

**Amendment in Section 351 of the Code of Criminal  
Procedure, 1898**

**(Report No.64)**

## **Amendment in Section 351 of the Code of Criminal Procedure, 1898**

During the prosecution of two accused persons before the Special Judge (Central) Customs, Taxation and Anti-smuggling, NWFP, it was revealed on the basis of statement of the accused and other evidence, that the actual owner of the smuggled goods, has not been brought to justice by the prosecution. Hence, while passing the final order against the accused, the Trial Court made the following observation in the judgment.

“In these circumstances, copy of the judgment be sent to Collector Customs, Peshawar, with the direction to ask his subordinate to conduct the investigation fairly, honestly and thoroughly so that no person should be escaped from the clutches of law. Moreover, since the main accused in this case is Waris Khan, therefore, the prosecution is directed to complete the investigation in this respect and submit challan against Waris Khan.”

Aggrieved from this order, the named accused in the case assailed the impugned portion of the judgment by filing Criminal Misc. Petition for quashing the proceeding under Section 561-A Cr.P.C. in the Peshawar High Court on the ground that the Code of Criminal Procedure does not contain any provision to authorize the trial court to order for re-investigation or call a person to join in the proceeding, after conclusion of trial, or direct the prosecution to conduct investigation afresh against person not earlier charged for the offence.

The High Court, while accepting the plea of the accused, quashed the impugned portion of the order of the Trial Court, reproduced above, and observed as follows:

“We could not lay our hands on any provision of law under which the Court is empowered to direct the reinvestigation of the case. Section 351, Cr. P.C, no doubt, provides that if in a case against the accused person, the Court finds from evidence that some person, other than the accused, have committed the offence which the Court can take cognizance of, the Court may join such person in the proceedings and proceed against him only if the person happens to be attending the Court. There is no such provision in the Criminal Procedure Code to authorize the trial Court to order for reinvestigation or call a person to join in the proceedings after trial of the accused is concluded.

It may be worth-mentioning that in Indian jurisdiction Section 351, Cr. P.C has been recast in the form of Section 319 which empowers the Court to proceed against any person, other than the accused, if there is some evidence to show that the person has committed an offence of which the Court can take cognizance. Such person can be summoned as a co- accused before the Court. In other words, this newly recast Section 319, Cr. P.C the Indian jurisdiction gives

discretion to the Court to proceed against the person who is not an accused at the trial if it appears from the circumstances of the case, that such person, other than the accused, is involved in the crime but in our jurisdiction, no such powers are available to the trial Court to make direction to the prosecution to conduct investigation afresh against person who appears, from the evidence, to be connected with the offence. The august Supreme Court of India in the case of Girish Yadav and others, appellants v. State of Madhya Pradesh, respondent AIR 1996 SC 3098 while dispelling the contention of the learned counsel for the appellants had observed that though the police had not submitted charge-sheet against certain persons but there was enough powers with the Court to exercise its jurisdiction under Section 319, Cr.P.C. to proceed against them if subsequently, on recording of evidence, it was found out that they were reasonably connected and there was sufficient involvement of such persons in the commission of offence.

This makes it clear that necessity of such amendment was felt by the Indian Legislature as there was no specific provision in the old Code for the trial Court to direct a person to be brought up and face the trial against whom there is ample evidence showing his involvement in the crime”.<sup>1</sup>

Section 351 of the Pakistani Code of Criminal Procedure reads as under:

- “Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into
1. 2001PCr. LJ 660 of which such court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.
  - (2) When the detention takes place after a trial has been begun the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard”.

The Indian legislature has recast the provision in Section 319 as under:

“319. Power to proceed against other persons appearing to be guilty of offence.- (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under Sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard:

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced”.

Obviously, Section 351 provides that if the court, hearing a case against a certain accused, found from the evidence, that some person, other than the accused, was also concerned in that very offence, the Court could detain such persons and join him in the proceedings. But this could be done only if such persons happened to be attending the court and not otherwise. However, the reformed Section 319 of the Indian Cr. P.C which corresponds to Section 351 of the Pakistani Cr. P.C, has provided that the court may proceed against such person whether he is attending the court or not. It states that where, in the course of any inquiry into, or trial, in offence, it appears from the evidence that any person not being accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed. But the proceeding in respect of such person shall be commenced afresh and the witness re-heard. The court shall take cognizance against the newly added accused in the same manner in which cognizance was first taken of the offence against the other accused.

