

ORDER SHEET

LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Misc. No.7517/B/2023

Liaquat Ali Vs The State etc.

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with the signature of the Judge and that of parties or counsel where necessary
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29.3.2023 Mr. Muhammad Ahsan Bhoon, Advocate, with Mr. Hafeez-ur-Rehman Chaudhry, Advocate, for the Petitioner.
Rao Zaigham Ali, Special Prosecutor for ANF, with Hakim Ali/SI.

Tariq Saleem Sheikh, J. – By this application, the Petitioner seeks post-arrest in case FIR No.57/2022 dated 15.12.2022 registered at Police Station ANF, Lahore, for offences under sections 9(2)(Item 9), and 15 of Control of Narcotic Substances Act, 1997 (XXV of 1997) (the “CNSA”).

2. As per FIR, the prosecution case is that on 15.12.2022 the Anti-Narcotics Force (ANF) received source information that the Petitioner (Liaquat Ali) and co-accused Syed Asad Abbas Naqvi traded in a contraband chemical and would transport it in Hyundai Tucson vehicle No. ALF-507 and Honda City car No.LEF-17-2695 to deliver it to their customers near Universal College, Raiwind Road, Lahore, around 8:15 p.m. Consequent thereupon, the authorities constituted a raiding party headed by the Complainant, Hakim Ali/SI, which managed to intercept the accused and recovered 10 kgs. of ketamine, a psychotropic substance, from each of them.

3. In support of this application, Mr. Muhammad Ahsan Bhoon, Advocate, contends that the Petitioner is a partner in *FYNK Pharmaceuticals* (the “Firm”), which is engaged in the sale, purchase, distribution, manufacturing, import and export of various medicines under licence from the Government. He submits that ketamine is a dissociative anaesthetic used medically for induction and maintenance of

anaesthesia. It is also used to treat depression and is a pain management tool. The Firm imported it for manufacturing injections for hospital use on 20.4.2021 in accordance with the law. The Ministry of Narcotics Control, Government of Pakistan, classified it and its salts as psychotropic substances for the purpose of the CNSA and placed them at Serial No. 39-A of the Schedule thereto vide notification dated 15.10.2021. The said notification cannot be applied retrospectively to question the import of 20.4.2021. The Petitioner – and the transaction – are protected under Article 12 of the Constitution of the Islamic Republic of Pakistan, 1973 (the “Constitution”). Mr. Bhoon further contends that the ANF officials seized ketamine from the Firm’s factory and not from the cars on Raiwind Road. The facts given in the FIR are false and concocted.

4. The Special Prosecutor for ANF contends that the Government subjected ketamine and its salts to regulation and control vide SRO No. 446(I)/2020 dated 6.4.2020. Hence, the Petitioner’s import, if any, on 20.4.2021 was unlawful. He further contends that section 7 of the CNSA prohibits the transportation of psychotropic substances, even inside Pakistan, except in accordance with Control of Narcotic Substances (Regulation of Drugs of Abuse, Controlled Chemicals, Equipment and Materials) Rules, 2001. The Petitioner has violated section 7 as well and thus committed an offence under section 9(2) of the CNSA. Besides, the Special Prosecutor claims that the Petitioner has contravened various other provisions of the aforesaid Rules, which constitutes a separate offence.

5. Arguments heard. Record perused.

6. *Nullum crimen sine lege* (“no crime without law”) and *nulla poena sine lege* (“no punishment without law”) are the fundamental principles of criminal law. Tribe writes:

“It is essential in a free and democratic society that citizens are able, as far as possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards.”¹

¹ L. Tribe, *American Constitutional Law*, 2nd Edn., 1998, p. 1033.

7. The above principles feature in all human rights instruments.² Article 11(2) of the Universal Declaration of Human Rights (1948) says:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

Article 7(1) of the European Convention on Human Rights (ECHR) (1950) reproduces this text. Article 15(1) of the U.N. Covenant on Civil and Political Rights (1966) also reproduces it with the following addition:

“If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”

8. Article 9 of the American Convention on Human Rights provides:

“No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense, the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”

9. The Constitutions of almost all countries also contain a similar prohibition. Article 1, Section 9 of the U.S. Constitution says, “No ... *ex post facto* law shall be passed.”³ In *Calder v. Bull*, (1798) 3 U.S. 386, Chase J. of the U.S. Supreme Court explained that the expression *ex post facto* law means:

- i) Every law that makes an action done before the passing of the law and which was innocent when done, criminal and punishes such action.
- ii) Every law that aggravates a crime or makes it greater than it was when committed.
- iii) Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

² Beth Van Schaack, *Legality & International Criminal Law*. Available at: <https://www.jstor.org/stable/10.5305/procannmeetasil.103.1:0101a>

³ This Article is confined to penal legislation and has no application to legislation relating to civil action. See: *Harisiades v. Shaughnessy*, (1952) 342 US 580 (594), and *Calder v. Bull*, (1978) 3 Dall 386 : 1 L Ed 648.

