

HCJDA-38

**JUDGMENT SHEET**  
**IN THE LAHORE HIGH COURT**  
**RAWALPINDI BENCH**  
**RAWALPINDI**  
**JUDICIAL DEPARTMENT**

Criminal Appeal No. 395 of 2022	
Usman Ali Vs. The State & another	
Date of Hearing	13.07.2022
Appellant represented by	Mir Mohammad Ghufraan Khurshid Imtiaz Advocate
State represented by	Khawaja Sohail Iqbal District Public Prosecutor
Complainant represented by	Syed Qamar Abbas Shamsi Advocate

**J U D G M E N T**

Usman Ali (*appellant*) along with Muhammad Zohaib had faced trial in case FIR<sup>1</sup> No. 383 (*PQ*) recorded on 28.07.2021 on the complaint of Ghazala Yousaf (*Pw-2*)<sup>2</sup> at Police Station Kallar Syedan District Rawalpindi under Sections 367-A/377/292-A/292-B/506/342 PPC<sup>3</sup> and on conclusion thereof vide judgment dated 30.05.2022 passed by the learned Additional Sessions Judge, Rawalpindi (*trial court*), he was convicted and sentenced as under: -

- **Under Section 292-A PPC** to undergo seven years *RI*<sup>4</sup> and to pay fine of Rs.100000/- (one lac). In default of payment of fine he was ordered to further undergo three months *SI*<sup>5</sup>

---

<sup>1</sup> First Information Report

<sup>2</sup> Prosecution Witness

<sup>3</sup> Pakistan Penal Code (Act No. XLV of 1860)

<sup>4</sup> Rigorous Imprisonment (See: Section 60 PPC)

<sup>5</sup> Simple Imprisonment (See: Section 60 PPC)

➤ **Under Section 292-C PPC** to undergo 14 years RI and to pay fine of Rs.1000000/- (ten lacs). In default of payment of fine he was ordered to further undergo six months SI.

2. The sentences of appellant were ordered to run concurrently<sup>6</sup> and benefit of Section 382-B<sup>7</sup> Cr.P.C was also extended to him. However, on the strength of same judgment Muhammad Zohaib was acquitted from the case.

3. Facts of the case are that Ghazala Yousaf (Pw-2) on 25.07.2021 had submitted an application (PA) before Muhammad Usman ASI<sup>8</sup> (Pw-4) at Police Post Pindori<sup>9</sup> on the basis whereof report No.08 (PD) was entered in Daily Diary<sup>10</sup>. After initial interrogation said application along with report was sent to Police Station on the basis whereof FIR was recorded by Afzal Mehmood SI<sup>11</sup> (Pw-9).

4. In her application, Ghazala Yousaf maintained that she was the resident of Moza Nandana Jatal and her husband was settled in United Kingdom; she was told by her son Ibrahim Yousaf (Pw-1) that Usman (appellant) was black mailing him since long who also committed sodomy with him by capturing the incident through photographs and videos; she shared said disclosure with her husband Jameel; her son was minor and under fear who further told that Usman had been giving threats to

---

<sup>6</sup> Section 35 Cr.P.C

<sup>7</sup> Period of detention in jail to be considered while awarding sentence of imprisonment

<sup>8</sup> Assistant Sub Inspector

<sup>9</sup> A village situated about 30 Kilometers away from Rawalpindi, Pakistan

<sup>10</sup> It is also called 'Roznamcha'

<sup>11</sup> Sub Inspector

kill him besides receiving the money; according to Ibrahim Yousaf, Usman disclosed that he was also having the pictures of girls of their family and the material in shape of photos and videos was in possession of Zohaib.

5. Investigation of the case was started by Jamshed Khan ASI (*Pw-7*) who on 27.07.2021 arrested Usman Ali (*appellant*) and Muhammad Zohaib. During investigation appellant and his co-accused got recovered mobile phones those were sent to PFSA<sup>12</sup> for forensic examination from where considerable material was retrieved in shape of photos and videos.

6. On conclusion of investigation report<sup>13</sup> under Section 173 Cr.P.C was submitted in court.

7. A charge under Sections 292-A/292-B/292-C/367-A/377 PPC read with Section 22 of the Prevention of Electronic Crimes Act, 2016 (*Act*) framed on 24.01.2022 was not pleaded guilty by appellant and his co-accused, where after prosecution in support of its case had produced as many as thirteen witnesses.

