

IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Appeal No. D-42 of 2016
Cr. Jail.Appeal No. D-44 of 2016

PRESENT:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Zulfiqar Ahmad Khan

Appellant : Ali Amir & Ali Nawaz
through Mr. Muhammad Yousif Leghari,
Advocate.

Respondents : The State
through Syed Meeral Shah Bukhari, D.P.G.

Date of Hearing : 19.04.2017

Date of Judgment : 28.04.2017

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellants Ali Amir, Ali Nawaz and others faced trial before the learned Special Judge for CNS, Tando Allahyar in Special Case No. 01 of 2015 for offence under Section 9(c) Control of Narcotic Substances Act, 1997. By judgment dated 29.03.2016 appellants / accused were found guilty and they were convicted u/s 9(c) of CNS Act, 1997 and sentenced to imprisonment for life and to pay fine of Rs.1,00,000/- each. In case of default in the payment of fine, they were ordered to undergo S.I for six months more. Appellants were extended benefit of Section 382-B Cr.P.C. Co-accused Suhail Akhtar, Yaseen and Wahid Bux were acquitted.

2. Brief facts of the prosecution case as per FIR are that on 01.01.2015 SHO/SIP Riaz Ahmed Soomro, of PS Chambar left PS alongwith ASI

Mehboob Alam Pahore, ASI Akhtar Ali Bozdar, PCs Mohammad Hussain, Manzoor Ali, driver PC Yaqoob Ali vide roznamcha Entry No. 09 at 1300 hours on mobile for patrolling duty in the jurisdiction of PS Chamber. While patrolling at various places when they reached at `Bhambhro Khooh` stop, SIP Riaz Ahmed received spy information that two unidentified persons were bringing charas in a Gray colour Mehran Car from Tando Allahyar side. On receipt of such information, police party reached at Essa Tube Well Road leading from Tando Allahyar to Chamber and held Nakabandi. It is alleged that at 1630 hours a Gray colour Mehran Car appeared from Tando Allahyar side, it was stopped. It is stated that two persons were found sitting in it. Upon checking of said Mehran Car, one white colour plastic bag containing 42 pockets wrapped in Maroon colour Panni containing charas were recovered. On inquiry said persons told their names to be Ali Amir son of Khuda Dad and Ali Nawaz s/o Wali Muhammad. Both the accused further disclosed that they had purchased the said charas from one Suhail Akhtar s/o Bashir Ahmed. From personal search of the accused Ali Amir, two currency notes each Rs.500/- total Rs.1000/- were recovered, while on personal search of accused Ali Nawaz five currency notes of Rs.100/- total Rs.500/- were recovered. Recovered charas was weighed, it become 42 Kilograms. Small quantity from each recovered slab of charas was separated, which become 485 grams and the same was sealed for chemical examination and remaining recovered charas was also sealed. Upon inquiry regarding documents of vehicle in question, accused Ali Aamir disclosed that he was owner of said Mehran Car but could not produce its documents, while accused Ali Nawaz was his driver, therefore, said car was also seized under section 550 Cr.P.C. Such Mashirnama of arrest and recovery was prepared in presence of mashirs namely ASI Mehboob Ali and ASI Akhtar Ali Bozdar. Thereafter, accused and the recovered property

were brought at PS, where FIR was registered against the accused persons under section 9-(c) of Control of Narcotic Substance Act, 1997.

3. During investigation 161 Cr.P.C. statements of PWs were recorded, accused Suhail Akhtar was arrested. Charas was sent to the chemical examiner for analysis, positive report was received. After completing the legal formalities, challan was submitted against accused accused Ali Aamir, Ali Nawaz and Suhail Akhtar u/s 9(c) of CNS Act, 1997.

4. A charge against the above named accused persons was framed at Ex.7, under Section 9(c) Control of Narcotic Substance Act, 1997, to which they pleaded not guilty and claimed their trial.

5. At the trial, prosecution examined SIP Riaz Ahmed Soomro at Ex.08, who produced Mashirnama of arrest and recovery at Ex.9, FIR at Ex.10, chemical examiner's expert report at Ex.11, attested copy of departure and arrival entry at Ex.14/15, Mashirnama of arrest and recovery of accused Suhail Akhtar at Ex.13. Mashir ASI Mehboob Alam was examined at Ex.16. Thereafter, DPP for State closed prosecution side.

