

DECOY WITNESS'S EVIDENCE IN PAKISTAN: AN ETHICAL AND LEGAL CONUNDRUM

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Abstract:

Decoy witnesses are employed by investigating agencies to grab culprits particularly in corruption cases and cases of selling and possessing of intoxicants. This mode of laying trap against the accused persons gives rise to many controversies. Numerous ethical and legal issues envelop the relevance of decoy witnesses' evidence and the weight appended to it in criminal cases. The present paper is meant to debate such issues with reference to Pakistan's legal system. Though the issues in Pakistan's legal system are not substantially different from the rest of the world, but one unique categorization devised by Pakistani judiciary has given such issues a relatively differing complexion. The paper will analyze the decided cases by the superior judiciary to bring to the fore how it has rationalized its reliance on decoy witness's evidence in some cases while excluding others. This judicial attitude can be labeled as pragmatic and realist.

Key Words: Decoy Witness; Law of Evidence; Courts; Case Law; Pakistan.

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1. Introduction:

Decoy evidence is not welcome in a number of countries (Shiv Bahadur Singh 1954). The attitude of Pakistani courts in this regard is multifaceted. It has not been explored in a systematic manner. The present paper intends to fill this vacuum by analyzing some decided cases by the superior judiciary. The judicial attitude of Pakistani courts is quite complex and multilayered which needs to be articulated in a simplified manner so as to engender proper appreciation on the subject. And most importantly such an understanding should not be devoid of theoretical foundations. Hopefully the present paper will serve this purpose.

In addition to the introduction and a conclusion at the end, the paper is divided into two main sections. The first section will analyze the cases to explain the complexity of the judicial attitude of Pakistani courts. Moreover, some salient features of this attitude will be formulated to make the layered scenario comprehensible. The second section will be devoted to explicate the requirement of corroboration vis a vis decoy evidence.

In this introductory discourse, three issues are dealt with. The first is what is the meaning of decoy witness? The second is what are the provisions in Pakistan's legal system which could be linked to decoy witness? And the third is about theoretical debate of decoy witness's evidence and its use in judicial proceedings.

Decoy means "a living or artificial bird or other animal used to entice game into a trap or within shooting range" (2014 Feb. 15). Decoy is also defined at another place as "a person who entices or lures another person or thing, as into danger, a trap, or the like" (2014 Feb. 16). The word decoy is common for both animals and human beings whenever the purpose of their employment is to trap someone else. Hence, a decoy witness is a person who is employed by investigating agencies to bring culprits into trap. It is an easy and efficacious manner resorted to in a number of jurisdictions to bring to justice such criminals who are otherwise successfully evading process of law.

There is no specific provision in Pakistan's legislative instruments regarding decoy witness. Some provisions of Pakistan Penal Code 1860 (hereafter referred to as PPC) and Qanun-e-Shahadat Order 1984 (hereafter referred to as QSO) states circumstances similar to that of decoy person but they are not precise or specific enough to exclude role of courts in interpretation and evaluation of his evidence. A decoy person assists and facilitates commission of a particular offence. In ordinary course of events, such a person is known as abettor and is liable to penalty

though it may not be the same which would have been implemented on the main accused (Sections 107-116 PPC). Another section 161 of PPC may also be read in this context as it mentions in its illustration that the one who pays bribe to a public servant to get any benefit or avoid any disadvantage is an abettor and liable as such.

Article 16 of QSO says that an accomplice or a co-accused in a crime is a competent witness against another accused and reliance could be placed on his evidence without requiring any corroborative evidence if there is nothing to cast doubt or infirmity in his evidence. As a decoy person is a co-accused, he may be supposed to be an accomplice and his evidence could be relied upon without any corroboration if circumstances so permit.

