IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD

Cr. Appeal No.D-09 of 2018

PRESENT
Mr. Justice Naimatullah Phulpoto
Mr. Justice Shamsuddin Abbasi

Date of Hearing:	*19.03.2018*
Date of Judgment:	*05.04.2018*
Appellant/accused:	*Hussain Ali Sahibzado S/o Muhammad Ali, through Mr. Mehar Qadir Khan, Advocate.*
The State:	*Through Syed Meeral Shah Bukhari, Additional Prosecutor General, Sindh.*

J U D G M E N T

SHAMSUDDIN ABBASI, J:- Appellant Hussain Ali Sahibzado faced trial before the Court of Special Judge, Narcotics / Sessions Judge, Jamshoro @ Kotri in Special Case No.24 of 2016 for offence punishable under Section 9(c) of Control of Narcotic Substances Act, 1997, arising out of Crime No.35 of 2016 of P.S Sehwan. The Appellant was convicted under Section 9(c) of CNS Act, 1997, and sentenced to imprisonment for life and to pay a fine of Rs.50,000/- and in default of payment of fine to further undergo Simple Imprisonment for 06 months and benefit of Section 382-B Cr.P.C was also extended to him.

2. The brief facts of the prosecution case are that on 24.03.2016 SIP Umed Ali Lakho, SHO P.S Sehwan left P.S alongwith his subordinate staff namely ASI Altaf Hussain Mangi, HC Anwar Ali and PC Aneesullah, duly armed with official weapons on police mobile vide roznamcha entry No.24 at 2030 hours for patrolling of the area. After patrolling at different places when they reached at Lal Bagh check post, they started checking of the vehicles. At about 1:30 p.m. a golden coloured car bearing registration No.AWH-434 appeared from Sehwan, to whom they gave signal and having checked the same and found 02 Nylon bags containing 60 bags of chars from the rear seat of the car. They arrested the accused under Section 55 Cr.P.C and inquired his name on which he disclosed to be Hussain Ali S/o Muhammad Ali by caste Sahibzada, resident of Sawat and he further disclosed that he was going to sale out the said chars to Karachi and SHO / SIP Umed Ali Lakho appointed ASI Altaf Hussain Mangi and HC Anwar Ali as Mashirs and conducted personal search of accused and two notes of Rs.500/- were also recovered from him. They also inquired the documents of the vehicle for that accused replied that he had no documents. SHO / SIP Umed Ali Lakho weighed the recovered chars and found 73 K.G and 790 grams. Out of 60 packets, they separated 10 grams of chars from each packet. SIP Umed Ali Lakho sealed the property in presence of the mashirs and prepared such mashirnama of arrest and recovery of chars on the spot. Thereafter, SIP Umed Ali Lakho brought the accused and case property to P.S where he lodged FIR against the accused under Section 9 (c) of CNS Act, 1997, on behalf of the State.

3. During the investigation, SIP Umed Ali Lakho conducted himself investigation of the car and recorded the statement of P.Ws under Section 161 Cr.P.C. he visited at the place of incident and

prepared mashirnama of place of incident. The complainant / I.O also sent the case property to the chemical examiner for analysis and after receiving positive report and completing other formalities I.O submitted challan under Section 9(c) of CNS Act, 1997.

4. The learned trial Court framed the charge against the accused for offence under Section 9(c) of CNS Act, 1997 at Ex-02, and the accused did not plead guilty and claimed to be tried.

5. In order to prove it's case, the prosecution had examined P.W-1 SIP Umed Ali Lakho, who is complainant and I.O of the case at Ex-4. He has produced the copy of FIR at Ex-4/A, mashirnama of arrest and recovery at Ex-4/B, roznamcha entry No.24 at Ex-4/C, roznamcha entry No.35 at Ex-4/D, report of chemical examiner at Ex-4/E, detail of each packet of chars at Ex-4/F, letter for verification of vehicle at Ex-4/G, entry of sending sample to chemical examiner at Ex-4/H, photographs of the vehicle at Ex-4/I. The prosecution had also examined P.W-02 Altaf Hussain Mangi, mashir of the case at Ex-6. Thereafter, the prosecution closed its side.

