JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
(JUDICIAL DEPARTMENT)

Criminal Appeal No.284 of 2019

Tufail Abbas Kazmi
Versus
The State

Appellant by:	Ch. Abdul Rehman Hur Bajwa, Advocate.
State by:	Hazrat Younas, State Counsel with Muhammad Yousaf, Sub-Inspector.
Date of Hearing:	02.06.2020.

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GHULAM AZAM QAMBRANI, J.: This appeal has been directed against the judgment dated 20.07.2019 passed by the learned Sessions Judge/Judge Special Court (CNSA) (West), Islamabad, in case F.I.R No. 235, dated 15.12.2017 under Sections 9-C/15 CNSA 1997, Police Station Noon, Islamabad, whereby appellant (Tufail Abbas Kazmi) has been convicted under Section 9-C of the Control of Narcotic Substances Act, 1997 for recovery of 1025 grams of heroin and 235 grams of charas and sentenced to undergo six years R.I with a fine of Rs.30,000/- (thirty thousands). In default of payment of fine, he shall further undergo six months SI with benefit of Section 382-B Cr.P.C.

2. Briefly stated facts of the prosecution case as per the written complaint Ex.PA of complainant, Muhammad Iqbal Gujjar SI, is that he alongwith Waseem ul Haq and Mohsin Shah were on patrolling duty in private vehicle and present in the area of Jhangi Syedan Stop, Islamabad where he received secrete information about a person indulged in selling of narcotics to the students and present near Service station, on this information they reached there at about 08:00 p.m. where they found a person having shopping bag of blue colour in this right hand. On seeing the police party, he tried to slip away but was overpowered and disclosed his name as Tufail Abbas Kazmi (accused/appellant). Inside the shopping bag there was polythene bag containing heroin weighing 1025 grams and in another polythene bag charas in pieces weighing 235 grams was recovered, out of which 01 grams of heroin

and 10 grams of charas was separated for chemical analysis purpose and sent to the laboratory.

3. After completion of investigations, report under Section 173 Cr.P.C was submitted before the learned trial Court and the appellant was sent to face the trial. The learned trial Court after fulfilling the codal formalities, framed the charge against the appellant to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined following witnesses.-

i. PW.1 Malik Mumtaz SI is author of F.I.R.

ii. PW.2 Arif Hussain HC had deposited parcels of samples in the office of NIH, Islamabad.

iii. PW.3 Mohsin Shah, Constable is a recovery witness,

iv. PW.4 Muhammad Iqbal Gujjar SI is complainant, recovery witness and the investigating officer.

v. PW.5 Muhammad Aslam SI being Moharrar, transmitted parcels of samples to Forensic Science Laboratory, Islamabad, through PW.2 Arif Hussain HC.

4. On closure of the prosecution evidence, appellant/ convict was examined under Section 342 Cr.P.C. He categorically denied the accusation and opted not to be examined on oath under Section 340 (2) Cr.P.C. On completion of trial, the learned trial Court convicted and sentenced the appellant vide judgment dated 20.07.2019 as mentioned above.

5. Learned counsel for the appellant contended that there is an unexplained delay of five days in sending the alleged samples for chemical analysis to the Forensic Science Laboratory, Islamabad; that in non-sending the samples within 72 hours to the Laboratory, it cannot be said that the same were kept in safe custody; that while recording the statement under Section 342 Cr.P.C the alleged recovered contraband i.e. case property Exh.P1 and Exh.P2 were not put to the appellant which was an incriminating piece of evidence, which is not curable, therefore, the impugned judgment is not sustainable; that fake and fabricated case has been planted and the alleged recovery has been foisted against the appellant; that the prosecution has miserably failed to prove its case beyond reasonable shadow of doubt against the appellant. Lastly, submitted that the appellant may be acquitted from the charge levelled against him.

6. Conversely, the learned State Counsel opposed the contentions raised by the learned counsel for the appellant contending that the appellant had failed to establish any enmity against the prosecution witnesses to falsely involve him in a heinous case; that recovery of 1025 grams heroin and 235 grams of charas has been effected from conscious and physical possession of the appellant; that samples were separated and sealed at the spot and sent to the Laboratory and chemical reports are available on record as Ex.PF and Ex.PG, which confirm that the recovered material were heroin and charas, respectively. He further submitted that the laboratory report is followed by protocol; that the prosecution has proved its case against the appellant and urged for dismissal of the appeal.

7. We have heard the arguments of the learned counsel for the appellant and the learned State Counsel and have perused the available record with their able assistance.