6. Statements of accused under Section 342 Cr.P.C. were recorded at Ex.18 to Ex.22 respectively. Accused persons denied the prosecution allegations and claimed false implication in this case. However, accused Ali Aamir and Ali Nawaz offered to examine themselves on oath. Accused Ali Amir examined himself on oath at Ex.23 and also produced his defence witnesses namely Imran Ali and Asif Sheikh, who were examined at Ex.24 and 29 respectively. No other defence witness was examined by the accused Ali Aamir. Accused Ali Nawaz examined himself on oath at Ex.25 and he too produced his defence witnesses namely Ghulam Nabi and Mir Muhammad who were examined at Ex.26 and 27 respectively.

7. The learned trial court after hearing the learned counsel for the parties and assessment of the evidence available on record by judgment dated 29.03.2016 convicted the appellants Ali Aamir and Ali Nawaz as stated above and acquitted the accused Sohail Akhtar, Yaseen and Wahid Bux by extending them benefit of section 382-B Cr.P.C, hence this appeal.

8. The facts of this case as well as evidence produced before the trial court finds elaborate mention in the judgment passed by the trial court therefore, is not reproduced here so that to avoid any duplication and necessary repetition.

9. Mr. Muhammad Yousif Leghari, learned counsel for the appellants Ali Amir and Ali Nawaz contended that prosecution story was un-natural and unbelievable. It was the case of spy information but the SHO PS Chamber failed to associate with him any independent and respectable person of the locality to witness the recovery proceedings. It is further argued that according to the prosecution case charas was recovered from the dicky of the car but the trial court did not put such question to the accused and other incriminating pieces of evidence in statements recorded u/s 342 Cr.P.C. for their explanation. Learned counsel for the appellant further argued that on the same set of evidence co-accused have been acquitted by the trial court. Learned counsel argued that once the prosecution evidence was disbelieved with respect to a co-accused then that could not be relied upon with regard to other accused unless they were corroborated by such corroboratory evidence which came from an independent source and which was also unimpeachable in nature. It is also argued that the Investigation Officer appeared before the trial court but failed to mention the name of the police official who had taken the sample to the office of the chemical examiner. Mr. Leghari argued that complainant was also the Investigation Officer of the case which fact by itself

is sufficient to suggest the partiality of the investigation. It is also argued that there was delay of more than 72 hours in sending the sample of the narcotic to the chemical examiner for analysis and such delay has not been explained by the prosecution. Lastly argued that samples remained at police station and there was no evidence that the samples were in safe custody during that period and WHC of the police station has also not been examined by the prosecution. In support of his contentions, reliance has been placed upon the following cases:-

- (i) Muhammad Aslam v. The State (2011 SCMR 820).
- (ii) Amjad Ali v. The State (2012 SCMR 577).
- (iii) Ikramullah and others v. The State (2015 SCMR 1002).
- (iv) Abdul Hameed v. The State (2016 SCMR 707).
- (v) Para Din and others v. The State (2016 SCMR 806).
- (vi) Abdul Sattar v. The State (2016 SCMR 909).
- (vii). Abdul Hameed v. The State (2016 SCMR 707).
- (viii). Nazeer Ahmed v. The State (PLD 2009 Karachi 191).
- (ix) Sarwar Khan v. The State (2000 P.Cr.L.J 779).
- (x) Fida Hussain v. The State (2013 P.Cr.L.J 1237).
- (xi) Ali Haider and 2 others v. The State (2014 P.Cr.L.J 783).
- (xi) Nazeer and another v. The State (2014 P.Cr.L.J 1358).
- (xii) Abdul Qadir v. The State (2015 P.Cr.L.J 235).
- (xiii) Muhammad Siddique v. The State (2011 YLR 2261).
- (xiv) Zafar Iqbal v. The State (2013 YLR 598).
- (xv) Shafqat Mehmood v. The State (2015 YLR 2163).
- (xvi) An unreported judgment of this court passed in Cr.Appeal.No.D-307/2012 dated 12.02.2015.

