

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

Cr. Appeal No. D- 64 of 2019

**Present:-**

**Mr. Justice Abdul Maalik Gaddi.**

**Mr. Justice Adnan-ul-Karim Memon**

Date of hearing: 18.08.2020  
Date of Judgment: 18.08.2020  
Appellant: Sikandar Ali through Mr. Zainuddin Baloch,  
Advocate.  
State: Through Mr. Shehwak Rathore Deputy  
Prosecutor General, Sindh.

**JUDGEMENT**

**ABDUL MAALIK GADDI, J-** Through this Criminal Appeal, appellant Sikandar Ali s/o Bux Ali has called in question the judgment dated 11.04.2019 passed by the learned 1<sup>st</sup> Additional Sessions Judge / MCTC, Umerkot, in Sessions Case No.16 of 2018 (Re: The State v. Sikandar Ali) arising out of Crime No.02 of 2018, registered at P.S D.I.O Excise Taxation Mirpurkhas, for an offence under Section 9(C) of Control of Narcotic Substances Act, 1997, whereby he was convicted and sentenced to suffer imprisonment for life and to pay fine of Rs.35,000/- (Rupees Thirty Five Thousand), in case of non-payment of fine, to suffer S.I for six (06) months more with benefit of Section 382-B Cr.P.C.

**2.** Brief facts of the prosecution case are that on 16.03.2018 complainant Inspector Nand Lal of P.S D.I.O Excise and Taxation Mirpurkhas alongwith his subordinate staff namely E.C Sikandar Ali, E.C Muhammad Amin, E.C Muhammad Zafar and E.C Ghulam Ali left P.S vide entry No.40 at 1330 hours, in Government Official vehicle number GS-8225 for patrolling within the jurisdiction of District Umerkot to control the Narcotics offences. During patrolling at different places they reached at Kandi Stop, Umerkot-Chachro Road, District Umerkot and started snap checking of vehicles. During checking they found a light blue colour Toyota Corolla Car, having registration Number ATL-867 coming from Umerkot side, to which they got stopped by pointing the hand gesture. They saw two persons seated inside that Car, one was driving while other was sitting at front

seat. They enquired about their names etc, to which the person sitting on front seat disclosed his name as Abdul Waheed son of Muhammad Ishaque by caste Magsi, presently resident of Warah, District Qambar-Shahkot and originally resident of Jhal Magsi, Balochistan province, while the second person sitting on driving seat disclosed his name as Sikandar Ali son of Baksh Ali by caste Chandio resident of Rasool Abad Mohalla Larkana. Due to non availability of private mashir, complainant associated E.C Sikandar Ali and E.C Muhammad Amin as mashirs and conducted personal search of Abdul Waheed Magsi, then Sikandar Ali and then conducted search of their Car. On personal search of Abdul Waheed Magsi they secured three currency notes of Rs. 1000/- and one colored copy of his CNIC from front pocket of his shirt, while one Red Colour Samsung Mobile phone from his side pocket. On personal search of driver Sikandar Ali, they secured two currency notes of Rs.1000/-, his driving license and a silver colour China Mobile from side pocket of his shirt. On the search of their Car registration Book in the name of Aslam Khan son of Allah Dino Manganhar, resident of Manganhar Mohalla Dadu was found from the drawer of Dash Board. On further checking, at back side of front seat and footsteps of rear seat a green colour bag was found. They opened that bag and found three packets wrapped with Khaki colour plastic tape. They further opened the packets and found opium in all three packets. They weighed the packets of opium separately and found two packets of 7 Kilograms each, while remaining one was found weighing 06 kilogram, total weighing 20 kilogram opium. They sealed the whole opium in same bag for chemical examination. Thereafter, they arrested the accused persons and prepared such mashirnama of arrest and recovery in presence of mashirs E.C Sikandar Ali and E.C Muhammad Amin. Thereafter, arrested accused and recovered property and Car were brought at P.S where complainant Inspector Nand Lal lodged instant FIR on behalf of State.

**3.** The Prosecution in order to substantiate the charge against the appellant, examined the following two (02) witnesses:

**P.W No.1:** Complainant Inspector Nand Lal examined at Ex-6, he produced memo of arrest and recovery at Ex6-A, arrival & departure entries over one leaf at Ex.6-B, FIR at Ex.6-C, two entries of Malkhana over one leaf at Ex.6-D, letter addressed to Chemical Examiner at Ex.6-E and report of Chemical Examiner at Ex.06-F respectively.

**P.W No.2** Mashir E.C Sikandar Ali examined at Ex.7.

All the above named witnesses have been cross-examined by Learned ADPP for State.