All the above provisions though might be extended to a decoy person with little bit legal imagination but they are not read as such. A decoy person is not regarded as an abettor and his evidence is not treated as of an accomplice's evidence. As far as a decoy person is concerned, he is motivated to help grab the accused while an accomplice has had the same guilty intention as that of the accused. A distinguishing line is drawn on the basis of services provided by him to investigating agencies and his laudable motive. It is argued that he does not commit crime as a criminal: he facilitates to collect evidence against a criminal who is otherwise hard to apprehend. There might be apparent similitude between a decoy person and a criminal but the state of mind of the former is altogether different from the latter. Rather his objective is quite praiseworthy and there seems no reason to connect a decoy person with the crime.

The supporters of the use of decoy witness's evidence argue that had not been there a decoy witness it would have been difficult to apprehend the accused. But they forget while making such an argument that it was the decoy person who instigated the crime and ultimately it was the investigating agency which laid the foundation of commission of the crime. The institution which is primarily charged to prevent commission of crimes if gets involved in facilitating commission of crimes, it would raise questions as to utility of such institution. In response to this objection, the supporters of using decoy witness's evidence take refuge behind a so-called realist argument: any approach, not specifically prohibited by law but handy in bringing criminals behind the bars, can be resorted to.

There is another problem with use of decoy witness's evidence. Once we encourage the use of this method in investigation of crimes how would it be possible to prevent its misuse? This question is raised by those who opine that law should not be a tool for lawlessness. If there is

possibility that a particular reading of law opens a door for lawlessness, it would be better not to read law in that manner or abolish the law to foreclose the door for misapplication. The supporters of decoy evidence come forward with a potent argument here that there are many laws which are susceptible to misuse or being misused in reality even then we do not say that all such laws must be abolished. This is so because the argument based on misuse of law would virtually take us to that situation where there would not be any law left out of this criticism. And we will have to take off the domain of law and leave the space to no law at all.

It is this theoretical background in which the evidence of decoy witness is evaluated in judicial proceedings. During the analysis of the cases in the following sections, we will come across the same theoretical underpinnings highlighted by the Pakistani judiciary in one way or another.

2. Decoy Witness and its Evidentiary Value in Pakistan:

The judicial attitude in Pakistan has not been very favorable to decoy witness as shown by a plenty of decided cases on the one hand and on the other there has not been conscientious attempt to permanently foreclose the evidence of decoy witness except in hudood cases. The first famous case which attracted wide print media coverage in the national dailies on the subject is A. Mirzaada (1956). In this case, two Jews of Afghan origin were harassed by the police and one of them was put behind bars on the charge of black-marketing to make them agreeable to the police's terms. In such a situation, one of the accused offered to pay bribe to the police officer who informed about it to the Magistrate and other police officers. A raid was organized to apprehend the accused red handed. When bribe was being received by the police officer, the raiding party caught them. The trial court convicted the both accused persons and they brought the present appeal before Sindh Chief Court. The court condemned the practice of employing decoy persons to trap accused persons and said that when bribe was proved to be accepted willingly, the receiving police officer should be tried under relevant provisions of law and not those who were made to pay.

In the instant case, the court deprecated the employment of decoy person but the same was not sufficient to warn police officials not to carry out this practice. This being the reason we find numerous cases involving the same mode of apprehending accused personals in the years to follow.

During the decade of 1960s, many cases were reported on the evidence of decoy witness. Let us analyze two out of them. Interestingly enough the both were registered under Section 161 of PPC for receiving illegal gratification by public officials. In *Ansar Ali Mia Vs The State* [PLD 1961 Dacca 806], the appellant was alleged to have received bribe for doing favor in his official duty. As per prosecution story, the complainant approached the police with a complaint that the appellant was asking to give him money to get his work done. The police advised him to do the same and then arrested the appellant at the spot with currency notes. The appellant denied having demanded the money from the complainant and argued that the same had been put into his pocket without his knowledge and consent. The court, without finding any inherent irregularity in collecting evidence with the assistance of decoy witness, decided that the prosecution version should have been sufficiently corroborated as it was based on decoy evidence which was liable to be examined and considered with some caution.