- iv) Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.

10. Durga Das Basu, citing Cooley, adds the following two rules to the above:⁴

- i) Every law which, assuming to regulate civil rights and remedies only, in effect, imposes a penalty or the deprivation of a right for something which, when done, was lawful.
- ii) Every law which deprives persons accused of a crime of some lawful protection to which they have become entitled: such as the protection of a former conviction or acquittal, or the proclamation of amnesty, or takes away a defence.

11. In England, there is no legal bar on Parliament's capacity to make any law and give them a retrospective effect. Nevertheless, in *Phillips v. Eyre*, (1870) LR 6 Q.B. 1, the Court observed: "Retrospective laws are no doubt *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought not to change the character of past transactions carried upon on faith of the then existing law." In *Waddington v. Miah*, [1974] UKHL 6; [1974] 2 All ER 377, Lord Reid said: "It is hardly credible that any Government department would promote or that Parliament would pass retrospective criminal legislation." The Human Rights Act of 1998 secures the rights set out in the ECHR. It obligates public agencies (including the government, police, and local governments) to uphold these rights. As a result, the right mentioned in Article 7(1) of the ECHR (supra) is also protected under the aforesaid Act.

12. In India, Article 20(1) of their Constitution limits the law-making power of every legislative authority in the country as regards retrospective criminal legislation. In *Rao Shiv Bahadur Singh and another v. The State of Vindhya Pradesh* (AIR 1953 SC 394), the Supreme Court of India ruled that Article 20(1) prohibits conviction or sentence based on an *ex post facto* substantive law. However, nobody has a vested right in the procedure. As long as the substantive law remains unchanged, a trial can be held under a procedure that differs from what existed when the offence was committed. In *Sukhdev Singh*

⁴ Durga Das Basu, *Commentary on the Constitution of India*, 9th Edn., Vol.5, p. 4492

v. *State of Haryana* (AIR 2013 SC 953), the Supreme Court held that the provisions of a penal statute should be strictly construed. They cannot be applied retrospectively unless the legislative intent and expression are absolutely clear. According to Basu, Article 20(1) of the Indian Constitution follows the American pattern but does not use the expression *ex post facto* laws.⁵

13. In Pakistan, Article 12(1) of the Constitution of 1973 is relevant to our discussion. It reads:

12. Protection against retrospective punishment.— (1) No law shall authorize the punishment of a person—

- (a) for an act or omission that was not punishable by law at the time of the act or omission; or
- (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

14. In *Nabi Ahmed and another v. Home Secretary, Government of West Pakistan, and others* (PLD 1969 SC 599), the Supreme Court of Pakistan held that there is no fundamental difference between retrospective law and *ex post facto* law. The former is used in civil and the latter in criminal matters, which are more serious by definition. Speaking for the Court, Qadeeruddin Ahmad J. stated that one of the reasons for the rule against *ex post facto* law is that law abiding-citizens regulate their lives according to the law as it existed at the time of their actions. They expect the law to remain consistent and reliable. People examine and consider the implications in light of the demands of the law, including the requirements implied in the current legal system, and feel duped if the law later lets them down by taking away or reducing their rights or enhancing their obligations.

15. According to Justice Fazal Karim, Article 12 is concerned with “punishment”. It is not as broad as the *ex post facto* clause in the American Constitution, which encompasses even procedural amendments, such as rules of evidence. Article 12 guarantees protection with reference to the time of the act or omission which may subsequently be made punishable and to the commission of an offence for which a heavier or a different kind of penalty may be imposed by

⁵ *ibid*, p. 4500.

legislation that takes effect from a previous date. The time of the commencement of a proceeding to impose the punishment is not critical to the protection. This distinction is important. As a result, while every law that alters the legal rules of evidence or any other procedural rule is prohibited by the American *ex post facto* clause, it is not barred by Article 12 of our Constitution.⁶