**4.** Learned trial Court after hearing the respective parties convicted and sentenced the appellant as stated in the preceding paragraph; hence, this appeal.

**5.** Mr. Zainuddin Baloch, learned counsel for appellant submits that the appellant is innocent and has falsely been involved in this case; that alleged opium has been foisted upon him; that it was the case of spy information but the complainant failed to associate any private person of the locality to witness the recovery proceedings. Learned counsel while reading the prosecution evidence pointed out that charge against appellant was not framed in accordance with law as no description of allegedly recovered Corolla Car having registration No.ATL-867 has been mentioned and statement of accused was also not recorded in accordance with law and that all incriminating pieces of evidence were not put to the accused and accused has not been awarded fair opportunity of being heard on material points of the case. He therefore, prays that instant appeal may be allowed and the impugned judgment may be set aside and the case may be remanded back to the trial court for de-novo trial.

**6.** On the other hand, learned Deputy Prosecutor General appearing on behalf of State conceded the contentions raised by learned counsel for appellant and has recorded his no objection for remanding the case to the trial Court for de-novo trial.

**7.** We have heard the learned counsel for the parties and have perused the material available on record. We are persuaded to hold that it was the primary responsibility of the trial Court to ensure that truth is discovered. The procedure adopted by the trial court is reflective of miscarriage of justice. Offence is punishable for death or imprisonment for life and appellant has been awarded imprisonment for life without providing him opportunity with regard to material questions to be put to him in statement of accused u/s 342 Cr.P.C. As regards to the contention of learned counsel for appellant that all the pieces of evidence were not put to accused under section 342, Cr.P.C for his explanation, Honourable Supreme Court in an unreported

judgment in Criminal Appeal No.292 of 2009 dated 28.10.2010 in the case of **MUHAMMAD HASSAN v. THE STATE**, held as under:-

*“3. In view of the order we propose to pass there is no occasion for going into the factual aspects of this case and it may suffice to observe that the case of the prosecution against the appellant was based upon prompt lodging of the F.I.R., statements of three eyewitnesses, medical evidence, motive, recovery of weapon of offence and a report of the Forensic Science Laboratory regarding matching of some of the crime-empties with the firearm allegedly recovered from the appellant’s possession during the investigation but we have found that except for the alleged recovery of Kalashnikov from the appellant’s possession during the investigation no other piece of evidence being relied upon by the prosecution against the appellant was put to the appellant at the time of recording of his statement under section 342, Cr.PC.*

**8.** 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 u/s 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. The case in hand is a case of narcotics entailing a sentence of life imprisonment or death and we have truly been shocked by the cursory and casual manner in which the learned trial Court did not amend the charge after declaring the co-accused Abdul Waheed as proclaimed offender. It is noted that the allegedly recovered car, its model and colour have not been mentioned in the charge sheet and the description of car has also not been confronted to the appellant in his statement u/s 342 Cr.P.C. It goes without saying that the omission on the part of the 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 trial Court. In the case of **MUHAMMAD NAWAZ and others Versus The STATE AND OTHERS** (2016 SCMR 267), Honourable Supreme Court of Pakistan has observed as under:-

*“.....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.”*

**9.** In the present case trial Court did not perform its function diligently and has taken the matter lightly and in a casual manner awarded life imprisonment to the accused. As such, appellant was prejudiced in his trial and defence. Therefore, a miscarriage of justice has occurred in the case. Procedure adopted by trial Court is an illegal procedure that cannot be cured under section 537, Cr.P.C. Thus, it has vitiated the trial.

**10.** We shall further add that it shall always be the undeniable duty of a judge that justice is not only done but should be shown to have been done. Such duty becomes double when the charge, under trial, is one of capital punishments. We would further add that it is the duty of the trial Court to frame charge correctly in accordance with law. Thus, if above legal position is put in juxta-position to present situation, the Safe Criminal Administration of Justice, as well Article 10-A of the Constitution, leave us with no option but either to remand back the case in hand to the trial Court for *de-novo* trial.

**11.** Accordingly, this is a fit case to be remanded back from the stage of framing of charge; hence, we set-aside the impugned judgment dated 11.04.2019 and remand the case back to the trial Court for *de-novo* trial. The appellant shall be at liberty to lead evidence afresh if any, thereafter trial Court shall pass afresh judgment within thirty (30) working days from receipt of this judgment after hearing the parties without being influenced by the earlier judgment whereby appellant was convicted. The office shall send a copy of this judgment along with R&P's immediately to the concerned trial Court for information and compliance.

**12.** The instant Criminal Appeal stands disposed of in the above terms along with pending application[s].

**JUDGE**

**JUDGE**

**\*Hafiz Fahad\***