

Stereo. HC JD A 38.
Judgment Sheet
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN.
JUDICIAL DEPARTMENT

Criminal Appeal No.243-J of 2023.
(Muhammad Shahid Mehmood Vs. The State)

J U D G M E N T

Date of hearing:	29.10.2024.
Appellant by:	Mr. Ali Muhammad Dhool, Advocate.
State by:	Mr. Shahid Aleem ,District Public Prosecutor.

SADIQ MAHMUD KHURRAM, J:- The appellant namely Muhammad Shahid Mehmood son of Ejaz Khan was tried by the learned Additional Sessions Judge, Dera Ghazi Khan in case F.I.R No. 29 of 2020 dated 09.12.2020 registered at Police Station BMP Bawata, District Dera Ghazi Khan, in respect of an offence under section 9(c) of the Control of Narcotic Substances Act, 1997. The learned trial court vide judgment dated 01.03.2023 convicted Muhammad Shahid Mehmood son of Ejaz Khan (appellant) and sentenced him as infra:-

Muhammad Shahid Mehmood son of Ejaz Khan :

Rigorous (sic) imprisonment for Life under section 9(c) of the Control of Narcotic Substances Act, 1997 and directed to pay fine of Rs.100,000/- and in default thereof to further undergo simple imprisonment for six months.

The appellant was, however, extended the benefit available under Section 382-B of the Code of Criminal Procedure, 1898 by the learned trial court.

2. Feeling aggrieved, Muhammad Shahid Mehmood son of Ejaz Khan (convict) lodged the instant Criminal Appeal No. 243-J of 2023 through jail assailing his conviction and sentence.

3. Precisely, the necessary facts of the case, as divulged through the statement of Nasrullah Khan, *Naib Dafedar* (PW-5), the complainant of the case, are as under:-

“Stated that on 09.12.2020, I was posted as Naib Dafedar at P/S. BMP Bawata, Dera Ghazi Khan. On the same day, I alongwith Muhammad Jameel Sawar, Khalil Ahmad Sawar was present on patrolling duty at Picket Bawata Check post. In the meanwhile, at about 11:50 AM, A Corolla Grandi bearing Registration No.643/BHU white in colour, coming from Baluchistan towards Punjab reached at Check Post. We stopped said car which was driven by one person, I interrogated the driver, who disclosed his name as Muhammad Shahid Mehmood S/O Ejaz Khan, resident of Kanjror Kotla Afghanan, Tehsil Shakar Garh, District Narowal. Being a suspicious, I checked the said car and found 12-packets charas was recovered from the secrete cavities of tanky of the said car. Upon checking the said packets, Charas was found. On weighing by me, each packet was found 1000 grams. I separated 50/50 grams Charas from each packet as representative parcels and sealed it into parcels while remaining Charas was also separately sealed into parcels with the stamp of NU. I took remaining parcels 12 P-1 to P-12 as well as 12-representative parcels of charas into possession vide recovery memo Ex.P.C attested by Muhammad Jameel Sawar and Khalil Ahmad, Sawar. I took into possession Corolla Grandi bearing Registration No.643/BHU white in colour P-13 vide recovery memo Exh.PD, which is attested by Muhammad Jameel and Khalil Ahmad Sawar. Accused further disclosed that he purchased said charas from Quetta Balochistan and sold the same in Narowal Punjab. On further personal search of accused by me, amount Rs.2100/-denomination currency notes as one note of 1000 P-14,

two notes of 500/500 P15/1-2 and one note of 100 P-16 was recovered from the accused, which also took into possession vide recovery memo Exh.P.E which is attested by Muhammad Jameel Sawar and Khalil Ahmad Sawar. I drafted complaint Ex.P.B and handed over to Muhammad Jameel Sawar, for registration of FIR. After registration of FIR, Kareem Nawaz Jamedar alongwith Muhammad Jameel Sawar came at the place of occurrence, I incorporated FIR No. on the head note of recovery memos. I handed over all sealed parcels of Charas, police papers, Car, Currency notes and accused to Kareem Nawaz Jamedar. Kareem Nawaz Jamedar interrogated the accused, recorded his first version. He also interrogated by me as well as Muhammad Jameel and Khalil Ahmad Sawar, on our pointation, he prepared rough scaled site plan and recorded statements of Muhammad Jameel and Khalil Ahmad Sawar U/S 161 Cr.P.C and Kareem Nawaz Jamedar, completed his investigation at spot.”

