IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Special Criminal Jail Appeal No.D-291 of 2019

Present:
Mr. Justice Muhammad Saleem Jessar
Mr. Justice Khadim Hussain Tunio -

Appellant:	Muhammad Afzal Khan son of Malik Muhammad Akbar Niazi through Mr. Habibullah G. Ghouri, advocate.
The State:	Through Mr. Mohsin Ali Khan, Special Prosecutor ANF.

Date of hearing;	09.11.2021
Date of judgment;	17.11.2021
Date of announcement;	18.11.2021

JUDGMENT

KHADIM HUSSAIN TUNIO, J:- Muhammad Afzal Khan, appellant, was tried by learned 1st Additional Sessions Judge/Special Judge Narcotics (MCTC), Sukkur in Special Case No.36/2016 Re- The State Vs. Muhammad Afzal and others outcome of FIR bearing Crime No.4/2016 registered at P.S ANF, Sukkur for an offence punishable under section 9(c) Control of Narcotic Substances Act, 1997. After regular trial, vide judgment dated 15.11.2019, appellant was convicted for the offence under section 9 (c) CNS Act, 1997 and sentenced to imprisonment for life and to pay fine of Rs. 100,000/- (one lac), in case of non-payment of fine, he was ordered to suffer imprisonment for one year more. However, appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that on 17.02.2016, SIP Nooruddin, after receiving information regarding the transport of narcotics, formed a raiding party and apprehended the present appellant and recovered 15 foil packets, each being one kilogram of

charas from his travelling bag, totally 15 kilograms, in the presence of HC Ayaz Ahmed and PC Riaz Ahmed who were appointed as mashirs. The case property and the accused were then brought to P.S ANF, hence, this F.I.R.

3. After usual investigation, challan was submitted against the appellant. A formal charge was framed against the appellant by the trial Court to which he pleaded not guilty and claimed to be tried.

4. In order to substantiate the charge, prosecution examined PW-1 complainant/I.O Inspector Nooruddin at Exh-4 and PW-2 PC Riaz Ahmed who produced various documents in their evidence. Thereafter, prosecution side was closed; vide statement at Exh-6.

5. Statements of accused u/s 342 Cr.P.C were recorded at Exh-7 and Exh-8 wherein the accused claimed false implication in the case on the pretext of enmity and denied the prosecution allegations.

6. Learned counsel for the appellant submits that original entries of the Daily Diary, by which the complainant had left PS, were not produced in evidence; however, only photostat copies duly attested were exhibited. He next submits that A. D. Manzoor Ahmed, being senior police officer, though was member of raiding party, was not made witness of the proceedings nor was examined by the IO under Section 161 Cr. P. C. He further submits that Incharge of the Malkhana, with whom property in question was deposited, was also not examined nor was produced before the trial Court. The complainant himself has acted as IO of the case; therefore, impartiality in the investigation is lacking. He further submits that though the appellant replied in question No.5 that he will get himself examined

on oath; however, he was not examined nor copy of such statement is available in the file. He further submits that the person through whom the property was dispatched to the laboratory and the person who brought it back, both were not examined; hence, learned counsel submits that prosecution has not come with clean hands; therefore, judgment impugned suffers from many infirmities as well illegalities and is liable to be set-aside. Learned counsel lastly submits that the property as well Chemical report were not confronted with the appellant at the time of recording of his statement under Section 342, Cr. P. C; hence certain pieces of evidence which were essential, not confronted, then appellant could not agitate his defence.

7. In support of his contentions, he placed reliance upon the cases of 2018 SCMR 344, 149, 2019 SCMR 1300, 2021 SCMR 451. Learned counsel; therefore, prays for grant of appeal and acquittal of the appellant.