6. The learned trial Court recorded the statement of accused at Ex-8 in which accused denied the allegations leveled by the prosecution but neither examined himself on oath nor led any evidence in his defence.

7. Trial Court after hearing learned Advocates for the parties and assessment of evidence by judgment dated 23.12.2017 convicted the accused under Section 9(c) of Control of Narcotic Substances Act, 1997 and sentenced him as referred in the foregoing paragraph, hence, filed the present appeal.

8. The learned Counsel for the Appellant contended that the complainant himself was an Investigating Officer of the case and place of the incident is busy road of Indus Highway but the I.O did not associate any independent person to witness the recovery proceedings. Learned Counsel further contended that the alleged chars was recovered on 24.03.2016 but it was sent to the chemical examiner for analysis on 26.03.2016 and the same was received by the chemical examiner on 07.04.2016 and there was delay of 14 days in sending the recovered chars. I.O was bound to send the recovered chars within 72 hours after its recovery and he further contended that the prosecution had not explained the element of safe custody, which created serious doubts in the prosecution case. He further contended that 60 samples were combined in a single parcel and also contended that there were material contradictions in the evidence of the prosecution. It is submitted that the judgment passed by the learned trial Court suffers from misreading and non-reading of evidence, full of contradictions, lacunas and discrepancies. Learned Counsel lastly contended that it was the duty of the learned trial Judge to put all incriminating evidence, brought by the prosecution, to the accused to obtain explanation in his statement recorded under Section 342 Cr.P.C but here in this case the learned trial Court did not put question regarding positive report of chemical examiner, in respect of the alleged recovery of chars.

9. On the other hand, the learned Additional Prosecutor General submits that it was day time incident. The chars recovered from the Appellant is 73.790 kilograms, which is a huge quantity and the prosecution had fully established their case against the Appellant. Learned A.P.G also admitted that the learned trial court has failed to put specific question regarding positive report of the chemical examiner of

the recovered chars and at the very outset prayed for remand of the case to the learned trial Court to record the statement of accused afresh.

10. We have heard the learned Counsel for the Appellant as well as learned Additional Prosecutor General and perused the record minutely.

11. The prosecution had examined two prosecution witnesses in this case. P.W-1 SIP Umed Ali Lakho, who is complainant as well as I.O of the case. He deposed that on 24.03.2016 at 0130 hours one golden colour 2.OD Corolla Car was coming from Sehwan side and they got it stopped and checked it and found two Nylon bags lying at rear seat of the vehicle. They checked the bags and found 60 packets of chars lying in the Nylon bags. They weighted the total recovered chars on the spot, which became 73.790 kilograms and the complainant separated 10 grams from each packet (60 packets) separately and sealed the recovered chars at the spot in presence of the mashirs. P.W-2 ASI Altaf Hussain, who is a mashir of the case, has also stated on the same line in his deposition as stated by the complainant / I.O SIP Umed Ali Lakho of the case.

12. The law is settled that any piece of evidence not put to accused person at the time of recording statement under Section 342 Cr.P.C, could not be considered against him, from the prosecution evidence available on record were not put to the accused person while his statement under Section 342 Cr.P.C was recorded.

13. In order to appreciate the contradictions by learned Advocate for Appellant, statement of accused person recorded under

Section 342 Cr.P.C before learned trial Court at Ex-8, is hereby reproduced as under:-