8. From the perusal of record, it reveals that the alleged recovery was effected on 15.12.2017, through recovery memo Ex.PC and personal belongings of the appellant through recovery memo Ex.PD, were prepared at the spot, samples were taken for chemical analysis purpose which were sent through PW.2, Arif Hussain- HC, to the Laboratory on 20.12.2017 and besides this the witnesses have also been examined before the learned trial Court.

9. Perusal of the depositions of the witnesses shows that though the prosecution was able to prove the recovery, but the un-explained delay of five days in sending the samples to the laboratory have raised questions. As per statement of PW.1 on 15.12.2017, he was posted at Police Station Noon, Islamabad, and at about 9:00 PM, PW Naseem ul Haq brought complaint Ex.PA for registration of F.I.R which was sent by complainant PW.4, Muhammad Iqbal Gujjar S.I, and registered F.I.R No. 235/2017 which bears his signatures. PW.2, Arif Hussain Head Constable, has deposed that on 19.12.2017 Muhammad Islam Malik ASI Moharrar handed over him two sealed parcels stamped with SR for onward transmission to N.I.H Laboratory, Islamabad. After getting docket from the E.T.O Office, he reached N.I.H Laboratory, but the time was over, therefore, he returned back to the police station and handed over the parcels to the Moharrar. He has further deposed that on 20.12.2017, he again brought the sealed parcels to the N.I.H Laboratory where he deposited the same. PW.3 has stated that on 15.12.2017, he alongwith PW.4, Muhammad Iqbal Gujjar SI and Waseem ul

Haq, were on patrolling in the area of Jhangi Syedan Stop, Islamabad. They received spy information that a person who used to sell narcotic to the students of the area was present at the Service Station near Bus Stop. On such spy information, they arrested the appellant, who was carrying a blue shopper bag in his hand, upon seeing the police party, he tried to run away but was overpowered. Upon search of the blue coloured shopping bag, heroin 1025 grams and 235 grams charas were recovered. He further stated that the Investigating Officer separated one gram heroin and prepared sealed parcel while the remaining heroin was sealed, separately. Likewise, 10 grams of charas was separated and sealed into a parcel as sample while the remaining was sealed into a separate parcel as case property Ex.P1 and Ex.P2, respectively. It has further been stated by him that the contrabands were taken into possession through recovery memo Ex.PC which bears his signatures.

10. PW.4, Muhammad Iqbal Gujjar SI, has deposed that on 15.12.2017, he alongwith Waseem ul Haq and Mohsin Shah were patrolling on a private vehicle. In the meanwhile, he received spy information that a person used to sell narcotics at Jhangi Syedan Stop, Islamabad, near Service Station, Islamabad. On such information he alongwith other officials at about 8:00 PM reached at the stated place where a person was present while carrying a blue shopping bag in his right hand, who was overpowered. On query, he disclosed his name as Tufail Abbas Kazmi. Upon search of the blue coloured shopping bag, it resulted into recovery of heroin and pieces of charas, separately alongwith Rs. 1820/-. On weighing, the heroin powder became 1025 grams while the charas became 235 grams which were taken into possession through recovery memo Ex.PC. It has further been narrated by him that he separated one gram of heroin for chemical analysis purpose and sealed the same into parcel while the remaining case property Ex.P1 was sealed and stamped as SR. Similarly, from the recovered charas he separated 10 grams for chemical analysis purpose and the remaining was sealed as case property as Ex.P2. PW.5, Muhammad Islam ASI, has deposed on the same line as stated by PW.2 Arif Hussain and has further deposed that the parcels remained intact in his custody.

11. Re-appraisal of the statements of the prosecution witnesses reveals that they remained consistent in their respective depositions despite being subjected to lengthy cross-examination. Their testimonies are consistent regarding the time, date, place and mode of recovery. The laboratory reports

Ex.PF & Ex.PG confirmed that the samples contained contraband substance i.e. heroin and charas. The laboratory reports Ex.PF and Ex.PG are followed by protocols.

12. The appellant was arrested on 15.12.2017 and recovery was effected on the same date. Samples were drawn and sealed at the spot, but were sent to the Laboratory on 20.12.2017 after un-explained delay of five days, though, as per Rule 4(2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001, this exercised was required to be completed within seventy two hours of the recovery, and for this purpose, even there is no plausible explanation from the side of the prosecution that why such inordinate delay was caused in the completion of this exercise by the Investigating Officer. In the instant case, the delay in sending of the samples has not been explained plausibly. This crucial factor was taken into consideration by the August Supreme Court in the case titled "*Muhammad Aslam Vs The State*" [**2011 SCMR 820**].

