Evidence Act.

I'm indebted to many people who have generously contributed to the completion of this book. Topping the list is Prof.Mohd.Akram Hj.Shair Mohammad for his precious advice and guidance which permitted me to complete this book. My special thanks to my staff Suzan Lim Yok Hun and my friend Zulkeple Abdul Hamid for their invaluable and painstaking contribution in ensuring the accomplishment of this book. Last but not the least I'm also indebted to my beloved wife Mega Hidayati and my little son Suffian for their immaculate support and encouragement which made the completion of this book possible.

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ABBREVIATIONS

A.	All Indian Reports
A.C.	Appeal Cases.
All E.R.	All England Reports.
A.I.R.	All Indian Reports.
C.A.	Court of Appeal
C. & P.	Carrington and Payne
C.P.C.	Criminal Procedure Code
C.C.R.	Crown Cases Reserved
C.L.J.	Current Law Journal
C.J.	Chief of Justice
Col L.R.	Columbia Law Review
Cr.App. Rep.	Criminal Appeal Reports
Cr. L.R.	Criminal Law Review
D.D.A.	Dangerous Drugs Act
F.D.	Federal Judge
I.L.R.	Indian Law Reporter
K.B.	King's Bench
L.R.C.C.R.	Law Reports, Crown Cases Reserved
L.Q.R.	Law Quarterly Review
M.L.J.	Malaysian Law Journal
M.L.R.	Malayan Law Review
M & W	Meeson and Welby
P.C.	Privy Council
P.L.D.	Pakistan Law Digest
P.Cr. L.J.	Pakistan Criminal Law Journal

Q.B.	Quene's Bench
Q.B.D.	Queen's Bench Division
R	Regina
Supra	Cited earlier
Sup. Ct.	Supreme Court
S.C.J.	Supreme Court Judge
S.C.R.	Supreme Court Report
T.L.R.	The Time Law Reports
W.L.R.	Weekly Law Reports

**THE SCOPE AND EXTENT OF SECTION 425 OF THE
CRIMINAL PROCEDURE CODE AND THE CORRESPONDING
LAW UNDER THE ISLAMIC CRIMINAL PROCEDURE.
A COMPARATIVE ANALYSIS**

INTRODUCTION

From time immemorial, the role of a Judge in the adversarial system of justice has often been misunderstood. History repletes with countless examples to this effect. Although depicted symbolically as a blindfolded lady balancing the scales of justice a Judge should not be completely oblivious to the surrounding events as the trial affecting his assessment of a case. It is true that he must not load onto any side of the scales extrinsic evidence but he certainly owes a duty to take onto the scales formal evidence which, although available and alluded to, was inadvertently left out by either party. Indeed it is in this respect that Judges should be more bold in exercising their powers under section 425 of the Criminal Procedure Code - (CPC) which reads.

"Any Court may at any stage of any inquiry, trial or any other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examine, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case"

The section is almost word for word similar to section 311 of the Indian Criminal Procedure Code 1973, except that in section 311, the words "to be" have been added after the word "appear to it" and before the word "essential to". Those two words may not bring significant change in the principle of law applicable to this section, but it adds to emphasize that the evidence of witness sought to be examined under the section must be essential to the just decision of the case"¹ it may be noted that section 425 of the Criminal Procedure Code follows the old Indian Law i.e. section 540 of the 1898 Code, which was substituted with the present section 311 in 1973 with the aforesaid little change in the wordings of the section.

Section 425 enables and, in certain circumstances, imposes on the Court duty of summoning witnesses who would not otherwise be brought before the Court². The object is to enable the court to arrive at the truth or otherwise of the fact under investigation by summoning and examining the witnesses who can give relevant evidence irrespective of the fact as to whether a particular party has summoned them or not.

In short, the overriding object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one

¹AIR Commentaries The Code of Criminal Procedure(8th Ed.)
vol.III at page 232.

²Chitale @ Rao's Commentaries on the Code of Criminal Procedure
(6th Ed.1898) Vol.III at page 3767

person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension conviction of justice failing by an erroneous acquittal or by an erroneous conviction the Court would be justified in exercising its discretion in calling for the additional evidence³.

SCOPE AND APPLICATION OF SECTION 425

Section 425 gives a general power to the Court to summon and examine any person as a witness (*suo motu*) if his evidence is essential for the just decision of the case. The object of this section, to enable the Court to arrive at the truth of the facts under investigation regardless of whether a particular party chooses to summon him or not. The action to be taken under this section necessarily depends upon the facts of each case and it is not possible to formulate a general rule applicable to all cases determining when and under what circumstances the power under the section should be exercised. This section and section 165, Evidence Act confer jurisdiction on the Court to act in aid of justice. This section intended to be wide as the repeated use of the word "any" throughout its length clearly indicates.

It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Section 60, 64 and 91, Evidence Act are based on this rule. The court is not empowered under the provision of the code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be

³Abdul Munim Khan vs State of Hyderabad
AIR 1953 SC Hyd 145

left to the parties. But in weighing the evidence the Court can take note of the fact that the best available evidence has not been given and draw an adverse inference. This is generally a matter of considerable difficulty for the court. The court will often have to depend on interested allegation made by the parties or on inconclusive inferences from facts elicited in the evidence. In such cases, the Court has to act under this section, the second part of which lays a duty on the court to summon and examine a witness, whose evidence appears essential to the just decision of the case. The fact that the police gave a list of witnesses in the charge-sheet does not disable the prosecution from examining any other witness. In any case, the power vested in the court under this section is not subject to any restrictions.

