

HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

Criminal Appeal No. 05 of 2021
(Mst. Zainab Bibi alias Gudo vs. The State)

J U D G M E N T

Date of Hearing: 22.06.2021

Appellant by: Mr. Muhammad Zaki Qureshi Advocate

State by: Mr. Naveed Ahmad Warraich, Deputy District
Public Prosecutor.

SOHAIL NASIR, J. Mst. Zainab Bibi alias Gudo (*appellant*) had faced trial in case FIR 691 (*PB*) recorded on 12.07.2020 at Police Station Waris Khan, Rawalpindi under Section 9(C) of the Control of Narcotic Substances, Act, 1997 (*The Act*) on the complaint of Muhammad Saleem SI (*Pw-6*) for the allegations of having the possession of *Charas* weighing 2100 grams. On conclusion of trial vide a judgment dated 19.12.2020 passed by learned Additional Sessions Judge/Judge Special Court CNS, Rawalpindi she was convicted under Section 9(C) of *The Act* and sentenced to undergo five years and six months R.I and fine of Rs.25000/- (*twenty five thousand*). In default of payment fine she was ordered to further undergo five months and fifteen days SI. Benefit of Section 382-B Cr.P.C was also extended to her.

2. Facts of the case as evident from complaint (*PB*) are that on 12.07.2020 police party headed by Muhammad Saleem SI (*Pw-6*) was present on duty at Mohallah Chah Sultan opposite to Allah Wali Mosque; at about 08:20 pm an old aged lady having a shopping bag of blue colour came there, who was over powered being suspected; she told her name Zainab Bibi alias Gudo; on search of her shopping bag *Charas* in round shape weighing 2100 grams was recovered out of which 105 grams was separated for chemical analysis; recovered *Charas* (*PI*) and sample were made

into independent sealed parcels and secured vide a recovery memo Ex. PA.

3. On the basis of complaint mentioned above FIR (**PB**) was recorded by Muhammad Luqman Pasha TSI (**Pw-3**).

4. The case was investigated by Ahmad Yar SI (**Pw-4**), who on conclusion thereof submitted a report under Section 173 Cr.P.C (**Challan**) in the Court.

5. A charge under Section 9-C of **The Act** on 16.10.2020 framed against appellant was not pleaded guilty by her where after prosecution had produced Nadeem Qaiser HC/Moharrar (**Pw-1**), Rafia Tabassum, Lady Constable/recovery witness (**Pw-2**), Muhammad Luqman Pasha TSI/author of FIR (**Pw-3**), Ahmad Yar SI/IO (**Pw-4**), Abdul Rehman ASI/recovery witness (**Pw-5**), Muhammad Saleem SI/complainant and recovery witness (**Pw-6**) and Muhammad Shoaib Constable/recovery witness (**Pw-7**).

6. After giving up Muhammad Yasin Constable being unnecessary and producing the report of Punjab Forensic Science Agency Lahore (**PE**) prosecution's evidence was closed by learned ADPP.

7. In her examination made under Section 342 Cr.P.C, appellant pleaded her false involvement in this case. She opted not to produce defence evidence or to appear in terms of Section 340(2) Cr.P.C.

8. Learned counsel for appellant contends that while examining the appellant under Section 342 Cr.P.C, the report of chemical examiner was not put to her and this defect is not curable under the law, therefore on this score alone she is entitled for acquittal.

9. On the other hand, learned DDPP contends that point raised is technical in nature and for that omission the conviction recorded by learned Trial Court cannot be declared invalid.

10. **Heard.**

11. For effective discussion on the proposition before us, Section 342 Cr. PC is reproduced 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)
(3)
(4)

12. Under the above said provisions, it is the duty of trial Court to examine the accused. Power to examine an accused under the settled principles of law is not mere a formality but a mandate to enable an accused to explain any circumstance, appearing against him in evidence. During this exercise every piece of evidence which can be used against appellant for the purpose of conviction is required to be put to him, so he may in a position to respond thereto. Every piece of evidence certainly includes the documentary evidence also. 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, deviation from said duty shall render the conviction invalid.

13. The honorable Supreme Court of Pakistan in ‘**Din Muhammad vs. The Crown 1969 SCMR 777**’ was pleased to observe as under: -

“In reaching these conclusions the learned Judges have not considered a material defect in the proceedings viz. that three of the circumstances from

which they were drawing inferences adverse to the appellant had not been put to him when he was questioned under section 342, Cr. P. C by the committing Magistrate and the Sessions Judge. No question was put to him in respect of the evidence of PW-3 about the reply he was said to have given the witness when asked about the whereabouts of the deceased or the evidence of PW-7 or that of PW-16. The circumstances spoken to by these witnesses even if accepted as proved, can be made the basis of an adverse inference against the appellant only on the ground that he had no satisfactory explanation for them, but the possibility of his having been able to give an explanation though not convincing at least plausible enough to create a reasonable doubt cannot reasonably be excluded. The importance of the examination of the accused under section 342, Cr. P. C has been pointed out by their Lordships of the Privy Council as well as by this Court in more than one decision, and it is unfortunate that the learned Judges overlooked this serious omission”

14. In “**Munir Ahmad alias Munni vs. the State 2001 SCMR 56** again it was observed that: -

“The matter does not end here. No question with regard to this incriminating piece of evidence was put to the appellant during his examination under section 342, Cr.P.C. This is undoubtedly quite strange. In laws, if an incriminating piece of evidence is not put to an accused and it has resulted in causing prejudice to the accused the same shall not be considered as evidence against him”

15. We have perused the examination of appellant recorded by learned Trial Court where in question No. 5 only there is mention of sending the sample to PFSA but by stretch of no imaginations report of PFSA (**PE**) was put to her through any question for

enabling her to explain that piece of evidence. Omission, therefore, is not curable under the law and has caused miscarriage of justice.

16. In view of above, this Criminal Appeal is **allowed**. Impugned judgment dated 19.12.2020 passed by learned Trial Court is **set aside** and appellant is **acquitted** from the case. She is in custody and she shall be released forthwith if not required in any other case. The case property shall be dealt with in the manners as directed by the learned Trial Court.

(RAJA SHAHID MEHMOOD ABBASI)
JUDGE

(SOHAIL NASIR)
JUDGE

APPROVED FOR REPORTING

(SOHAIL NASIR)
JUDGE

**Sharif*