4. On the above stated facts, F.I.R No. 29 of 2020 (Exh.PA) dated 09.12.2020 was registered at Police Station BMP Bawata, District Dera Ghazi Khan, in respect of an offence under section 9(c) of the Control of Narcotic Substances Act, 1997.

5. After the formal investigation of the case, report under section 173 of the Code of Criminal Procedure, 1898 was submitted before the learned trial court and the appellant namely Muhammad Shahid Mehmood son of Ejaz Khan was sent to face trial. The learned trial court framed the charge against the accused on 18.01.2021 under section 9(c) of the Control of Narcotic Substances Act, 1997 . The accused pleaded not guilty and claimed trial and the learned trial Court proceeded to examine the prosecution witnesses.

6. In order to prove the facts, the prosecution got as many as **five** witnesses examined. The prosecution got Muhammad Jameel , *Sawar* (PW-2) and Nasrullah Khan,*Naib Dafedar* (PW-5) examined as witnesses of the recovery of the twelve packets (P-1 to P-12) containing “*Charas*”, each packet weighing 1000 grams, from the possession of the appellant, which twelve packets (P-1to P-12) of “*Charas*” were recovered from the secret cavities of the car (P-13) as was being driven by the appellant. Sohrab Khan, *Naib Dafedar* (PW-1) stated that on 09.12.2020, he got recorded the formal F.I.R (Exh. PA). Abdul Hakeem *Moharrir* (PW-3) stated that on 09.12.2020, Kareem Nawaz *Jamedar* (PW-4), the Investigating Officer of the case, handed over to him twelve sealed parcels said to contain the samples drawn and separated from the recovered packets of “*Charas*” and twelve sealed parcels said to contain the remaining packets of the recovered “*Charas*” for keeping them in safe custody and on 14.12.2020, he handed over the twelve sealed parcels said to contain the samples drawn and separated from the recovered packets of “*Charas*” to Muhammad Jameel , *Sawar* (PW-2) for their onward transmission to the office of the Punjab Forensic Science Agency, Lahore . The prosecution witness namely Kareem Nawaz, *Jamedar* (PW-4) investigated the case from 09.12.2020 till its conclusion and detailed the facts of his investigation in his statement before the learned trial court.

7. On 17.10.2022, the learned Assistant District Public Prosecutor gave up the prosecution witness namely Khalil Ahmad ,*Sawar* as being unnecessary and closed the prosecution evidence after tendering in evidence the report of the Punjab Forensic Science Agency, Lahore (Exh.PG) .

8. After closing of prosecution evidence, the statement of the appellant was recorded under section 342 of the Code of Criminal Procedure, 1898 and the appellant pleaded his innocence and in reply to as to *why the PWs had deposed against him*, he stated that the witnesses were Police Officials, who deposed falsely against him just to strengthen the prosecution being subordinate of the complainant of the case. The appellant opted not to appear in terms of section 340(2) of the Code of Criminal Procedure, 1898 and did not adduce any evidence in his defence.

9. After completion of evidence and hearing both the parties, the learned trial court held the appellant guilty of the offence and sentenced him as referred to above.

10. The learned counsel for the appellant submitted that the prosecution had failed miserably to prove the case against the appellant. Learned counsel further argued that while examining the appellant under section 342 Code of Criminal Procedure, 1898 , the learned trial court posed the question that the twelve packets (P-1 to P-12) containing “Charas”, each packet weighing 1000 grams, were recovered from the *personal search* of the appellant whereas the prosecution witnesses namely Muhammad Jameel, *Sawar* (PW-2) and Nasrullah Khan, *Naib Dafedar* (PW-5) had stated that the twelve packets (P-1 to P-12) containing “Charas”, each packet weighing 1000 grams, were recovered from the secret cavities of the car (P-13) as was being driven by the appellant, therefore the appellant was misled in his defence and the appellant could not be convicted on the basis of evidence which he had not been questioned about while examining the appellant under section 342 Code of Criminal Procedure, 1898.

11. On the other hand, the learned District Public Prosecutor appearing on behalf of the State submitted that the prosecution had proved the charge by producing admissible and relevant evidence. He further submitted that all the witnesses corroborated each other. He requested that the appeal be dismissed.

12. We have heard the learned counsel for the appellant as well as the learned District Public Prosecutor and perused the record.