In *S. M. Anwar* (1968), the appellant was a university lecturer. During his duties as examination superintendent, he found the complainant in the present case using unfair means and recommended for proceedings against him. As per prosecution version, the complainant was asked to pay money by the appellant to set aside the proceedings of unfair means pending in the university. The complainant along with a magistrate under cover handed over to the appellant the marked currency notes in a shop which were found in his possession by the raiding party. The appellant denied the charge of having any bribe from the complainant. An independent witness who saw these people in the shop said that there was an argument among them and the appellant was refusing to pocket the currency notes offered to him. In such a situation, the court did not find itself satisfied as to the evidence of willful acceptance of currency notes by the appellant. The court observed that the magistrate accompanying the complainant to the shop to see the proceedings of handing over of currency notes to the appellant had reduced himself to “status of ordinary decoy witness” whose evidence could not be relied upon without corroboration. As is evident in the court’s observation, it contemptuously referred to the evidence of decoy witness.

In the years to follow, the courts kept on toeing the same judicial attitude of viewing the decoy evidence disapprovingly and insisting on its corroboration. Number of cases can be cited to establish this attitude. For example, Lahore High Court in *Maqsood Ahmad* (1986) observed that reliance cannot be placed on uncorroborated statement of decoy witness. In another case *Muhammad Rafique* (1994), the same high court said that a solitary statement of a decoy witness

without any independent corroboration was “grossly insufficient for proving the guilt of the accused”. Mere corroboration has not been emphasized but the same should have been brought forward by an “unimpeachable” source (Shehzad Hussain Qureshi 1996). Meaning thereby a deficient/tainted piece of evidence should not be brought to corroborate another deficient piece of evidence, i.e. decoy evidence. Why decoy evidence is regarded as tainted or deficient. The answer was given by the High Court of Sindh in Zafarullah (1989) because it is commonly viewed with suspicion.

The abovementioned decisions concur on one point that decoy evidence is not bad per se; hence, not liable to be excluded from consideration in all circumstances. When we require corroboration of any piece of evidence we first admit it in judicial proceedings and then ask for something which would likely to strengthen it.

Approach of Pakistani judiciary took a novel turn when it was confronted with decoy evidence in hudood cases. It has categorized cases into two groups: the one is hudood cases and the other is tazir related offences. In the former group, it has unreservedly criticized the use of decoy evidence while in the latter it has accepted decoy evidence though its reliance is not unconditional and absolute. This division of cases into hudood and tazir and thereafter using decoy evidence in the one excluding it from consideration in the other may appear promising, but a question could be raised here if something is bad in one category of offences how could that be good in another category of offences. The reason seems to be severity of punishment in hudood related offences. There is another cogent reason of this categorization. The quality of evidence prescribed for hudood cases should be beyond any reproach while some sort of blemished/deficient evidence seems to be admissible in tazir cases. This is so as the criterion for qualification of witnesses is different in the both categories. Whatever might be the justification of such categorization, punishing someone of tazir offences on the basis of decoy witness's evidence would bring the ethical value of such punishment substantially down in eye of public.

Having said so, let us reproduce a part of Federal Shariat Court's judgment which is regarded as a cornerstone for the above referred categorization. The court observed in Muhammad Iqbal (1989) in the following manner:

“The responsibility of this court sitting as a Shariat Court is far greater than a Court of normal jurisdiction. The offences falling under the Hudood Shariat Laws carry harsh punishments. Obviously the standard of proof must also be harder, it is highly desirable that we should, as far

as possible, try to eliminate any unethical and unworthy practice for procuring evidence against the accused. We can hardly lay hand on a single case in Islamic history where punishment was awarded to the offender on the testimony of Decoy witness or fake purchaser. On the contrary Islamic jurisprudence has introduced a revolutionary concept of Tazakya tushahood to ensure a fair trial. A decoy witness or a fake purchaser is a self-condemned lair. How his version can inspire confidence when tested on the touchstone of Tazakya tushahood?"