10. Syed Meeral Shah, learned D.P.G. argued that the appellants were arrested from the car by the police officials at the spot and from the dicky of the car 42 Kg charas was recovered. It is further contended that FIR was

lodged with promptitude and samples were sent to the chemical examiner without any casual delays. D.P.G. submitted that evidence of PWs was corroborated by the positive report of the chemical examiner. It is contended that the police officials had no enmity whatsoever with the appellants to foist such a huge quantity of charas upon them. Learned D.P.G. further contended that the police officials are good witnesses and they were rightly believed by the trial court as their testimony remained un-shattered during the cross examination. Learned D.P.G. further contended that appellants cannot be absolved from the responsibility as they were transporting the narcotics in the vehicle being driven / used by them. However, learned D.P.G. conceded to contentions of defence counsel that at the time of recording the statements u/s 342 Cr.P.C. all the incriminating pieces of evidence were not put to the accused persons for explanation and reply.

11. We have carefully heard the learned counsel for the parties and scanned the entire evidence.

12. Record reflects that PW-1 Riaz Ahmed SHO PS B-Section Tando Allahyar has deposed that on 01.01.2015 he was posted as SHO PS Chamber. On the same day, he alongwith his subordinate staff left for patrolling. He received secret information that two unknown persons were taking charas in a Grey coloured Mehran car from Tando Allahyar. On such information, police party reached at Eisa Tube Well road leading from Tando Allahyar to Chamber and held Nakabandi. At 16:30 hours a Grey colour Mehran car appeared from Tando Allahyar side. It was stopped and two persons were found sitting in it. Upon checking of the said car, one white colour plastic bag containing 42 packets was recovered. On inquiry, accused disclosed their names as Ali Amir son of Khuda Dad by caste Gujjar and Ali Nawaz son of Wali Muhammad by caste Tharee. Both the accused disclosed that they have

purchased charas from Suhail Akhtar Sanjrani. In the cross examination, he has replied that the charas was deposited by him in Malkhana. Muhammad Hassan WHC was the incharge and sample was sent to the chemical examiner for analysis through PC Muhammad Hassan.

13. Mashir ASI Mehboob Alam has deposed that SIP Riaz Hussain took him on 01.01.2015 and other staff members for patrolling. On spy information car of the accused persons was stopped and it was searched. From the dicky of the car a bag containing 42 packets of charas were recovered. Total weight of charas was 42 Kgs.

14. In the statements of accused recorded u/s 342 Cr.P.C. at Ex.18 and 19 it transpired that no question has been put to accused persons that 42 kgs charas was recovered from the dicky of the car on 01.01.2015 at 1630 hours at Tando Allahyar-Chamber Mian road. No question was put to accused persons that they were sitting in the car at the relevant time. No question was put to accused Ali Nawaz that he was driving the car at that time. It appears that no question has been put to the accused persons that they were transporting the charas in vehicle for selling. There was no question to the accused persons that weight of the each packet of charas was 1 kg. No question has been put to the accused that they had purchased the charas from co-accused Suhail Akhtar. There was evidence of the prosecution that accused used to sell the charas in different towns but no such question has been put to the accused persons. The law is settled that any piece of evidence not put to accused persons at the time of recording statement u/s 342 Cr.P.C. could not be considered against them. From the prosecution evidence available on record, it transpired that all the incriminating pieces of evidence available on record were not put to the accused persons while their statements u/s 342 Cr.P.C. were recorded.

15. In order to appreciate the contentions raised by the learned advocate for the appellants, statements of accused persons recorded u/s 342 Cr.P.C. before the trial court at Ex.8 and 9 are hereby reproduced as under:-

“STATEMENT OF ACCUSED U/S. 342 CR.P.C.

Name: Ali Aamir **F/Name:-** Khudadad
Caste: Shaikh **Religion:-** Islam
Age about: 46 years **Occupation:** Malhi at
Karachi City Govt.
R/o. Flat No.A-8/9, **District: Karachi**
Johar Complex

Q.No.1. *You have heard the prosecution evidence, it has come on record that on 01.01.2015, at 1630 hours, at Tando Allahyar Chamber Main Road, near Essa Tube well curve, SIP Riaz Ahmed Soomro arrested you and recovered 42 Kilograms of Charas from your possession. What you have to say?*

Ans. *No Sir. It is false prosecution story.*

Q.No.2. *It has also come in evidence that 485 grams of Charas out of total 42 KG was sent to the Chemical examiner, who reported the same to be Charas. What you have to say?*

Ans. *Charas was not recovered from my possession. Report is managed.*

Q.No.3. *Do you claim the case property viz one Mehran Car, registration No. Nil, Engine No.599005, Chassis No.1137543, Model 2015?*