8. Finally after tendering the reports of PFSA (*PX to PZ*), prosecution's evidence was closed by learned Assistant District Public Prosecutor.

9. In his examination made under Section 342 Cr.P.C, appellant pleaded his false implication, He opted not to produce defence evidence or to appear as a witness in terms of Section 340(2) Cr.P.C.

---

<sup>12</sup> Punjab Forensic Science Agency

<sup>13</sup> Also called 'Challan'

**10.** I have heard both the sides and with their valuable assistance, I have also gone through the record of learned trial court.

**11.** It will not be out of context to add here that appellant was acquitted from the charges under Sections 367-A/377 PPC and Section 22 of the Act.

**12.** Prosecution's case is that during investigation at the instance of Usman Ali (*appellant*) his mobile phones (*P5 and P7*) and of Muhammad Zohaib (*P6*) were taken into possession vide three independent inventories (*PG, PF and PL*). All devices were sent to the office of PFSA for forensic examination from where considerable and incriminating material in shape of videos and photos were retrieved and sent to police on a Digital Video Disk/DVD/CD (*P14*). The impugned judgment reveals that conviction of appellant has been based on the said material.

**13.** On scanning of record, it has been observed that right of fair trial has been denied to appellant due to following reasons: -

- *Non-supply of copy of DVD/CD to appellant in terms of Section 265-C, Cr.P.C.*
- *Non-displaying the videos and photos during the statements of any of the prosecution witnesses.*
- *Non-displaying the videos and photos while examining the appellant under Section 342 Cr.P.C.*

**14.** Supply of copies of evidence to an accused is a valuable right. On omission of Chapter XXIII<sup>14</sup> Cr.P.C

---

<sup>14</sup> The trial before High Courts and Courts of Session (Sections 266 to 336)

under the Law Reforms Ordinance, 1972 (XII of 1972) as there was a vacuum therefore Chapter XXII-A<sup>15</sup> Cr.P.C was inserted on the strength of same Ordinance, which was further substituted by way of Code of Criminal Procedure (Amendment) Act, 1976 (XLIV of 1976)<sup>16</sup> while describing a comprehensive procedure indicating all the steps in a criminal trial before High Courts and Courts of Session. Besides many other safeguards an important right of accused to receive the copies of documents in terms of Section 265-C before framing of charge and recording of evidence was protected. For effective discussion said provisions is as under: -

**“265-C. Supply of statements and documents to the accused: (1) In all cases instituted upon police report, copies of the following documents shall be supplied free of cost to the accused not later than seven days before the commencement of the trial, namely: -**  
**(a) the first information reports**  
**(b) the police report;**  
**(c) the statements of all witnesses recorded under Sections 161 and 164; and**  
**(d) the inspection note recorded by an investigation officer on his first visit, to the place of occurrence and the note recorded by him on recoveries made, if any:**  
***Provided that, if any part of a statement recorded under Section 161 or Section 164 is such that its disclosure to the accused would be inexpedient in the public interest, such part of the statement shall be excluded from the***

<sup>15</sup> The trial before High Courts and Courts of Session (Sections 265-A to 265-P)

<sup>16</sup> PLD 1976 Central Statues 369 (Sections 265-A to 265-N)

*copy of the statement furnished to the accused.*

*(2) in all cases instituted upon a complaint in writing-*

*(a) the complainant shall: -*

*(i) state in the petition of complaint the substance of the accusation, the names of his witnesses and the gist of the evidence which he is likely to adduce at the trial; and*

*(ii) within three days of the order of the Court under Section 204 for issue of process to the accused, file, in the Court for supply to the accused as many copies of the complaint and any other document which he has filed with his complaint as the number of the accused and*

*(b) copies of the complaint, and any other documents which the complainant has filed therewith and the statements under Section 200 or Section 202 shall be supplied free of cost to the accused not later than seven days before the commencement of the trial.”*

**15.** Right to know by accused the case against him is based on the principles of natural justice therefore the wisdom behind the provisions is obvious that before commencement of trial<sup>17</sup> the accused must know that what the evidence against him prosecution intends to produce so he has to be in a position to defend him properly therefore the provisions of Section 265-C, Cr.P.C has to be construed liberally that the copies of every evidence oral or documentary should be made available to him. Only the complete and fair disclosure of entire evidence to be used against accused can ensure a free and transparent trial. The scenario will not change even if an accused has himself conceded to, the

---

<sup>17</sup> A trial is commenced on framing of charge (Haq Nawaz & others vs. The State & others **2000 SCMR 785**)

omission to apply with the provisions of Section 265-C<sup>18</sup>.