16. In ***The Income Tax Officer (Investigation) Circle I, Dacca and another v. Sulaiman Bhai Jiwar*** (PLD 1970 SC 80), the Supreme Court of Pakistan held that no statute should be construed to have a retrospective operation unless such a construction appeared very clearly or through the necessary implication from the Act itself. In ***Abdul Rehman v. The State*** (1978 SCMR 292), the sentence of transportation for life was calculated as 20 years when the offence was committed. The Supreme Court ruled that the sentence of life imprisonment could not be subsequently substituted for it because that meant a prison term of 25 years. In ***Dr. Muhammad Safdar v. Edward Henry Louis*** (PLD 2009 SC 404), the parties to the dispute had instituted civil suits regarding the property. The matter was *sub judice* long before the Illegal Dispossession Act of 2005 came into force. The Supreme Court held that the 2005 Act could not be applied retrospectively. In ***Khizar Hayat v. The State*** (2012 SCMR 1066), the offence under section 324 PPC carried a maximum sentence of 10 years imprisonment and a fine at the time of occurrence. Later, on 25.10.1994, the Criminal Law (Third Amendment) Ordinance, 1994 amended section 324 PPC and provided that a person committing the said offence would be punished not only for his intention to commit *Qatl-e-Amd* but also for the injury caused by him with that intention. Since the occurrence in the case before the Supreme Court had taken place long before that amendment, it ruled that the appellant's sentence could not be enhanced retrospectively because of Article 12(1)(b) of the Constitution.

17. Let's now turn to the case at hand. The CNSA consolidates and amends the law relating to narcotic drugs, psychotropic substances, and controlled substances. It *inter alia* aims to control their production,

⁶ Fazal Karim, *Judicial Review of Public Actions*, 2nd Edn., Vol. 2, p. 1012.

processing and trafficking and implement the provisions of the international conventions in this regard. Section 2 of the CNSA defines the aforesaid terms which are supplemented by the Schedule thereto.⁷ Section 2(za) empowers the Federal Government to declare any substance to be a psychotropic substance by notification in the official Gazette.⁸ Under section 7(2), it can make rules to permit and regulate the import, export, and transhipment of narcotic drugs, psychotropic or controlled substances through a licence or permit.

18. The Petitioner claims that the Firm manufactures ketamine HCl 50 mg/ml ampules under its brand name *Ketajin Injection*. On 15.11.2019, it submitted a letter to the Drug Regulatory Authority of Pakistan (DRAP) inquiring about the status of ketamine HCl in the country. On 7.1.2020, DRAP responded to that letter, stating that ketamine HCl was not included in any Schedule of the CNSA and thus did not require specific import authorization. However, it enjoined the Firm to comply with all the formalities prescribed by law, including obtaining a clearance certificate from the Assistant Director (I & E) concerned as specified under the Drugs (Import & Export) Rules, 1976, before customs clearance. On 23.9.2020, the Firm applied to DRAP to renew its product registration in Form 5B and then placed an order for 1000 kgs. of ketamine hydrochloride B.P. with Smart Solutions GmbH, Germany. On 16.4.2021, the shipment arrived in Pakistan and was cleared.

19. The Federal Government, exercising the powers conferred under section 2(za) of the CNSA, declared ketamine hydrochloride a psychotropic substance by inserting it at Serial No. 39-A in the Schedule to the CNSA vide SRO No. 446(I)/2020 dated 6.4.2020. However, it withdrew that SRO *ab initio* vide Letter No. 13-20/2014-Policy-1 dated 21.8.2020 (see the Appendix). Subsequently, by SRO 1350(I)/2021 dated 15.10.2021, the Federal Government again declared that ketamine

⁷ Control of Narcotics Substances (Amendment) Act, 2002 (XX of 2022) has introduced various amendments in the CNSA (Act XXV of 1997) which are not relevant for the decision of the present case. However, there is no material change in the law on this point. The original “Schedule” has been re-designated as “Schedule-I” by amending clause (za) of section 2 of the CNSA (Act XXV of 1997).

⁸ Control of Narcotics Substances (Amendment) Act, 2002, has also inserted new section 74 in Act XXV of 1997 which authorizes the Federal Government to amend the Schedules, by notification in the official Gazette, and add, amend or omit any entry therefrom.

and its salts would be a psychotropic substance for the purpose of the CNSA by placing it at Serial No. 39-A in the Schedule thereof.

20. On 16.4.2021, when the Petitioner's shipment landed in Pakistan, its import was prohibited under the CNSA. However, it cannot be sanctioned due to Letter No. 13-20/2014-Policy-1 dated 21.8.2020. In light of the law and jurisprudence outlined above, SRO 1350(I)/2021 dated 15.10.2021 also cannot be applied retrospectively to punish the Petitioner. Article 12(1) of the Constitution protects him.