The FSC (Muhammad Iqbal 1989) further brought to light the true role of an investigating agency by stating the following: "prosecuting agency is a medium between State and the offender to secure justice in a case by marshalling all true evidence before the Qazi or the Court. When by using its own men as fake purchaser, the prosecuting agency itself renounces the role of an impartial investigating agency and adopts the role of an interested party pitched against the accused with the set object of securing conviction the whole exercise become vitiated and open to question."

In the instant case (Muhammad Iqbal 1989), the appellant was convicted under Articles 3 & 4 of Prohibition (Enforcement of Hadd) Order, 1979, for selling heroin and keeping the same in his possession respectively. He was booked under the above said provisions by the police after sending an excise constable as decoy witness. The decoy witness was given three marked currency notes which he handed over to the appellant in exchange of heroin. When the police party raided him, he was found to have those marked currency notes along some amount of heroin. These were the facts which culminated into his conviction in the trial court. The FSC in the appeal filed by the appellant set aside the conviction under the Article 3 for selling the prohibited intoxicant after discussing the relevancy and significance of decoy witness's evidence. While the court kept his punishment intact under the Article 4 for possessing the same intoxicant in custody. The reason for such a distinction was that under the former provision, the conviction was awarded on the basis of evidence of the decoy witness (the excise constable). While under the latter provision, the conviction was substantially based on the recovery made by the police and not on the evidence of decoy witness. The ratio of the case is: decoy evidence should not be relied on in cases where a court is implementing a punishment under hudood laws as the quality of evidence required for such conviction could not be expected to be forthcoming from such evidence.

The point emphasized by the court for not relying decoy evidence in hudood cases is supported by the provisions requiring probity and honesty of a witness as provided in the relevant legislations (???). At the same time, it seems astonishing that while laying down a principle of far reaching implication, the court did not bother to analyze any decision of the superior judiciary in Pakistan, though it mentioned couple of foreign cases in its decision (e.g. Shiv Bahadur Singh 1954; 1947 2All ELR 569). It would not be out of place here to mention that these decisions have nothing to do with the non-reliance of decoy evidence in hudood cases. They have laid down a general rule as to judicial attitude with regard to decoy evidence that investigating agencies should be discouraged to collect evidence in this manner.

In another case (Muhammad Ihsan 1991), the Lahore High Court on a bail application discussed the relevancy and use of decoy evidence in hudood cases. The case was registered against the applicant under the Articles 3 & 4 of the Prohibition (Enforcement of Hudood) Order, 1979 and Section 497 PPC. He was caught by the police with the help of decoy person in market. The court censured the manner of employing decoy person for nabbing an accused as the same manner could have been put to one's own service or manipulated easily. The accused was granted bail in the case. The court further laid down some rules for discouraging this practice and directed the senior officials of police to make necessary measures to implement them. The rules are the following: “ (a) in future no police officer should get assistance from a decoy witness to trap the drug seller, as the concept of decoy witness or a fake purchaser is against the spirit of Islamic justice; (b) that the recovery of narcotics should be effected in the presence of public witnesses to obliterate the chances of false implication; (c) the compliant police officer should not be the investigating police officer of the case as leads to biased investigation and is contrary to concept of justice.”

In Muhammad Ihsan (1991), the court heavily relied on the FSC's decision of Muhammad Iqbal (1989) above-referred and even moved a bit farther by formulating rules to prevent misuse of decoy evidence. The court made rules regarding the cases of recovery of narcotics in general and the ratio of the case could have been extended to similar other cases. The above mentioned cases have set the precedent that decoy evidence is not worthy of reliance particularly in hudood cases. The trend of not giving any credence to decoy evidence could have been applied to other cases had the judiciary attempted to do this but it consciously or unconsciously kept this embargo confined to hudood cases. There are obvious advantages of this laxity as each individual case of

tazir offence would be evaluated in its own circumstances. The court may or may not rely on decoy evidence taking into account necessity and potency of such evidence. For example, in Muhammad Saleem (2000) the accused was allegedly found to be involved in unauthorized foreign exchange business by the investigating agency and a first information report (FIR) was registered to this effect. The accused applied to the court for quashing of the FIR and contended against the manner of employing decoy witness to raid his shop. The court after having reliance on Muhammad Iqbal (1989) pronounced that it was unethical and against the principles of Islamic justice to adopt such a manner. Moreover, the police did not accompany two respectable persons of locality for carrying out the raid. Taking these circumstances into account, the court quashed the FIR.