8. On the other hand, Mr. Mohsin Ali Khan, learned Special Prosecutor ANF, opposes the appeal and submits that attested copy of Roznamcha entry was produced in evidence, which is available at page 39 of the paper book and the property was dispatched to the laboratory within 12 hours; hence, question of safe custody and transmission does not arise. He submits that there is no animosity between the parties; therefore, question of false implication is also lacking. He further submits that sample of 10 grams from each packet were taken in the light of dictum laid down by the apex Court in the

case of Aamir Zaib; therefore, it was a good exercise and cannot be questioned.

9. In support of his contentions, he placed reliance upon the cases of 2021 SCMR 1773 and 1795.

10. We have given due consideration to the arguments advanced by learned counsel for the appellant, learned Special prosecutor ANF and perused the record.

11. After perusing the record, it transpires that the complainant SIP Nooruddin has testified that on 17.02.2016, he was posted at PS ANF Sukkur when he received information from his higher ups regarding the transport of huge quantity of narcotic substance by the appellant and he was directed to constitute a raiding party. The raiding party accompanied by the informer reached Sukkur bus terminal and apprehended the appellant who was carrying a travel bag. The bag was searched in the presence of official mashirs HC Ayaz Ahmed and PC Riaz Ahmed and was found containing 15 foil packets containing charas which was weighed and each packet was found to be 1 kilogram each, totally 15 kilograms. 10 grams were separated from each packet for the chemical examiner and placed in envelopes and then in a bag along with the rest of the charas.

12. At the very outset, it is observed that the learned trial Court committed serious infirmities and illegalities while recording the statement of the appellant u/s 342 Cr.P.C and did not observe due care and caution. The statement, *prima facie*, appears to be patently stereotypical wherein only a few routine questions were put to the appellant, but material pieces of incriminating evidence have not been put to the appellant by the learned trial Court. Such a practise is against the principles of natural justice. The statement of appellant recorded by the trial Court is reproduced for ready reference:-

(58) 65 Ex. No 07.

IN THE COURT OF ADDITIONAL SESSIONS JUDGE-I/ SPECIAL JUDGE NARCOTICS, SUKKUR

Special Case No.36 of 2016

The State v Muhammad Afzal and others

STATEMENT OF ACCUSED UNDER SECTION 342 CR.P.C.

Name is: -	Muhammad Afzal
Father's Name:-	Muhammad Akbar
Caste:	Niazi
Religion:	Islam
Age about:	46 Years
Occupation:	Rickshaw Business
Resident of	Raeesani Road, Quetta.

Q.No.1. You have heard the prosecution evidence. It has come in the evidence that on 17.2.2016, about 2205 hours, at Sukkur Bus terminal, you were apprehended by the police party of P.S ANF headed by Inspector Noordin, who secured 15 Kilograms of charas beside original CNIC, Rs.1200/-, one mobile phone of Nokia alongwith Mobilink Sim No.0300-3892488 and Zong Sim No.0313-1199112 from your possession in presence of mashirs. What have you to say?

Ans:- No Sir. It is false.

Q.No.2. Whether the charas i.e. 15 Kilograms and original CNIC, Rs.1200/-, one mobile phone of Nokia alongwith Mobilink Sim No.0300-3892488 and Zong Sim No.0313.1199112 were recovered from your possession by the police party?

Ans:- No Sir. It has been foisted upon me.

Q.No.3. Why the PWs have deposed against you?

Ans: Sir, they have deposed against me due to enmity and they are police officials.

Q.No.4. Have you to say any-thing else?

Ans: Sir, I am innocent. I pray for justice.

Q.No.5. Do you want to examine yourself on oath?

Ans: Yes Sir.

Q.No.6. Do you want to lead evidence in defence?

Ans: No Sir, ANF police has issued threats to my witness [illegible] jail.