16. Coming to the effect of non-compliance of the said provisions, it goes without saying that as it jeopardizes the right of fair and impartial trial therefore it vitiates the whole trial.

17. Learned counsel for complainant and learned Law Officer for State jointly maintain that the provisions of 265-C, Cr.P.C, in cases upon police report, states only about first information report, police report, statements of all witnesses recorded under Sections 161 and 164 Cr.P.C, and the inspection notes recorded by the investigating officer and as it does not cover any other document therefore the learned trial court was under no obligation to supply the copy of DVD/CD to appellant. This argument has no force at all for the simple reason that the documents mentioned in the provisions is a minimum standard so if in addition thereto, there is any other evidence to be produced by the prosecution against an accused copy thereof must be supplied and disclosed to him also. In Naveed Asif's case<sup>19</sup> the honorable Supreme Court of Pakistan had observed that, notwithstanding the provisions of Section 265-C, Cr.P.C, the court is empowered to issue direction for supply of the copies of statements or documents at some other stage of the proceedings as well if the dictates of justice so demand. The apex court in

---

<sup>18</sup> Rehmat Ali vs. The State 1986 SCMR 446; Muhammad Ashiq & 2 others Vs. Muhammad Anwar & 2 others 2005 YLR 933; Nadeem Ahmed Khan & others vs. The State 2007 PCRLJ 233; Shahbaz Masih Vs. The State 2007 SCMR 1631 and Muhammad Siddique vs. The State 2009 YLR 1007

<sup>19</sup> Naveed Asif vs. The State PLD 1988 SC 99

**Zulfikar Ali Bhutto's** case<sup>20</sup> was pleased to hold that where the police officer does not record the statement of a witness as required by Section 161, Cr.P.C but writes it in the diary maintained under Section 172, Cr.P.C its copy should also be given to the accused.

**18.** Article 164 after insertion of its proviso<sup>21</sup> in the Qanoon-e-Shahadat Order, 1984 (P.O No. X of 1984), empowers the court to allow any evidence to be produced that becomes available because of modern devices and techniques and conviction on the basis thereof is lawful. Therefore provisions of Section 265-C, Cr.P.C cannot be read in isolation and now the courts are under a statutory duty to supply the copies of any such document at the relevant stage.

**19.** As mentioned earlier that the supply of copies in terms of Section 265-C, Cr.P.C is not mere a formality so prosecution cannot be allowed to give a surprise to accused by producing an evidence for which he had no earlier notice. The court seized with the trial is also under obligation to ensure that none of such provisions be compromised and no right is to be denied to accused.

**20.** In the case in hand admittedly copy of DVD/CD at no stage of trial was supplied to appellant so as to disclose him the nature of videos and photos. During the examination-in-chief or cross-examination of any of the thirteen witnesses produced by prosecution the videos and photos were not displayed. It was the duty of learned trial court to show the said material to accused

---

<sup>20</sup> Zulfikar Ali Bhutto vs. The State **PLD 1979 SC 53**

<sup>21</sup> The proviso was inserted by way of Criminal Laws (Amendment) Act (IV of 2017)



at least at the stage of examination of Ibrahim Yousaf (*Pw-1*) to enable the appellant to cross-examine him in this context.

**21.** The learned trial court instead of following the lawful procedure as mentioned above, adopted a novel way and for that this Court cannot close the eyes. The statements of all prosecution witnesses were recorded and subsequent thereto on 22.04.2022 examination of appellant was also made under Section 342 Cr.P.C. The case was fixed for final arguments and after about a month that was 26.05.2022 the learned trial court directed the production one of the mobile phones which was produced on 27.05.2022 and then the videos and photos were seen inside the court room as evident from an order dated 28.05.2022. To my mind this was a futile exercise for a simple reason that the appellant at that stage was having no opportunity at all to cross-examine any of the witnesses in this regard. On 29.05.2022 it was Sunday so on the very next working day that was 30.05.2022 the learned trial court convicted the appellant relying on the said photos and videos.