13. We have noticed that in the Murasla, Exh.PA, the recovered charas weighing 235 grams has been stated that it was into different pieces but the number of pieces has not been mentioned. On the other hand, it is the case of prosecution that out of 235 grams charas only 10 grams was sent to the N.I.H Laboratory for analysis purpose. The weight of each piece has also not been mentioned. The alleged recovered charas admittedly consisted upon pieces but it has not been mentioned that as to whether the samples were taken from each piece or not but test report was of only one piece. In such a situation, principle laid down by the Hon'ble Supreme Court in the case of "*Ameer Zaib vs. the State*" [**2012 PLD SC 380]**, is applicable, therefore, the appellant can be held responsible for keeping in possession of only 10 grams of charas and not for the whole as mentioned above the alleged recovery.

14. As per prosecution case, two separate polythene shoppers were recovered from the convict, one containing heroin weighing 1025 grams and the other containing charas weighing 235 grams, which he was carrying in polythene shoppers and from the packet of heroin, one gram was separated and later sent to the laboratory for chemical examination and also from the other packet of charas, 10 grams of charas was separated and sent to the laboratory for chemical examination but we have noted that at the time of recording statement of appellant under Section 342, Cr.P.C., case property (heroin and chars) Exh.P1 and Ex.P2 had not been put to him at all. The law is

settled by now that if a piece of evidence or a circumstance is not put to an accused person at the time of recording his statement under Section 342, Cr.P.C. then the same cannot be considered against him for the purpose of recording his conviction.

15. The learned trial Court committed an illegality by not putting the incriminating piece of evidence to the accused/appellant while recording his statement under Section 342, Cr.P.C. which is a binding provision of law. Section 342, Cr.P.C. reads as under.-

> *"342. Power to examine the accused.--(l) 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."*

16. This section is based on the principle involved in the maxim *audi alteram partem*, means that no one should be condemned unheard. Where a person is to be charged with any penal liability he should be made aware of all the facts and circumstances existing against him in order to enable him to give explanation in respect of those charges and evidence produced against him. Departure from such procedure could be fatal to prosecution as a very important step in the trial would, thus, be bypassed making the entire trial completely vitiated. The accused should be heard not merely on what is prima facie proved against him but also on every circumstances appearing in evidence against him.

17. The Hon'ble Supreme Court of Pakistan in a case reported as "*S.A.K. Rehmani vs. The State*" [**2005 S C M R 364**] has held as under.-

> "It may be mentioned here that the provisions as contained in Section 342, Cr.P.C. have been discussed on different occasions by various judicial forums by holding that reasonable opportunity must be afforded to the accused while recording his statement under Section 342, Cr.P.C. enabling him to explain his position. The provisions as contained in Section 342, Cr.P.C. were discussed in the case of Abdul Wahab v. Crown PLD 1955 Federal Court 88 which still holds the field is reproduced herein below for ready reference.-

> *"The opening words of the 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. In Tani's case 20 Cr.LJ 12 (Nag.), it was held in order that the accused may explain all the facts appearing in the evidence against him, it is necessary that his attention should be directed to all the vital parts of the evidence against him, specially if he is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are or are likely to be considered by the Court to be against him. In Alimuddin's case (52 Cal. 522), it was laid down the Court should not only point out to the accused the circumstances appearing in the evidence which require explanation but it must out of fairness of the accused exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation and failure or refusal on the part of the accused to give the explanation will entitle the Court to draw an inference against him.' In the Calcutta case cited above, it was also pointed out that the word `generally' does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the questions should relate to the whole case generally, and should not be limited to any particular part or parts of it. The word `generally' does not mean that the accused cannot be subjected to a detailed examination by the Court. The law intends that the salient points appearing in the evidence against the accused must be pointed out to him in a succinct form and that he should be asked to explain them if he wished to do so".*

It could 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.