Section 540 of the Code of Criminal Procedure is manifestly in two parts, the first part gives a purely discretionary authority as the word used therein is "may" while the second part is mandatory as the word "shall" has been used to emphasize its import and blinds the Court to examine any witness if his evidence is essential to the just decision of the case and it is not left to the Court to rely on a mere presumption under section 114(g) of the Evidence Act that the evidence which could be and is not produced, would, if produced, be unfavorable to the person withholding it⁴

⁴Jamatraj Kawalji Vs state of Maharashtra
AIR 1968 SC 178.

Simply stated, this section consists of two parts.

- (1) giving, a discretion to the Court to examine the witness at any stage and
- (2) the mandatory portion which compels a Court to examine a witness if his evidence appears to be essential to the just decision of the case. The discretion given is very wide and the very width requires a corresponding caution.

The section enables the Court at any stage of any inquiry, trial or other proceedings under the Code, to summon any person as a witness. The power is not confined to any particular class of person as a witness. The power has been conferred to satisfy the quest of the Court in order to do justice between the parties. It is crystal clear that justice is not from the point of view of the prosecution or of the accused, but justice from the point of view of an orderly society. Holding the balance of scales in its hand, the Court keeps an open mind. Any party to the proceedings, may point out to the Court under section 311 of the desirability of some evidence, but the decision and discretion in that regard is that of the Court⁵.

⁵Surjit Kaur v. Baldev Singh
1983 - C LJ 109 at page 110 (punj)

In the light of the foregoing the first part of the section is purely discretionary to the criminal court and enable it, at any stage of an inquiry, trial or other proceeding under the code to:

- a) to summon anyone as a witness or
- b) to examine any person present in
- c) Court or
to recall and re-examine any person
whose evidence has already been
recorded.

On the other hand, the second part of the section is mandatory, and compels the Court to take any of the aforementioned steps if the new or additional evidence appears to it essential to the just decision of the case.

The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the Court. But the second part does not allow for any discretion; it binds the Court to examine fresh evidence, and the only condition prescribed is that this evidence must be essential to the just decision of the case. Whether the new evidence is essential or not must of course depend on the facts of each case and has to be determined by the presiding Judge. Whenever the Court find that any evidence which is essential for this has not been examined, the law enjoins it to call and examine it. If this results in what is sometimes

thought to be to the "filling of loopholes", that is a purely subsidiary factor and cannot be taken into account⁶ .

The Court examines this evidence neither to help the prosecution nor to help the accused. The evidence is examined in the interests of justice. There seems to be no reason why it should have been intended by the Legislature that the Court should be robbed of this power or should be absolved of its duty of ascertaining the truth before a case has been decided, but after the parties have concluded the evidence or argued the case. If the provisions were intended for the benefit of the parties, it may have been possible to argue that a party, having exhausted all the opportunities allowed to it, should not be permitted to introduce further evidence. The provision has not been, as already stated inserted for the benefit of a party, It is often that after the parties have led all the evidence and the Court has given a thorough consideration to that evidence, the Court feels the necessity of examining some evidence which has not been brought before it⁷.

It is imperative to note at this juncture that the section gives a sort of residuary discretionary power to the Court, but " essential" evidence should be the purpose and not the second thoughts of a litigant. Otherwise, there will be no end to argument, as such party can invite the Court to take further evidence to support its revised version or to fill up its gaps in evidence. By using the word "essential" and qualifying the word

⁶Ram Jeet vs State
AIR 1958 1958 All 439 at page 440

⁷Inayat vs Rex AIR 1950 All - 369 page 370

"decision" by the adjective "just", the Legislature has clearly indicated that the power should be exercised very cautiously and only where the Court thinks the evidence absolutely necessary in the interest of justice. In other words, the statute arms the Court with powers to take any evidence it likes *ex debito justiciæ*. The words "just decision" do not necessarily imply that the decision should be either in favour of the prosecution or the defence. They merely confer a duty. But by using the word "just" the Court is cautioned against taking any action which may result in injustice either to the accused or the prosecution.

The essence and object of section 425 was vividly put by the Indian Supreme Court in the case of *Inayat vc Rex*⁸ as follows

" One fact which has to be kept in view is that the Magistrate is the arbiter and the judge. He is not a party nor an investigator. He is not expected to fill up the gaps left by party. The overriding consideration for him while exercising powers under section 540, CR. P.C. is the interest of justice. Where it has not been shown that a witness could not be summoned by the prosecution under normal procedure, the Magistrate ordinarily will not exercise his discretion in favour of the prosecution.

⁸AIR 1950 All SC 370

There is no doubt that the Courts have very wide powers to summon Court witnesses, under section 540 of the Criminal Procedure Code but the very extent of these powers, imposes upon them a reciprocal responsibility of the same magnitude to use these powers with care and circumspection. It is only for that purpose that a Court can have resort to section 540 of Criminal Procedure Code for summoning Court-witnesses. The Court cannot use there powers to advance the cause of prosecution, or that of defence, and wherever he passes such an order, putting one of parties in a position of advantage, vis-a-vis, the other the High Court will be justified in interfering in the exercise of its revisional jurisdiction to correct the error"

In many instances it happens that new light is thrown on the case by witnesses, it then becomes desirable, in the interests of justice that fresh evidence should be called for. In some cases there are accidental gaps created by the prosecution in the evidence, which renders it desirable to call additional evidence. The section is intended to meet such cases and to enable the Court to get at the truth and to come to a proper conclusion in the matter under inquiry or trial.