13. At the very outset, we have noticed that the learned trial court, while examining the appellant under section 342 Code of Criminal Procedure, 1898 , posed the question to the appellant that the twelve packets (P-1 to P-12) containing “*Charas*” , each packet weighing 1000 grams, were recovered from the *personal search* of the appellant whereas the prosecution witnesses namely Muhammad Jameel, *Sawar* (PW-2) and Nasrullah Khan, *Naib Dafedar* (PW-5) had stated that the twelve packets (P-1 to P-12) containing “*Charas*” , each packet weighing 1000 grams, were recovered from the secret cavities of the car (P-13) as was being driven by the appellant. The learned trial court ,while recording the statement of the appellant under section 342 Code of Criminal Procedure, 1898 , questioned as under:-

Q.2 It is in the prosecution evidence that on 09.12.2020, at about 11:50 AM, in the area of check post BMP Bawata, you accused was arrested; on **your personal search** 12 packets of chars, which were 1000-grams in each packet, were recovered from your possession vide recovery memo Ex.P-C, which is attested by the witnesses Khaleel Ahmed Swar and Muhammad Jameel Sawar. What do you say about it?

Ans. I know nothing about it.” (emphasis supplied)

It is obvious that the learned trial court erred when it posed the question that

the twelve packets (P-1 to P-12) containing “*Charas*”, each packet weighing 1000 grams, were recovered from the *personal search* of the appellant whereas according to the prosecution witnesses namely Muhammad Jameel, Sawar (PW-2) and Nasrullah Khan, Naib Dafedar (PW-5), the twelve packets (P-1 to P-12) containing “*Charas*”, each packet weighing 1000 grams, were recovered from the secret cavities of the car (P-13) as was being driven by the appellant. Section 342, Cr.P.C. reads as under:

342. Power to examine the accused.---(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the Court may draw such inference from such refusal or answer as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) Except as provided by subsection (2) of Section 340 no oath shall be administered to the accused.

Section 342, Cr.P.C. consists of two parts. The first part ordains that at any stage of inquiry or trial the Court may, without previously warning the accused, ask him questions to elicit his explanation in respect of any evidence brought against him. On the other hand, the second part *casts a duty on the Court* to question him generally on the case after the prosecution witnesses have been examined and before he is called on for his defence. The examination of the accused under section 342, Cr.P.C. must relate to the evidence and the circumstances which are brought against him by the prosecution during the trial. It is not an inane formality but has to be carried out in the interest of justice and fair play. In the case of *Abdul Wahab v. The Crown (PLD 1955 FC 88)*, the Federal Court

observed as under:

"The opening words of section are very important. It is 'for the purpose of enabling the accused to explain the circumstances appearing in evidence against him' that his examination is needed. Where 'the circumstances appearing in evidence against him' are not put to the accused and his explanation is not taken thereupon, it cannot be said that the purpose of section 342 has been fulfilled. It is not a mere formality, but is an essential part of the trial that the accused should be given notice of the point or points which he must meet in order to exonerate himself. ... It should not, however, be overlooked that the real object of section 342 is not to subject the accused to a detailed cross-examination. It is, as a matter of fact, inviting his attention to the point or points in the evidence which are likely to influence the mind of the Judge in arriving at conclusions adverse to the accused, and before such an adverse inference can be drawn, the accused should be afforded an opportunity to offer an explanation, if he has any."

Similarly, in the case of *S.A.K. Rehmani v. The State* (2005 SCMR 364), the august Supreme Court of Pakistan observed as under:-

"The purpose of this section is that the Court should give an opportunity to the accused to give such explanation as he may consider necessary in regard to the salient points made against him. It is, however, not intended merely for his benefit. It is part of a system for enabling the Court to discover the truth, and it constantly happens that the accused's explanation, or his failure to explain, is the most incriminating circumstance against him. The result of the examination may certainly benefit the accused if a satisfactory explanation is offered by him; it may, however, be injurious to him if no explanation or a false or unsatisfactory explanation is given."

It is the mandate of the law that every incriminating evidence or circumstance that is sought to be used against an accused must be put to him under section 342, Cr. P.C. for the purpose of enabling the accused to explain the same. It is essential that the attention of an accused should be drawn to all the pieces of evidence one by one, avoiding the form of cross-examination, in order to afford him an opportunity of giving an explanation, consistent with his innocence. It is trite law, nevertheless fundamental, that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if

consequential miscarriage of justice occurs. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. The question of whether a trial is vitiated or not due to defects and errors made by the learned trial court while examining an accused under section 342 Cr.P.C. depends upon the degree of the error and the accused must show that non-compliance of section 342 Cr.P.C. has materially prejudiced him in his defence. Merely because of defective questioning under section 342 Cr.P.C., it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused had suffered some disability or detriment in relation to the safeguard given to him under section 342 Cr.P.C. Such prejudice should also demonstrate that it has occasioned a failure of justice. The burden is upon the accused to prove that prejudice has been caused to him and such prejudice be implicit. In the case of *S.A.K. Rehmani v. The State* (2005 SCMR 364), the august Supreme Court of Pakistan observed as under:-

