

FORM "A"
FORM OF ORDER SHEET

Date of order or proceedings	Order or other proceedings with signature of Judge or Magistrate and that of parties or counsel where necessary.
2.	3.
02.11.2018	<p><u>Cr.A No 439-B/2016.</u></p> <p><u>Present:</u></p> <p style="padding-left: 40px;">Mr.Hafeezullah Khan advocate for appellant.</p> <p style="padding-left: 40px;">Mr.Qudratullah Khan Gandapur, Asstt: A.G for the State.</p> <p style="padding-left: 40px;">Mr.Farooq Khan Surani advocate for respondent.</p> <p style="text-align: center;">*****</p> <p><u>SHAKEEL AHMAD, J.---</u> This criminal appeal has been preferred against the judgment dated 28.10.2016 passed by the learned Sessions Judge-II, Bannu whereby the appellant was convicted U/S. 3 of Illegal Dispossession Act, 2005, and sentenced to six(6) months SI with a fine of Rs.10,000/-(Ten thousand) and in default thereof to undergo further one (01) month SI.</p> <p>2. At the very out-set the learned counsel appearing on behalf of the appellant contended that the appellant has been convicted and sentenced without recording his statement U/S. 342 Cr.P.C, therefore, the conviction and sentence recorded by the learned trial Court is illegal and not sustainable in the eyes of law.</p>

Imranullah (S.B) Mr. Justice Shakeel Ahmad

	<p>3. When learned counsel for respondent was confronted with the above contention of the learned counsel for the appellant, he sought time for preparation. He was given one day to rebut the contention of the learned counsel for the appellant, but today when he appeared before the Court he frankly conceded that the appellant was convicted and sentenced without recording his statement U/S. 342 Cr.P.C, which is mandatory requirement under the law.</p> <p>4. I have given my anxious consideration to the point raised by the learned counsel for the appellant. It may be appreciated that the examination of an accused U/S. 342 Cr.P.C is based on principle involved in the maxim "audi alteram partem" is that no one should be condemned unheard, intended to offer him full opportunity to explain all incriminating circumstances appearing in evidence against him.</p> <p>5. Section 342 Cr.P.C has two parts. The first part gives a discretion to the Court whereas the second part is mandatory. Under the Ist part, the Court may put such questions to the accused which may be deemed appropriate in arriving at just conclusion whereas under the second part, examination of accused is must to point-out salient points appearing in evidence against him and</p>
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to ask for an explanation. It will be advantageous to reproduce Section. 342 Cr.P.C 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."

Affording such an opportunity is mandatory and the accused has to be heard in detail to enable him to explain his position and lead any evidence in defence and also to record statement on Oath in disproof of allegations leveled against him, if he opts to do so.

6. It is now settled that where the accused is not questioned at all, or his attention to an important piece of evidence is not invited, the omission so made is incurable illegality and fatal. In this behalf reliance can be placed on the judgment reported as ***Ashraf Vs The state (2004 P.Cr.L.J 42)***. In this contest reliance can also be placed on the cases reported as (1) Munir Ahmad alias

	<p>Munni v. The State 2001 SCMR 56, (2) Asif Ali Zardari and another v. The State PLD 2001 SC 568, (3) Rattan Singh v. State of H.P. AIR 1997 SC 768, (4) Sharad Birdhichand Sarda v. State of Maharashtra AIR 1984 SC 1622 and (5) State of Maharashtra v. Sukhdeo Singh 1992 Cr.LJ 3454 (SC).</p> <p>7. In the instant case trial court failed to record statement of the accused and convicted him, thus, committed an illegality whereby proceedings of the trial court stood vitiated.</p> <p>8. In view of the above, this appeal is allowed, the conviction and sentence recorded by the learned trial Court is set-aside and the case is remanded back to the learned trial Court with the direction to record statement of accused as required U/S. 342 Cr.P.C, while providing an opportunity to the parties to lead further evidence, if they opt to do so and thereafter re-write the judgment as required under the law.</p> <p><u>Announced</u> 02.11.2019</p> <p style="text-align: right;">JUDGE</p>
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