Suppose on a complaint against 10 persons, police charge-sheeted 6 and discharged the rest. If it appears to the court trying the 6 persons that sufficient material evidence are available against the other persons as well, the court may proceed against such persons under the Indian jurisdiction but in Pakistan the court could not try such persons for the same offence.

It is therefore, proposed to recast the provisions of Section 351 of the Cr.P.C. on the line of the provision of Section 319 of the Indian Code of Criminal Procedure to empower the trial courts in Pakistan to proceed against other accused persons, who on the basis of evidence adduced are found involved in the Commission of the same offence.

Comparative statement showing the existing provision of Section 351 of the Pakistan Code of Criminal Procedure, 1898 and Indian Code of Criminal Procedure follows:

**COMPARATIVE STATEMENT SHOWING THE EXISTING PROVISIONS OF SECTION 351,Cr.P.C (PAKISTAN) AND SECTION 319 CR.P.C.(INDIA)**

<b>Section 351 Cr.P.C (Pakistan)</b>	<b>Section 319 Cr.P.C.(India)</b>
<p>“Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.</p> <p>(2) When the detention takes place after a trial has been begun the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard”.</p>	<p>“319. Power to proceed against other persons appearing to be guilty of offence.- (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.</p> <p>(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.</p> <p>(3)Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.</p> <p>(4) Where the Court proceeds against any person under sub-section (1), then-</p> <p>(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard:</p> <p>(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced”.</p>

**Commission’s Deliberation**

The above proposal was considered by the Commission in its meeting held on 14-2-2004. The Secretary Law & Justice Commission of Pakistan explained that

following an observation by the Peshawar High Court to the effect that the scope of Section 351 of the Cr.P.C. needs to be broadened so as to empower the trial court to proceed against any person, who during an inquiry or trial is found to have been involved in the offence, though not charged. He stated that an amendment to this effect has already been made in the Indian Cr.P.C. and accordingly, a suitable draft amendment is proposed for the consideration of the Commission. The amendment seeks to empower the trial court to proceed against a person during the course of an inquiry for trial, who though not been charged as an accused person, but from examination of evidence, appears to be involved in it. During discussion it was pointed out that there are various precedents of superior courts to the effect that the trial court main concern is with the case and not individuals involved, and further, that a case decided cannot be re-opened. It was further pointed out that efforts should be made to ensure that the proposed amendment does not open a new avenue of corruption. It was also stated that Challan also contain a list of suspicious persons who are not charged though their named are put on record, in case any evidence comes to surface against them. It was agreed that the draft amendment needs to be revised so that no person may be arrested/detained on mere allegation and without prior investigation. Accordingly, the Commission approved the draft amendment subject to suitable changes thereto so that the trial court is empowered to serve a notice or summon upon the person concerned to show cause as to why proceedings may not be initiated against him on the basis of evidence disclosed during trial.

On the basis of above deliberations, a revised bill was prepared and forwarded to the Law, Justice & Human Right Division for further action.

**A  
Bill**

*further to amend the Code of Criminal Procedure, 1898*

**Whereas** it is expedient further to amend the Code of Criminal Procedure, 1898 for the purpose hereinafter appearing;

It is hereby enacted as follows: -

1. **Short title and commencement.**- (1) This Act may be called the Code of Criminal Procedure (Amendment) Act, 2003.

(2) It shall come into force at once.

2. **Substitution of Section 351, Act V of 1898.**- In the Code of Criminal Procedure, 1898 (Act V of 1898), for section 351, the following shall be substituted, namely: -

“351. Power to proceed against other persons appearing to be guilty of offence. –

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) a notice shall be served upon such person calling upon to show cause as to why proceedings may not be initiated against him on the basis of evidence adduced during trial;

- (b) on receipt of reply to the show cause, the court is of the opinion, that further proceedings against such person shall be initiated;
- (c) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard:
- (d) subject to the provisions of clause (c), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced”.

XXXI A.- Notice to co-accused  
(See Section 351)

To (name, description and address of the accused)

Whereas evidence has been adduced before me and duly recorded that (name, description and address of the accused), from which it appears you are involved in the commission of offence\_\_\_\_\_, punishable under section\_\_\_\_\_of the Pakistan Penal Code.

You are hereby called upon to show cause notice before me within \_\_\_\_ days as to why proceeding may not be initiated against you for the commission of the aforesaid offence.

Given under my hand and the seal of the Court, this\_\_\_\_\_ day .

(Seal)

(Signature)