16. There is no cavil with the proposition that section 342 Cr.P.C. can be bifurcated into two parts. Subsection (1) of section 342 Cr.P.C. confers discretion to the Court while its second part is mandatory and besides that the section revolves

> *around the maxim audi alteram partem i.e. that no one should be condemned unheard. References are "AIR 1940 Nag. 283, 41 Cri.LJ our 585, AIR 1957 Mys. 9, ILR 1956 Mys. 114, 1957 Cri.L. Jour 208, AIR 1936 Pesh. 211, AIR 1937.Pesh 20, 38 Cri. Jour 387,1 AIR 1935 Cal. 605, AIR 1936 Oudh 16, 36 Cri.L Jour 1303, AIR 1934; Oudh 457". 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 features/points made against him. It is however, not intended merely for his benefit. It is a 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". [PLD 1967 Dacca 503].*

18. It is settled law that a statement under section 342 of Cr.P.C. is either to be believed in its entirety or not at all. Reliance is placed on the cases titled as *"Shabbir Ahmad vs. The State"* [**PLD 1995 S.C. 343**], *"Abdur Rehman alias Boota and another vs. The State and another"* [**2011 SCMR 34**], *"Wajahat Ahmed and others vs. The State and others"* [**2016 SCMR 2073**], *"Muhammad Asghar vs. The State"* [**PLD 2008 S.C. 513**], *"Waqar Ahmed vs. Shaukat Ali and others"* [**2006 SCMR 1139**] and *"Ali Ahmad and another vs. The State and others"* [**PLD 2020 S.C. 201**].

19. It may be observed on the same wake of events that the whole object of enacting this Section is that the attention of the accused should be drawn to the specific points in the evidence on which the prosecution claims that the case is made out against the accused, so that he may be able to give such explanation as he desires to give.

20. Similar view was taken by the Hon'ble Supreme Court of Pakistan in the case reported as "*Haji Nawaz Versus the State*" [**2020 SCMR 687**] wherein it has been held as under.-

> *"The law is settled by now that if a piece of evidence or a circumstance is not put to an accused person at the time of recording his statement under section 342 Cr.P.C. then the same cannot be*

> *considered against him for the purpose of recording his conviction. Apart from that we have further observed that no evidence worth its name had been produced by the prosecution before the trial court establishing safe custody of the recovered substance at the local Police Station or safe transmission of the samples of the recovered substance from the Police Station to the office of the Chemical Examiner. This Court has already held in the cases of Amjad Ali v. The State (2012 SCMR 577) and Ikramullah and others v. The State (2015 SCMR 1002) that in the absence of any proof regarding safe custody or safe transmission of the recovered substance or the samples thereof a conviction cannot be recorded in a case of this nature."*

21. In this regard, we are also fortified by the law laid down by the Apex Courts in the cases of "*Qaddan and others vs. The State*" [**2017 SCMR 148**] and "*Imtiaz alias Taj vs. The State and others*" [**2018 SCMR 344**] wherein it has been held as under:-

> *"Piece of evidence or a circumstance not put to an accused person at the time of recording his statement under Section 342, Cr.P.C., could not be considered against him."*

22. We have also noted that at the time of recording of statement of the appellant under Section 342 Cr.P.C., the case property i.e. heroin Exh-PA and case property Charas Exh-P2, had not been put to him at all, which is fatal to the prosecution case. The law is settled by now that if a piece of evidence or a circumstance is not put to an accused at the time of recording of his statement under Section 342 Cr.P.C., the same cannot be considered against him for the purpose of recording his conviction.

23. Further as per the prosecution case, allegedly heroin weighing 1025 grams and charas weighing 235 grams was recovered from the appellant on 15.12.2017 through recovery memo Exh-PC but samples were taken for chemical analysis purpose through PW.2, Arif Hussain HC, to the Laboratory on 20.12.2017 after five days, but there is no worth evidence for the safe custody of the samples of the recovered substances at the Police Station from the date of alleged recovery i.e. 15.12.2017 uptill 19.12.2017. Keeping in view the facts and circumstances of the case, particularly the unexplained delay in sending the samples to the laboratory in violation of rule 4 (2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001 and non-putting of incriminating piece of evidence i.e. the case property Exh-P1 & Exh-P2, while recording statement under Section 342 of Cr.P.C has caused serious

prejudice and miscarriage of justice, while recording conviction and sentence against the appellant.

24. We are therefore, of the view that the learned trial Court while recording conviction and sentence against the appellant has committed illegality and irregularity which is not curable hence, the judgment herein impugned cannot be sustained. This appeal is, therefore, **allowed**. The conviction and sentence of the appellant recorded by the learned trial Court vide judgment dated 20.07.2019, is set-aside. The appellant is acquitted of the charge.

The appellant is in custody, is directed to be released forthwith, if not required in any other case.

(MIANGULHASSAN AURANGZEB)
JUDGE

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court, on 8th June, 2020.

JUDGE **JUDGE**

Approved for reporting

Rana.M.Ift