**22.** Moving the discussions to the examination of appellant under Section 342 Cr.P.C, the said provisions is also reproduced as under for a fruitful discussion: -

*“(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 S.340 no oath shall be administered to the accused.”*

23. A careful perusal of the above quoted provisions makes it clear that examination of an accused is not mere a formality by the court but a mandate to enable him/accused to explain any circumstances appearing against him in evidence therefore every piece of evidence which can be used against him for the purpose of conviction is required to be put to him. This Court in Mst. Zainab Bibi's<sup>22</sup> case while discussing the importance of examination of accused under Section 342 Cr.P.C had observed as under: -

*“Said examination of accused is based on the principles involved in maxi “Audi Alteram Partem” that means ‘no one should be condemned unheard’. These circumstances to be put to accused are also called ‘incriminate pieces of evidence’. The word incriminating means “a material that has harmful effect”. Therefore,*

---

<sup>22</sup> Mst. Zainab Bibi alias Gudo vs. The State (<https://sys.lhc.gov.pk/appjudgments/2021LHC2013.pdf>)

*deviation from said duty shall render the conviction invalid.”*

24. The settled principles<sup>23</sup> governing for examination of accused under Section 342 Cr.P.C are as under: -

- i. The failure of the trial court to question the accused about incriminating material will amount to an infringement of the provisions of Section 342 Cr.P.C.*
- ii. Where the circumstances appearing in evidence against accused are not put and his explanation is not taken thereupon, it cannot be said that the purpose of Section 342 Cr.P.C has been fulfilled.*
- iii. 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 him.*
- iv. 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 to 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.*
- v. The word ‘generally’ does not limit the nature of the questioning to one or mere 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*

---

<sup>23</sup> Rahim Bakhsh Vs. Crown **PLD 1952 FC 1**; Aminul Haque Vs. Crown **PLD1952 FC 63**; Abdul Latif vs. Crown **PLD 1952 FC 113**; Abdul Wahab Vs. The Crown **PLD 1955 FC 88**; Abdus Salam Molla Vs. The Crown **PLD 1955 FC 129**; Munawar Ahmad Vs. The State **PLD 1956 SC 300**; Din Muhammad vs. The Crown **1969 SCMR 777**; Munir Ahmad alias Munni vs. the State **2001 SCMR 56**; Ashiq Ali Vs. The State **2005 PCRLJ 48**; Muhammad Shah Vs. The State **2010 SCMR 1009**; Qaddan & others Vs. The State **2017 SCMR 148**; Mst. Anwar Begum Vs. Akhtar Hussain alias Kaka & 2 others **2017 SCMR 1710**.

*limited to any particular part or parts of it.*

- vi. The word 'generally' does not mean that the accused cannot be subjected to a detailed examination by the court.*
- vii. The real object of Section 342 Cr.P.C 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 is likely to influence the mind of the Judge in arriving at a 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.*
- viii. Section 342 Cr.P.C is absolutely essential in accordance with its terms, and where this is not done, the conviction might be quashed, or the trial might be set aside.*
- ix. It is wholly against the provisions of the Criminal Procedure Code or the demands of natural justice that a person should be convicted on the basis of something, of which he was not given any notice, and to which he was never required to give his own reply.*

**25.** Examination of appellant shows that questions No. 17, 18 and 20 were about recoveries of mobile phones whereas question No. 27 was about the reports of PFSA. It does not reveal that the videos and photos were displayed in the court and shown to appellant so as to give him an opportunity for offering the explanations. Learned counsel for complainant has frankly conceded this omission on the part of learned trial court.

**26.** Articles 10-A of the Constitution of The Islamic Republic of Pakistan, 1973 guarantees fair trial and due process of law and is as under: -

*“10-A. Right to fair trial. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process”*

27. The right of fair trial of an accused is universally recognized in the light of Articles 10 and 11 of the **Universal Declaration of Human Rights**<sup>24</sup>, that guarantee that everyone is entitled in full equality to a fair hearing by an independent and impartial tribunal, in the determination of any criminal charge against him and he shall have all the guarantees necessary for his defense.