Signature/L.T.I

[signature]

[signature] 10/09/2018

(Muhammad Ibraheem S. Soomro)

Additional Sessions Judge-I/ Special Judge Narcotics, Sukkur

13. From the perusal of the above statement, we also found it shocking how the answer to question No. 5 regarding examination on oath was a yes by the appellant yet the trial Court failed to perform its duty by recording such statement of accused on oath. Moreover, it may also be pertinent to observe here that the purpose of recording statement of accused in terms of Section 342 Cr.P.C. is to inform him of the prosecution's evidence brought on record, so that he may be able to explain any circumstances appearing in the evidence against him and also for the purpose of preparing his defence. It is well settled law by now that each and every material incriminating piece of evidence being relied by the prosecution against the accused must be put to the accused at the time of recording his statement in terms of

Section 342 Cr.P.C, providing him an opportunity to explain his position and failure to comply with such mandatory requirement of law being incurable under the provisions of Section 537 Cr.P.C, would vitiate the conviction and sentence awarded to the accused. Under these circumstances, in our view the conviction and sentence awarded to the appellant cannot sustain. The Hon'ble Supreme Court in an unreported judgment dated 28.10.2010 passed in **Criminal Appeal No.292 of 2009** (*Muhammad Hassan v. The State)* has held as under:

> **"**4. It is by now a settled principle of criminal law that ***each and every material piece of evidence being relied upon by the prosecution against an accused person must be put to him at the time of recording of his statement under section 342, Cr.P.C so as to provide him an opportunity to explain his position in that regard and denial of such opportunity to the accused person defeats the ends of justice.*** It is also equally settled that a ***failure to comply with this mandatory requirement vitiates a trial***… we have truly been shocked by the cursory and casual manner in which the learned trial Court had handled the matter of recording of the appellant's statement under section 342, Cr.P.C which statement is completely shorn of the necessary details which were required to put to the appellant. We have been equally dismayed by the fact that even the learned Judges of the Division Bench of the High Court of Sindh deciding the appellant's appeal had failed to take notice of such a glaring illegality committed by the trial Court. It goes without saying that the omission on the part of the learned trial Court mentioned above was not merely an irregularity curable under section 537, Cr.P.C but the same was a downright illegality which had vitiated the appellant's conviction and sentence recorded and upheld by the learned Courts below.**"**

14. Such a futile exercise has prejudiced the case of the appellant especially when, despite not putting the material questions to the appellant, the learned trial Court has used the same evidence to convict the appellant such as the positive report of the chemical examiner which is against the mandate of Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973, which guarantees fair trial for determination of civil and criminal liabilities of every citizen. In the case of ***Habibullah alias Bhutto and 4 others v. The State*** (**PLD 2007 Karachi 68**), this Court has observed that:-

> "……From this fact alone it appears that the learned trial Judge did not go through the evidence while recording the statements under section 342, Cr.P.C. so as to put all incriminating pieces of evidence to the appellants to obtain their explanation. Under section 342, Cr.P.C. a duty is cast upon the trial Judge to put questions to the accused persons on the incriminating facts which have come in the evidence enabling the accused persons to explain circumstances appearing on the evidence against them. Thus the Provisions of section 342, Cr.P.C. have not been fully complied with.

15. Similar view has also been taken by this Court while deciding Cr. Appeal No.D-66/2019, Confirmation Case No.D-03/2019, Cr. Appeal No.D-65/2019 and Cr. Appeal No.D-67/2019 vide judgment dated; 05.03.2020.

16. In view of above position and circumstances, the instant appeal is partly allowed and conviction and sentence recorded against the appellant vide impugned judgment dated 15.11.2019 are set-aside. The matter is remanded to the learned trial Court with direction to record the statement of the appellant u/s 342 Cr.P.C afresh, confronting him with each and every material incriminating piece of evidence to enable him to furnish his explanation thereto and to record his statement on oath if he still chooses to do so and then to pass a fresh judgment within a period of three (03) months from the date of receipt of R&Ps after giving the parties a fair opportunity of hearing, under intimation to this Court. Let the R&Ps be returned to the trial Court immediately.

J U D G E

J U D G E

Ghulam Muhammad / Stenographer