

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-07 of 2016

DATE **ORDER WITH SIGNATURE OF JUDGE**

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Zulfiqar Ahmad Khan

Date of Hearing: 18.04.2017

Date of Order: 18.04.2017

Appellant/accused Abdul Sattar alias Kalu S/o Muhammad Suleman
Through: Mr. Manzoor Hussain Subhopoto,
Advocate

The State: Through Mr. Amjad Ali Sahito, Special Prosecutor
ANF.

J U D G M E N T.

NAIMATULLAH PHULPOTO, J:- Appellant Abdul Sattar alias Kalu was tried by learned Special Judge (CNS)/1st Additional Sessions Judge, Hyderabad in Special Case No.87 of 2015 for offence under Section 9(c) of Control of Narcotic Substances Act, 1997. By judgment dated 30.01.2016, the appellant was convicted under Section 9(c) Control of Narcotic Substances Act, 1997 and sentenced to 07 years and 06 months R.I and to pay a fine of Rs.35,000/-, in case of default in payment of fine, the appellant was ordered to suffer S.I for 06 months and 15 days more. Benefit of Section 382(B) Cr.P.C was extended to the appellant/accused.

2. Learned Advocate for the appellant/accused has mainly argued that all the incriminating pieces of the evidence were not put to accused in his statement recorded under Section 342 Cr.P.C. Learned Advocate for appellant has further argued that according to the case of the prosecution 04 kilograms

and 200 grams of charas and 300 grams of opium were sent to the Chemical Examiner and the report was positive. On the basis of such report, the appellant has been convicted by the Trial Court but no question regarding the positive chemical report was put to the accused while recording his statement under Section 342 Cr.P.C, which has caused serious prejudice to the accused and the trial is vitiated and the conviction would not be sustainable under the law. In support of his contention, he relied upon the cases of *MUHAMMAD SHAH V/S. THE STATE (2010 SCMR 1009)* and *SHERAL ALIAS SHER MUHAMMAD V/S. THE STATE (1999 SCMR 697)*.

3. Mr. Amjad Ali Sahito, learned Special Prosecutor ANF admitted that no question regarding positive report of the Chemical Examiner was put to the accused in his statement recorded under Section 342 Cr.P.C. However, Special Prosecutor ANF submitted that case may be remanded back to the Trial Court for recording of statement of the accused under Section 342 Cr.P.C afresh by putting all incriminating pieces of evidence against the accused.

4. After hearing the learned Counsel for the parties, we have scanned the entire evidence, particularly, statement of the accused recorded under Section 342 Cr.P.C. According to the prosecution case, 04 kilograms and 200 grams of charas and 300 grams of opium were recovered from the possession of appellant on 13.04.2015 at 0930 hours, but from perusal of the statement of accused recorded at Ex.6, it transpired that question No.1 has been formulated as under:-

“Q.No.1. It has come in evidence that on 13.04.2015 at about 0930 hours, in front of cattle colony Tando Muhammad Khan Road behind Soomra hotel, police party of P.S ANF arrested you and recovered 04 K.G and 200 grams Charas (grass) in shape of pieces, and 300 grams opium, four knives for cutting Charas. What you have got to say?”

5. No question has been put to accused regarding the positive chemical report but such piece of evidence has been used against the accused. All the incriminating pieces of evidence available on record were not put to accused as provided under Section 342 Cr.P.C for the explanation of accused, then legally the same cannot be used against accused. In the case of Muhammad Shah V/s. The State (2010 SCMR 1009), the Honourable Supreme Court of Pakistan has held as under:-

"11. It is not out of place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him. It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C. in which the words used are "For the purpose of enabling the accused to explain any circumstances appearing in evidence against him" which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross-examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. The perusal of statement of the appellant, under section 342, Cr.P.C., reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his statement under section 342, Cr.P.C. enabling him to explain the circumstances particularly when the same was abandoned by him. It is, well-settled that if any piece of evidence is not put to the accused in his statement under section 342, Cr.P.C. then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained."

In view of above legal position, it is the matter of record that all the incriminating pieces of the evidence were not put to the appellant Fida Hussain in his statement recorded under section 342, Cr.P.C. It is held in the above judgment of the honourable Supreme Court that if any incriminating piece of evidence is not put to the accused in his statement under section 342, Cr.P.C. then the same cannot be used against him for his conviction. Mr. Zahoor Shah, learned A.P.-G. has very rightly submitted that the case may be remanded to the learned trial Court for recording statement of the appellant under section 342 Cr.P.C. in accordance with law.

For the above stated reasons, judgment of trial Court against appellant is not sustainable under the law, conviction and sentence recorded against appellant vide judgment dated 26-11-2012 are set aside. Case is remanded back to trial Court for recording statement of the appellant under section 342, Cr.P.C. strictly in accordance with law, in the light of above observations, learned trial Court is further directed to decide the case within one month under intimation to this Court.”

6. We, while relying upon the cases of *Muhammad Shah V/s. The State (2010 SCMR 1009)* and *Sheral alias Sher Muhammad V/s. The State (1999 SCMR 697)*, hold that conviction and sentence recorded by the Trial Court vide judgment dated 30.01.2016 are not sustainable in law and the same are set aside. Appeal is partly allowed. Case is remanded back to the Trial Court for recording statement of accused under Section 342 Cr.P.C afresh strictly, in accordance with law, in the light of above observations by putting all the incriminating pieces of evidence to accused in statement including the positive report of chemical examiner. Trial Court is further directed to decide the case of the accused within three months under intimation to this Court.

JUDGE

JUDGE

Shahid