Q.No.1.	*It is alleged that on 24.03.2016 at 0130 hours, at Indus Highway Road, Lal Bagh Check Post, Sehwan, you were arrested by Police party headed by SIP Umed Ali Lakho, from the car No.AWH-434 Toyoto Corolla, from where 60-packets of chars weighing 73.790 KGs of chars. What you have to say?*
Ans:	*No Sir, it is false.*
Q.No.2.	*It is evident that chars produced in Court as articles-A and car produced outside the Court as article-C, allegedly recovered from your possession. What you have to say?*
Ans:	*No Sir, it is foisted.*
Q.No.3.	*Why the prosecution witnesses have deposed against you?*
Ans:	*Sir, they are police officials and interested, so deposed falsely.*
Q.No.4.	*Do you want to examine yourself on oath?*
Ans:	*No Sir.*
Q.No.5.	*Do you want to examine any witness in your defense?*
Ans:	*No sir.*
Q.No.6.	*Do you want to say anything else?*
Ans:	*Sir, I had come from Karachi with my friend resident of Jamshoro. I came from his house to visit Jamshoro, but I was apprehended by police. I failed to produce my CNIC, therefore police took me to P.S, subsequently I came to know regarding this case. Sir I am innocent and pray for justice.*

14. It is the case of the prosecution that the complainant has recovered 73.790 kilograms chars from rear seat of the car, which was sent to the chemical examiner, wherefrom positive report has been received by the Investigating Officer. It is admitted position that the learned trial Judge was bound to put specific question from the accused regarding positive report of chemical examiner.

15. Learned Additional Prosecutor General conceded to the legal position that trial Court has committed illegality by omitting to put question regarding.

16. It is clear that the statement of accused was recorded under Section 342 Cr.P.C in a very stereotype manner. Relevant and very important incriminating piece of evidence has not been put to the accused for his explanation / reply. Perusal of the statement of accused under Section 342 Cr.P.C reveals that all the incriminating pieces of evidence brought on record were not put to the accused, while his statement was recorded under Section 342 Cr.P.C, enabling him to explain and reply the same, notwithstanding that the trial Court used such piece of evidence for convicting the accused. Under the law, if any piece of evidence is not put to the accused in his statement recorded under Section 342 Cr.P.C, the same cannot be used for his conviction. Exactly the same position is in the case at hand. The legal position has also been admitted by the learned Additional Prosecutor General appearing for State as stated above.

17. Reliance is placed on the case of *MUHAMMAD SHAH V/S. THE STATE,* reported as *2010 SCMR 1009,* in which the Honourable Apex Court 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 <u>appearing in evidence</u> 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 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.*

18. Reliance can also be placed on the case of *MUHAMMAD NAWAZ & OTHERS V/S. THE STATE & OTHERS*, reported as *2016 SCMR 267*, wherein the Honourable Apex Court has observed as under:-

> *"6(c).....There is yet another aspect of the case. While examining the appellants under section 342, Code of Criminal Procedure, the medical evidence was not put to them. It is well settled by now that a piece of evidence not put to an accused during his/her examination under section 342, Code of Criminal Procedure, could not be used against him/her for maintaining conviction and sentence".*

19. In another case of *QADDAN & OTHERS V/S. THE STATE* reported as *2017 SCMR 148*, wherein the Honourable Apex Court has held as follows:-

> *3.....Apart from that the motive set up by the prosecution had never been put to the present appellants at the time of recoding of their statements under section 342, Cr.P.C. The law is settled that a piece of evidence not put to an accused person at the time of recording of his statement under section 342, Cr.P.C. cannot be considered against him."*

20. Having observed the above dictum laid down by the Honourable Apex Court, we are of the considered view that the learned trial Court has committed illegality and violated the provisions of Section 342 Cr.P.C as well as Article 132 of Qanun-e-Shahadat Order, 1984, therefore, the judgment dated 23.12.2017 passed by the learned trial

Court is hereby set-aside and consequently the case is remanded back to the learned trial Court with direction to record statement of the accused under Section 342 Cr.P.C afresh by putting the relevant questions keeping in view the report of chemical examiner as observed above. A fair opportunity shall be provided to the accused for explanation / reply as well as prosecution. Thereafter, the learned trial Court shall pass the judgment afresh within one month after hearing both the parties in accordance with law.

JUDGE

JUDGE

Shahid