28. The honorable Supreme Court of Pakistan in **Naveed Asghar’s case**<sup>25</sup> was pleased to observe that: -

*“No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10-A cannot be taken away from the accused.”*

29. Components of right to fair trial and its importance were well elaborated by the apex court in **Muhammad Bashir’s case**<sup>26</sup>, as under: -

*“The Constitution of the Islamic Republic of Pakistan prescribes important safeguards against depriving a person of his "life or liberty" and with regard to arrest and detention, which includes "the right to consult and be defended by a legal practitioner of his choice". The Constitution also mandates a "fair trial and due process". A person arrested for an offence (1) must be informed of the grounds of his arrest;*

<sup>24</sup> <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

<sup>25</sup> Naveed Asghar vs. The State **PLD 2021 SC 600**

<sup>26</sup> Muhammad Bashir vs. Rukhsar & others **PLD 2020 SC 334**

*(2) must be permitted to consult with and be defended by a lawyer; (3) must be provided with the information of the offence he is charged for; (4) must be provided with an opportunity to cross-examine witnesses who depose against him; (5) must be given an opportunity to explain the circumstances disclosed in evidence against him; and (6) must also be provided an opportunity to produce evidence in his defense. These are also necessary ingredients to ensure the fairness of a trial.”*

**(Emphasis applied)**

30. This takes me to an ultimate view that because of serious illegalities committed by the learned trial court, appellant has been denied the constitutional guarantee of fair trial therefore conviction recorded against him cannot sustain.

31. Finally the most important question before this court is the ultimate outcome of instant appeal that whether it is a case of acquittal or remand for retrial? In Muhammad Asif Ali Usama<sup>27</sup> while commenting upon the duty of the trial court it was observed as under:-

*“There is no cavil to this proposition that solitary purpose of judicial proceedings in a criminal case is to discover the truth and to arrive at a just decision of the case. The word ‘Just’ is significant that means ‘Right, Fair, Well founded’. Therefore, every effort should be made by the court that no aspect of the case is to be left unattended, prior to declaration*

---

<sup>27</sup> Muhammad Asif Ali Usama vs. The State & another 2022 PCRLJ 59

*of final verdict as was stated by Judge Learned Hand<sup>28</sup>. -*

*“A Judge is more than a moderator; he is charged to see that the law is properly administered and it is a duty which he cannot discharge by remaining inert<sup>29</sup>”*

**32.** It was the duty of learned trial Judge to be vigilant while supplying the copies of documents to appellant under Section 265-C, Cr.P.C, to display the videos and photos during the statement of the victim of the case and also to show the same to appellant while examining him under Section 342 Cr.P.C, hence prosecution as a whole cannot be stated to be at fault. Therefore the case is liable to be remanded back.

**33.** Resultantly, this criminal appeal is allowed. Impugned judgment to the extent of conviction of Usman Ali (*appellant*) is set aside and case is remanded back with the following directions: -

- i. The learned trial court shall supply the copy of DVD/CD to appellant allegedly having videos and photographs retrieved from mobile phones by PFSA.*
- ii. After receiving the copy of DVD/CD, the appellant, if desires, shall be allowed to recall any of the prosecution witnesses already examined for cross-examination to this extent only.*
- iii. The appellant shall be examined again under Section 342 Cr.P.C where he shall be questioned on every incriminating piece of evidence and shall also be shown the videos and photos enabling him to explain the same.*

---

<sup>28</sup> Billings Learned Hand, January 27, 1872 – August 18, 1961) was an American judge and judicial philosopher. He served on the United States District Court for the Southern District of New York and later the United States Court of Appeals for the Second Circuit. As of 2004 Hand had been quoted more often by legal scholars and by the Supreme Court of the United States than any other lower-court judge.

<sup>29</sup> United States v. Marzano, 149F.2D 923 (2<sup>nd</sup> Cir. 1945)  
 (<https://law.justia.com/cases/federal/appellate-courts/F2/149/923/1507656/>)

- iv. As appellant has already been acquitted from the offences under Sections 367-A/377 PPC and no exception has been taken thereto by the rivals therefore the trial of appellant shall be confined to under Sections 292-A/292-C PPC only.*

**34.** As Syed Muhammad Ilyas, the learned Additional Sessions Judge, Rawalpindi has disclosed his mind while convicting the appellant, therefore the learned Sessions Judge, Rawalpindi is directed to proceed with the trial in the light of directions made above and to ensure the decision of the case within a period of one month from the date of receipt copy of this Judgment.

**(Sohail Nasir)**  
**Judge**

**Approved for Reporting**

**Judge**

**\*Adel\***