Ans. *No Sir.*

Q.No.4. *Why the P.Ws have deposed against your?*
Ans. *They are interested.*

Q.No.5. *Do you want to examine yourself on oath?*
Ans. *Yes Sir,*

Q.No.6. *Do you want to examine any witness in your defense?*

Ans. *Imran Ali Fazali s/o Fazal Ahmed and Muhammad Asif s/o Pervez Aslam, Manzoor Ahmed as my D.Ws.*

Q.No.7. *Do you want to say anything else?*

Ans. I was arrested on 30.12.2014 from Johar Complex Karachi and brought at Chamber and booked in this false case.

**Sd/-
(Ubedullah Khan)
Special Judge for CNS Act,
Tando Allahyar**

STATEMENT OF ACCUSED U/S. 342 CR.P.C.

Name:	Ali Nawaz	F/Name:-	Wali
	Mohammad		
Caste:	Tharani	Religion:-	Muslim
Age about:	58 years	Occupation:	Hari.
R/o.	Mirpur Bathoro	District:	Sajawal

Q.No.1. You have heard the prosecution evidence, it has come on record that on 01.01.2015, at 1630 hours, at Tando Allahyar Chamber Main Road, near Essa Tube well curve, SIP Riaz Ahmed Soomro arrested you and recovered 42 Kilograms of Charas from your possession. What you have to say?

Ans. No Sir. It is false prosecution story.

Q.No.2. It has also come in evidence that 485 grams of Charas out of total 42 KG was sent to the Chemical examiner, who reported the same to be Charas. What you have to say?

Ans. Charas was not recovered from my possession. Report is managed.

Q.No.3. Do you claim the case property viz one Mehran Car, registration No. Nil, Engine No.599005, Chassis No.1137543, Model 2015?

Ans. No Sir.

Q.No.4. Why the P.Ws have deposed against your?

Ans. They are interested.

*Q.No.5. Do you want to examine yourself on oath?
Yes Sir,*

Q.No.6. Do you want to examine any witness in your defense?

Ans. Yes Sir, Ghulam Nabi s/o Ismail Zangejo, Mir Muhammad s/o Allah Bachayo are my D.Ws.

Q.No.7. Do you want to say anything else?

Ans. I was arrested on 28.12.2014 from Mirpur Bathoro at the instance of the then SHO Liaquat Dars. I am innocent and pray for justice. Property is foisted upon me.

Sd/-

**(Ubedullah Khan)
Special Judge for CNS Act,
Tando Allahyar”**

16. From the above, it is clear that the statements of accused persons were recorded under section 342 Cr.P.C. in a very stereotype manner. All the incriminating pieces of evidence have not been put to the accused for their explanation / reply. Perusal of the statements of appellants u/s 342 Cr.P.C. reveal that all the incriminating pieces of evidence brought on record were not put to the accused while their statements were recorded u/s 342 Cr.P.C, enabling them 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 the statement recorded u/s 342 Cr.P.C, the same cannot be used for his conviction. Exactly the same position is in the case at hand. This legal position has also been admitted by the learned D.P.G. appearing for the State. It is an established position that all the incriminating pieces of evidence available on record in examination-in-chief, cross-examination or re-examination of witnesses are to be put to the accused, if the same are against him, while recording his statement under S.342, Cr.P.C. In the case of MUHAMMAD SHAH v. THE STATE reported in 2010 SCMR 1009, it is held as under:-

“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 in the above portion of the evidence against him, but also convicted him on such piece of evidence which cannot be sustained.”

17. In another case of QADDAN and others v. THE STATE (2017 S.C.M.R. 148) it is observed as follows:-

“Apart from that the motive set up by the prosecution had never been put to the present appellants at the time of recording 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.”

18. For the above stated reasons, case is remanded back to the trial court for recording the statements of accused u/s 342 Cr.P.C. afresh by putting all the incriminating pieces of evidence to the accused persons. A fair opportunity shall be provided to the accused persons for explanation and / or replying, as well as defending the evidence if any brought against the accused persons. Thereafter, the trial court shall pass the judgment after hearing both the parties

strictly in accordance with law. Learned trial court is further directed to decide the case within two (02) months.

Appeals stand disposed of in the above terms.

JUDGE

JUDGE

Tufail