

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

Cr. Appeal No. D- 52 of 2018

Present:-

Mr. Justice Abdul Maalik Gaddi.

Mr. Justice Adnan-ul-Karim Memon

Date of hearing: 19.08.2020.
Date of Judgment: 19.08.2020.
Appellant: Meer Muhammad Umer through
Mr. Shahnawaz Brohi, Advocate.
State: Through Mr. Muhammad Ayoub Qasar
Special Prosecutor ANF.

JUDGEMENT

ABDUL MAALIK GADDI, J- Through this Criminal Appeal, appellant Meer Muhammad Umer s/o Muhammad Anwer has called in question the judgment dated 31.03.2018 passed by the learned Special Judge Narcotic Substance / 1st Additional Sessions Judge, Hyderabad, in Special Case No.182 of 2015 (Re: The State v. Meer Muhammad Umer) arising out of crime / F.I.R No.D040403415, registered at P.S ANF, Hyderabad, for an offence under Section 6, 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.1,00,000/- (Rupees One Hundred Thousand), in case of non-payment of fine, to suffer S.I for one (01) year more with benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case are that on 27.11.2015 the complainant SIP Syed Salman was available at the P.S ANF where he received spy information with reference to his superiors that well known drug seller namely Meer Muhammad Umer Mustong is coming at Ayoob hotel National Highway, Hyderabad with a huge quantity of narcotics to deliver the same to his specific customer, and an immediate action would cause definite arrest and recovery. Upon such information he constituted a raiding party comprising upon Naib Subedar Muhammad Nawaz, H.C Muhammad Umer, H.C Abdul Hameed, H.C Abdul Razzaque, H.C Raheem Bux, P.C Kashan, P.C Imtiaz Ali, P.C Shoukat, P.C Imam Bux, P.C Imran, Sepoy Irshad, Sepoy Mohsin, drivers H.C Ghulam Rasool & P.C Safdar by two

government mobiles under the command of Incharge A.D Ghulam Abbas vide entry No.05 at 1000 hours. Upon such information, the Complainant party reached at the pointed out place along with the spy at 1030 hours, where on pointation of spy they noticed that a person was standing having travelling bag on his right shoulder. The Complainant party tactfully apprehended the said person. The persons available at the place of incident were asked to be act as mashirs in the present case but they refused due to passengers. Then ultimately H.C Muhammad Umar and P.C Kashan Ahmed were nominated as mashirs. The apprehended person disclosed his name as Meer Muhammad Umer S/o Muhammad Anwer by caste Brohi r/o Mohallah Azizabad No.1, Mastong, Balochistan. The apprehended person has given the key of the bag to SIP Syed Salman who checked the bag and found 16 multi colour foil pack packets. Each packet was also checked and found two slabs in each packet, each packet was weighed through electronic scale which was found 1/1 Kilograms each total 16 kilograms. The recovered Charas was sealed in the travelling bag for Chemical Analysis. From further personal search one CNIC of the accused and cash Rs.2100/- were also recovered. The memo of arrest and recovery was prepared in presence of mashirs namely H.C Muhammad Umer and P.C Kashan Ahmed and obtained their signatures upon it. Thereafter, arrested accused and the case property was brought at P.S. where instant FIR was registered against the accused named above.

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

P.W No.1: Complainant SI Syed Salman examined at Exh.3 (who produced carbon copy of FIR, entries No.5 & 6, memo of arrest and recovery, letter dated 30.11.2015 for sending the parcel for Chemical Examination, and Chemical Examination Report as Exh.3/A to Exh.3/E)

P.W No.2 Mashir H.C Muhammad Umer examined at Exh.4.

Both above named witnesses have been cross-examined by learned S.P.P for ANF.

4. The statement of accused was recorded U/S 342 Cr.P.C at Ex.06, in which he denied the prosecution allegation and claimed his innocence. However, in order to disprove the prosecution allegation, he examined himself on oath as well as two (02) D.Ws in his defence at Ex.7 to Ex.9 u/s 340(2) Cr.P.C.

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

6. Mr. Shahnawaz Brohi, learned counsel for appellant submits that the appellant is innocent and has falsely been involved in this case; 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 bag under which the alleged recovered charas was recovered and same has also not been confronted to accused in his statement u/s 342 Cr.P.C. 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.

7. On the other hand, learned Special Prosecutor ANF appearing on behalf of State submits that instant criminal appeal may be disposed of as per material available on record.

8. 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.

9. 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 deliver the judgment. It is noted that the allegedly recovered charas was lying in the travelling bag of accused but no description with regard to the said bag has been mentioned in the charge nor the same has been confronted to accused in his statement u/s 342 Cr.P.C. It is also noted that the name of a person to whom present appellant was going to deliver the travelling bag which contained alleged contraband / charas. 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."

10. 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.

11. 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.

12. 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 31.03.2018 and remand the case back to the Court below. However, since the matter has been decided by the trial Court i.e. 1st Additional Sessions Judge, Hyderabad; therefore, the contention of the learned counsel for the appellant that the trial Court has already formed its opinion and passed the impugned judgment and convicted the appellant as mentioned in the preceding paragraph of this Judgment, appears to be plausible. Hence, the instant case is remanded back to the Sessions Judge Hyderabad for *de-novo* trial from the stage of framing of charge. The prosecution as well as appellant would be at liberty to lead evidence afresh, if any, thereafter the Sessions Judge, Hyderabad shall pass fresh judgment within thirty (30) working days from receipt of this judgment after hearing the parties in accordance with law. The office shall send a copy of this judgment along with R&P's immediately to the Sessions Judge, Hyderabad for information and compliance.

13. The instant Criminal Appeal stands disposed of in the above terms along with pending application.

JUDGE

JUDGE

Hafiz Fahad