In the above case, the employment of decoy witness was deprecated and the accused was extended the benefit of such miscarriage of justice on the part of investigating agency. But the same unethical manner does not end up facilitating accused persons in all cases. In another case Muhammad Idress (2006), the house of the appellant was raided by the police after he had sold opium and received money from decoy witness. The appellant's attorney contended that the collection of evidence against him was carried out in an illegal manner including decoy evidence which vitiated the entire process of investigation. The court did not find any problem with decoy evidence as the case against the appellant was proved to be trustworthy and his conviction was maintained.

On the basis of the case law analysis carried out above, three distinct trends of Pakistani judiciary as to admissibility of decoy evidence are discernable. They are the following:

Firstly, the evidence of decoy witness is not received with favor and enthusiasm by the courts.

Secondly, such evidence has not been given any value in the Hudood/Shariat cases as the witness does not meet the criterion set out by Islamic law in this regard.

Thirdly, the evidence of decoy person does not inspire confidence and is generally treated as suspicious; hence, the same should not be acted upon without independent corroboration.

3. Decoy Evidence and its Corroboration:

As is mentioned above, one of the rules followed by the courts in Pakistan with respect to decoy evidence is to seek its corroboration before relying upon it. An important question comes to one's mind as to this judicial trend. Is a piece of evidence about which the court is not fully

satisfied would be supplied requisite quality by way of corroboration? The same question may be put in another manner: a piece of evidence which has been obtained by an unpleasant method, how could it attain sufficient reliability by corroborating it with another piece of evidence?

The fact that the courts seek corroboration for decoy evidence before an implicit reliance is placed on it demonstrates the judicial non-satisfaction with its quality and reliability. The courts are not unequivocal on this point (Muhammad Ramzan 1985; Shakir Husaain 1985; Dr Arshad Ali 1992; Nasir-ud-Din 1993). On the other hand, the same judicial attitude also brings to light lack of enthusiasm on the part of superior judiciary in Pakistan not to declare such evidence as unworthy of credit in all circumstances.

Decoy evidence though seems to have been problematic to rely on but it depends on circumstances of each case to lend it any evidentiary value. This space is created by the superior judiciary by way of insisting on its corroboration. Whenever the courts appear to have some doubts as to decoy evidence's value, they could simply hide behind the judicial practice of its corroboration. This attitude is realistic and pragmatic as one piece of evidence might be bad in numerous situations but the same could also be proved handy in several others. Hence, there is no reason to prevent the courts perpetually from having recourse to such evidence.

Let us analyze some decided cases to derive some important points where the courts usually require the corroboration of decoy evidence. As this matter is within judicial discretion and dependent on complicated questions of fact, one may expect varying points of view in some judgments. In the following passages an effort will be made to derive such points which would show the dominant trend of the judiciary.

In Muhammad Rafique (1994) the appellant was convicted under Section 5 of the Prevention of Corruption Act, 1947: whereupon he brought the present appeal to assail his conviction. It was pointed out that the conversation between him and the complainant was neither heard by the magistrate and the raiding police officer nor they witnessed the handing over of money to him. The court said in such a situation the mere recovery of marked currency notes along with uncorroborated statement of decoy witness/complainant could not form basis of conviction; hence, his conviction was set aside. In Muhammad Siddique (1993) the same two points were emphasized by the court that the witnesses neither heard the conversation nor transferring of money from the decoy witness to the appellant. The conclusion of the court was also similar to the one reached by the court in the previous decision and the appellant was acquitted.

