

**IN THE HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD.**

Present:

*MR. JUSTICE NAIMATULLAH PHULPOTO*

*MR. JUSTICE RASHEED AHMED SOOMRO*

Cr. Appeal No. D- 109 of 2015.

Date of hearing: 20.03.2017.

Date of decision: 20.03.2017

Appellant : Dawood  
Through M/s Amjad Ali Sahito and Rasool  
Bux Solangi, Advocates.

Respondent : The State  
Through Shahzado Salim Nahyoon, A.P.G for  
the State.

-----

**J U D G M E N T**

*NAIMATULLAH PHULPOTO, J:-* Appellant Dawood was tried by learned Sessions Judge/Special Court, (CNS), Tando Muhammad Khan in Special Case No.11 of 2014 for offence under Section 9(c) of Control of Narcotics Substances Act, 1997. Vide judgment dated 13.11.2015 appellant Dawood was convicted under Section 9(c) of C.N.S Act 1997, and sentenced to 11 years and 6 months R.I and to pay fine of Rs.55,000/-, in case of the default in payment of fine, he was ordered to suffer S.I for 8 months and 15 days more. The appellant was, however, extended the benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the F.I.R. are that on 17.05.2014 SIP Qamar Zaman left Police Station alongwith his subordinate staff for patrolling duty in the area, when the police party reached near Shrine of Haji Shah where it is alleged that Mehran Car appeared. Police party gave signal to the car. It is stated that one person sitting on the front seat of the vehicle got down and succeeded to run towards the Shrine, later on police came to know about his name as Sarwan s/o Abdullah Naurangzado. However, police caught hold present accused sitting on the driving seat and inquired his name to which he

disclosed his name Dawood son of Abdul Qadir alias Aban by caste Makhdoom R/o Ehsan Shah Colony Matli, District Badin. Police found the accused in suspicious manner and conducted search of the vehicle. Under the front seat of the Car police found a Ajrak cloth, in which 8 slabs of charas were wrapped. Complainant/S.I opened it and found charas in it. Personal search of the accused was also conducted and Rs.400/- were recovered from him. Complainant/S.I prepared mashirnama of arrest and recovery in presence of mashirs namely PCs Manthar Ali and Ghulam Rasool. Charas was weighed it became 8 kilograms and 180 grams, whole charas was sealed at spot for sending to the Chemical Examiner. Car bearing No.AWY-477 was also seized. Thereafter, accused Dawood was brought to the police station alongwith narcotic recovered from him and vehicle. FIR bearing Crime No.22/2014 was registered at P.S Tando Ghulam Haider on behalf of State against accused for offence under Section 9(c) of CNS Act, 1997.

3. During investigation, charas was sent to the Chemical Examiner. Positive report was received. Police made efforts for arresting the absconding accused Sarwan but could not succeed. After usual investigation final report was submitted against the present accused under Section 173 Cr.P.C. Accused Sarwan was shown as absconder. After completing the necessary formalities against the absconding accused, he was declared as proclaimed offender.

4. Charge was framed against accused Dawood by learned Trial Court at Ex.5 for offence under section 9(c) Control of Narcotic Substances Act, 1997. Accused met the charge with denial.

5. Prosecution at the trial, examined P.W SIP Qamar Zaman at Ex.10, he produced roznamcha entry No.7,9, memo of arrest and recovery, F.I.R., memo of vardat, sketch of vardat, roznamcha entry No.4, 6 and chemical report at Ex.10/A to 10/I, P.W PC Manthar Ali at Ex.11. Thereafter, prosecution side was closed at Ex.12.

6. Statement of accused was recorded under Section 342 Cr.P.C Ex.13. Accused denied the recovery of the charas from his vehicle. Other pieces of the evidence have also been denied.

7. Trial Court after hearing the learned counsel for the parties and assessment of the evidence, convicted the accused under Section 9(c) of Control of Narcotics Substances Act, 1997, and sentenced him to 11 years and 6 months R.I and to pay fine of Rs.55,000/-, in case of the default in payment of fine, he was ordered to suffer S.I for 8 months and 15 days more. Thereafter, aforesaid appeal is filed against his conviction and sentence.

8. Learned Advocate for the appellant has mainly argued that serious prejudice has been caused to the accused as all the incriminating pieces of the evidence were not put to him in his statement recorded under Section 342 Cr.P.C as well as in the charge. Learned Advocate has argued that charas was recovered from the vehicle of the accused but no such question was put to him for his explanation. Counsel for appellant further argued that no question was put to the accused that he was driving the car at the relevant time. He next argued that alleged offence has taken place within the territorial jurisdiction of P.S Tando Ghulam Haider whereas Trial Court in the charge has mentioned that offence took place within the territorial jurisdiction of Police Station Tando Muhammad Khan. Counsel for the appellant submitted that this is a fit case for acquittal of the accused. Counsel for the appellant has also pointed out that absconding accused after conviction of the appellant has been arrested and presently, he is facing trial before the trial Court.

9. Shahzado Salim Nahyoon, A.P.G for the State conceded to the contentions that Trial Court did not ask material questions from the accused while recording his statement under Section 342 Cr.P.C. However, learned A.P.G submitted that case may be remanded back to the Trial Court for recording of statement of the accused afresh under Section 342 Cr.P.C by putting all incriminating pieces of evidence against accused.

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, 8 kilograms and 180 grams charas was recovered from the vehicle of the appellant on 17.05.2014 at 1300 hours, but perusal of the statement of accused recorded at Ex.13, it transpires that question No.1 has been formulated as under:-

*“Q.No.1: You have heard the prosecution evidence, wherein it is alleged that you on 17.05.2014 at about 1300 hours at Moya Link road adjacent to Shrine of Haji Shah, Deh Fateh Bagh, Taluka Tando Ghulam Hyder, the police party of P.S Tando Ghulam Hyder secured 8180 grams of charas and absconding accused Sarwan made his escape good, in contravention of Section 6 of the Control of Narcotic Substance Act, 1997, headed by SIP Qamar Zaman Khoso, in presence of mashirs PC Manthar Ali and DPC Ghulam Rasool. What you have to say?”*

11. From the perusal of statement of appellant Dawood recorded under Section 342 Cr.P.C (Ex.13), it transpired that no question has been put to him regarding transportation of the charas in the car bearing No. No.AWY-477 and recovery of charas weighing 8 kilograms and 180 grams. Statement of the accused under Section 342 Cr.P.C has also been recorded in the stereotype manner so far the Chemical Examiner’s report is concerned. 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 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."*

12. The question regarding Chemical Examiner's report is stereotype. Counsel for appellant has submitted that it has caused serious prejudice to the accused and the trial is vitiated. Learned D.P.G has conceded that material incriminating pieces of the evidence have not been put to the appellant in his statement recorded under Section 342 Cr.P.C.

13. We while relying upon the cases of *Muhammad Shah v. The State (2010 SCMR 1009)* and *Sheral alias Sher Muhammad v. 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 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