"We have also adverted to the question that what should be the impact of non-compliance of the provisions as contemplated in section 342, Cr.P.C. We have thrashed out all the most entire precedent law: PLD 1969 Peshawar 12, 1969 SCMR 416, PLD 1960 Lahore 822, PLD 1960 Lahore 547, AIR 1962 SC 1229, AIR 1961 SC 175, AIR 1960 Raj. 80, AIR 1954 SC 692, AIR 1956 SC 731, AIR 1954 SC 660, PLD 1956 Lahore 174, PLD 1957 SC (Ind.) 133, ILR (1956) 2 All. 127, 1954 FCR 223, AIR 1961 SC 175, AIR 1960 Raj. 80, AIR 1954 SC 692, DLR FC 123, DLR FC 139, and judicial consensus seems to be that 'every error or omission amounting to non-compliance with the provisions of this section does not necessarily vitiates the trial; such errors fall within the category of curable irregularities and the question whether the trial is vitiated, in each case depends upon the degree of the error and upon the question whether prejudice has been or is likely to have been caused to the accused'. It must not be lost sight of that 'every defect or error in the examination under section 342, Cr.P.C. would not be consequential unless it is shown that prejudice has been caused and moreso, the nature of prejudice must be stated'. AIR 1960 Rajasthan 80, AIR 1956 SC 536, AIR 1956 SC 241. There is no cavil with the proposition that 'there must be proof of prejudice to the accused and unless miscarriage of justice

is shown to have occurred, particularly in a case where the accused was represented by counsel, **inadequate examination under S. 342 cannot be made a ground for setting aside the conviction.**' 21 DLR 377, PLD 1955 Dacca 68, AIR 1961 Calcutta 240 and AIR 1956 SC 536." (emphasis supplied)

From the above discussion, it follows that the appellate court has to examine all the incriminating material produced by the prosecution and see what piece of evidence or circumstance has not been put to the accused and its impact on the fate of the case. Similarly, it would determine whether the questions put to him were in accordance with law and he was not misled by any of them. If it comes to the conclusion that non-compliance with the provisions of section 342, Cr.P.C. has prejudiced the accused it may remit the matter to the trial Court for retrial from the point where the irregularity occurred, that is, from the stage of questioning the accused under section 342 Cr.P.C.. The noted maxim which connotes "*an act of the court shall prejudice no man*" is founded upon justice and good sense; and affords a safe and certain guide for the administration of law and justice. It is meant to promote and ensure that the ends of justice are met; it prescribes that no harm and injury to the rights and the interest of the litigants before the court shall be caused by the act or omission of the court. This rule of administration of justice is meant for the benefit of both sides of litigants before the court and it would be illogical to conceive that the rule would or should be applied for the advantage of one litigant to the prejudice and disadvantage of the other. It is the duty of the court to act as a neutral arbiter between the parties and to provide justice to them through strict adherence to the law and keeping in mind the facts of each case. Directing the learned trial court to correctly examine the appellant under section 342 Cr.P.C. cannot be condemned as filling up the lacuna in the prosecution case.

14. In this view of the above discussion, the instant Criminal Appeal No. 243-J of 2023 is **allowed in the terms that** the case is remanded to the trial court to continue the trial from the stage where the irregularity occurred, i.e. from the stage of examining the appellant under section 342, Cr.P.C. with the direction to question the appellant regarding all the incriminating pieces of evidence for his explanation while re-examining the appellant under section 342 of the Code of Criminal Procedure, 1898 and pass a fresh judgment after affording an opportunity of hearing to both sides, i.e. the prosecution and the defence, within a period of three months after the receipt of the certified copy of this judgment. During retrial, the appellant shall be treated as an under trial prisoner and his custody shall be regulated in the same manner. The conviction and sentence of the appellant recorded by the learned trial court vide judgment dated 01.03.2023 for the offence under section 9(c) of the Control of Narcotic Substances Act, 1997 are set aside.

(Ch. Abdul Aziz)
JUDGE

(Sadiq Mahmud Khurram)
JUDGE

Raheel