It would be appropriate to point out here that the conversation between a decoy witness and an accused should be overheard by the raiding magistrate/police officers is not a rule of law and is only a rule of prudence and caution and meant to ensure safe administration of justice (Nazir Ahmad 1998). Why an independent witness like a magistrate should have heard the conversation? The answer is given in a case titled Nazir Ahmad (1988). In this last cited case, the appellant took plea that he received the money to keep it in his temporary custody and the prosecution did not have any other evidence except the uncorroborated testimony of decoy witness to refute this plea. In such circumstances one can imagine that an independent evidence of magistrate or any other police officer who had heard the conversation between the accused and the complainant/decoy witness would give an unparalleled assistance to decide the matter.

In an old case titled Ansar Ali Mia (1961) Dhaka High Court decided that the acceptance of “illegal gratification” should be proved as conscious: mere recovery from the person of accused not sufficient. In another case Abdul Hye (1969) the same high court observed that mere recovery from any person of marked currency note would not prove that he had them in his possession as “illegal gratification” unless the same is proved beyond reasonable doubt by cogent evidence. In both of the above cases the court refused to act upon uncorroborated evidence of decoy witness alone. This is so because decoy witness is interested in success of the case and it would be fair to require proof of material facts by independent evidence other than him.

It is quite possible that an accused’s version of having currency notes in his possession might be true which could not be doubted on the basis of uncorroborated testimony of decoy witness. The marked currency notes might have been handed over to an accused person on one pretext or another by decoy witness (Muhammad Ismail Khan 1985). The recovered currency notes were received by an accused to buy decoy witness some commodity, e.g. sugar as was noted in Rahim Heyat Qureshi (1985). The money might have been returned by the complainant to the accused who gave him to buy something, e.g. wheat as brought to the court’s notice in Nasir Iqbal (1985). The amount recovered from the accused might be a returned loan (Amjad Rashid Khan 1985). The money might have been taken to pass on to somebody else (Ahmad Ali 1991). Therefore, whenever there is possibility that the justification rendered by an accused for having the marked currency in his possession might be true he should be given benefit of doubt (Akbar Ali 1985; Abdul Hameed 1985).

On basis of the analysis of the case law on the corroboration of decoy evidence, the following rules may be formulated:

- a. What has been transacted between decoy witness and an accused that should be proved by the evidence of independent persons, e.g. magistrate and decoy witness's evidence alone in this matter is insufficient.
- b. The factum of demand and acceptance of illegal gratification should be proved beyond reasonable doubt and mere decoy evidence should not be regarded enough for conviction.
- c. It should also be proved that what has been given by decoy witness to an accused that must be inconsistent with any theory or possibility of innocence of the latter.

The cases analyzed above to appreciate the impact of corroboration vis a vis decoy evidence bring home that the courts have tolerated decoy witness's evidence but the same is required to be corroborated in all material particulars by the prosecution otherwise the uncorroborated testimony of decoy witness is of little avail.

4. Conclusion:

The paper has carried out an analysis of decoy witness's evidence in Pakistan's legal system. During the analysis, various ethical and legal issues on decoy evidence have been deliberated upon with particular reference to the judicial attitude of Pakistani judiciary. It has been found that its attitude is not guided by idealism rather there has been well rooted pragmatic approach to tolerate decoy evidence despite a settled aversion to place reliance on it in absolute and unconditional manner. In offences of hudood, the judiciary has emphasized optimal probity and honesty on the part of witnesses as these offences attract severe punishments and it seems unconscionable to implement such penalties on the basis of blemished evidence such as decoy evidence. However, in the rest of the case, i.e. tazir offences, it has maneuvered artistically the requirement of corroboration so as to reduce the significance of decoy evidence in those cases. But the requirement of corroboration has not been stretched to such a limit to preclude the evidence of decoy altogether. This attitude seems reasonable as one may come across situation where it becomes virtually impossible to collect evidence by any other manner except by employment of decoy witness. In such borderline cases, one may have recourse to this method. Above all, even in those cases when it is resorted to, the requirement of corroboration provides as a safety valve for safe dispensation of justice.

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