21. Section 7 of the CNSA prohibits the transportation of any narcotic drug, psychotropic substance or controlled substance except when it is in conformity with the rules made under section 7(2) and is in accordance with the conditions of any permit, licence or authorization required to be obtained under those rules. Any contravention of section 7 is an offence under section 9. The Federal Government has, vide SRO 808(I)/2001 dated 28.11.2001, published those rules which are known as Control of Narcotic Substances (Regulation of Drugs of Abuse, Controlled Chemicals, Equipment and Material) Rules 2001 (hereinafter referred to as the "Rules"). Although SRO 1350(I)/2021 is not retrospective, the Petitioner was required to comply with the Rules from their enforcement date, i.e. 15.10.2021. It was necessary for him to obtain a valid permit or authorization under the Rules for the transportation of ketamine within Pakistan. In *Messrs Ghani Herbal Pharma Laboratories v. Secretary and others* (PLD 2005 Lahore 93), the appellant manufactured and sold Unani medicines under licence under the Dangerous Drugs Rules, 1958, in Form DD-5. He was allowed to acquire and hold 9 kgs. of medicinal opium quarterly. The authorities released him half of the sanctioned quota but refused the rest due to stock depletion. The appellant filed a constitutional petition in this Court seeking a writ of mandamus. Meanwhile, the CNSA was enacted, and the Dangerous Drugs Rules of 1958 were repealed. A Division Bench of this Court held that the appellant was required to get a licence under the Narcotic Substances (Regulation of Drugs of Abuse, Controlled Chemicals, Equipment and Materials) Rules, 2001, for further issuance

of any medicinal opium. He could not ask for the release of the remaining quantity against the previous licence.

22. PWs Abdul Samad Khan/ASI, Abdul Shakoor Shahid/Head Constable, Shafqat Javed/Constable, and Ishfaq Hussain/Constable have got their statements recorded under section 161 Cr.P.C. in support of the prosecution case that the ANF seized ketamine from the Petitioner at Raiwind Road. He has not produced any permit for such transportation to date. *Prima facie*, he has committed an offence under section 7 of the CNSA read with section 9 thereof. His defence plea that the ANF seized the aforementioned chemical from his factory would be considered at the trial.

23. The Petitioner is also obligated to maintain the consumption record of ketamine under the Rules. *Prima facie*, he has defaulted on that account as well and rendered himself liable under section 16 of the CNSA. In this context, it would be advantageous to refer to ***Khan Asfand Yar Wali and others v. Federation of Pakistan and others*** (PLD 2001 SC 607). Section 5(r) of the National Accountability Bureau Ordinance, 1999, stipulated that a person commits the offence of “willful default” if he does not pay, or continues not to pay, or return or repay ... on the date that it became due ... and a period of thirty days has expired thereafter. The appellant contended that “willful default” was not an offence punishable by law when he allegedly committed it. The Supreme Court held that section 5(r) envisages a continuing breach of duty to pay the loan. It contemplates default which is not committed once but is continuous. Thus, on every occasion the default occurs and recurs, it constitutes a new act and would attract section 5(r). In this sense, this provision is prospective and not retrospective.

24. In view of the above, this application is **dismissed**.

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge

Appendix

The Federal Government, exercising the powers conferred under section 2(za) of the CNSA, declared ketamine hydrochloride a psychotropic substance by inserting it at Serial No. 39-A in the Schedule to the CNSA vide SRO No. 446(I)/2020 dated 6.4.2020. However, it withdrew that SRO *ab initio* vide Notification No.13-20/2014-Policy-1 dated 21.8.2020 reproduced below:

<u>Immediate</u> <u>By Special Messenger</u>
GOVERNMENT OF PAKISTAN MINISTRY OF NARCOTICS CONTROL (6th Floor, Kohsar Block, Pak Secretariat)
No. 13-20/2014-Policy-1 Islamabad, 21 August, 2020 Subject: <u>NOTIFICATION</u> <p>The undersigned is directed to refer to Printing Corporation of Pakistan Press, Islamabad's SRO 446(1)/2020 dated 6th April, 2020, published in the Official Gazette of Pakistan Extra (Part-II) on 20th May, 2020 (copy enclosed) and to state that Secretary, Ministry of Narcotics Control has been pleased to withdraw the following SRO <i>ab initio</i>. A draft notification to this effect is also enclosed.</p> <p>2. You are therefore requested to publish the withdrawal of above mentioned SRO immediately.</p> <p><u>Encl: As Above</u></p> <p style="text-align: right;">(Syed Saadat Ali Bokhar) Section Officer (Policy-1) Tele: 051-9212815</p> <p>The Manager, Printing Corporation of Pakistan Press, <u>Islamabad</u></p>

<u>THE GAZETTE OF PAKISTAN, EXTRA,</u> <u>AUGUST 31, 2020 [PART II]</u>
<u>ERRATA</u>
<p>A Gazette of Pakistan Extraordinary Part-II received on 20.5.2020 from the Ministry of Narcotics Control for publication. It was allotted SRO No. 446(1)/2020 bearing folio 1179-x and published.</p> <p>Later on, the said Ministry cancelled the same vide Letter No.13-20-2014 Policy-I dated 21.8.2020, therefore, SRO No. 446(1)/2020 bearing folio 1179-x may be treated as Blank.</p> <p style="text-align: right;">Mansoor Qaiser Gazette Cell (PCPPI)</p>