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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR
(JUDICIAL DEPARTMENT)

Criminal Appeal No. 166 of 2020

The State Vs. Shafique Ahmed

J U D G M E N T

Date of hearing	**13.11.2023**
The State by	Ch. Asghar Ali Gill, Deputy Prosecutor General.
The Respondent by	Nemo

Muhammad Amjad Rafiq, J:- This appeal against acquittal filed by the State questions the impugned judgment dated 06.01.2020 passed by Additional Sessions Judge/CNS Court/MCTC Sadiq Abad, District Rahim Yar Khan whereby Shafique Ahmed, accused/ respondent was acquitted under section 265-K Cr.P.C., in case FIR No.758 dated 05.11.2019 under section 9-C of the Control of Narcotic Substance Act, 1997, Police Station City Sadiq Aabad, Rahim Yar Khan on the ground that PFSA Analysis Report, though not tendered in evidence, is bereft of necessary protocols.

2. Number of judgments of learned trial Courts are under challenge before this Court wherein accused(s) were acquitted under section 265-K of Cr.P.C. (the Code) on the ground that Narcotic Analysis Report does not contain protocols as required under Rule-6 of Control of Narcotic Substance (Government Analyst) Rules, 2001 (Government Analyst Rules, 2001) which are mandatory pursuant to dictum laid down by Hon'ble Supreme Court in cases reported as "*The STATE through Regional Director ANF Versus IMAM BAKHSH and others*" **(2018 SCMR 2039)** & "*KHAIR-UL-BASHAR Versus The STATE*" **(2019 SCMR 930)**. Learned Deputy Prosecutor General states that in both

cited cases, Supreme Court of Pakistan passed the judgment of acquittal while hearing appeals filed by the accused against their convictions, and request made by the prosecution, for summoning of analyst or re-examination of recovered contraband so as to produce additional evidence, was not acceded to while considering it as an attempt to fill the lacuna. Whereas in the present case evidence had yet not been recorded nor analyst report was tendered in evidence. Further states that in Imam Bakhsh & Khair-ul-Bashir Cases supra, report of Chemical examiner in old style was part of evidence wherein no protocols were mentioned but in the present case protocols are very much part of PFSA Analysis Report which format was found by the Hon'ble Supreme Court in number of cases as sufficient to fulfill the requirement of Rule-6 of Government Analyst Rules, 2001. He placed reliance in this regard on case reported as "*ASMAT ALI Versus The STATE*" **(2020 SCMR 1000).**

3. Despite notice, the respondent/accused is not in attendance, therefore, this appeal cannot be kept in wait, nor proceedings u/s 512 of the Code are required at appellate stage as held in case reported as "*HAYAT BAKHSH AND OTHERS Vs. THE STATE*" **(1981 SCMR 1)** (Equivalent citation **PLD 1981 SC 265**); further, appeal against acquittal can be decided even in the absence of accused as per section 423 of the Code; relevant part is reproduced:-

> **423. Powers of Appellate Court in disposing of appeal:** (1) The Appellate Court shall then send for the record, of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears and the Public Prosecutor, if he appears, and in case of an appeal under Section 411-A, sub-section (2) or Section 417**, the accused, if he appears,** the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may---
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> (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or sent for trial to the Court of Session or the High Court as the case may be, or find him guilty and pass sentence on him according to law;

Under the principle of Audi alteram partem, notice for hearing is necessary as per section 422 of the Code and thereafter power under section 423 of the Code becomes available to the Court. Plain reading

of above section explains that if the appellant or his counsel appear in appeal against conviction, the Court would provide him opportunity of hearing and to the Public Prosecutor but it is not mandatory for the Court to hear the appellant in an appeal against acquittal but **must hear the accused, if he appears**. Non-appearance of accused does not restrict the Court to decide the appeal in his absence. The Honourable Supreme Court in the case cited supra as "*HAYAT BAKHSH AND OTHERS Vs. THE STATE"* (**1981 SCMR 1)** has explained the scope of hearing of appeal against acquittal in the absence of accused; relevant excerpt is as under:-

> "Reliance of the learned counsel on the provisions contained in section 512, Cr. P. C. is of not much help in this behalf. While the present controversy relates to the hearing of or otherwise determination of an appeal, section 512, Cr. P. C. deals with trials. Moreover, the said provision is not attracted to the form and procedure of this Court. **It would not be possible at all to adjourn an appeal against acquittal even against a single acquitted accused/absconding respondent, for an indefinite period, although the office of the Court would make efforts to secure his surrender or arrest in obedience to the process of the Court, for a reasonable period before fixing the appeal for hearing; and if he remains fugitive, the Court would proceed to determine the appeal in his absence. If after examination of the case the acquittal merits to be reversed, there would be no impediment to decide the appeal accordingly, but in case the judgment of acquittal merits to be maintained, the same would not be reversed on account of the abscondence of the accused/respondent.** This would apply to both the situations whether the appeal is against one acquitted or more. The submission of the learned counsel that while dealing with the controversy the Court should keep in view its power to do complete justice is undoubtedly weighty, but as already indicated, this power is concomitant with the power of the Court to pass such orders as are necessary for the ends of justice and also for the prevention of the abuse of the process of the Court. These aspects of rendering justice cannot be visualized and considered in isolated water tight compartments. They have to be put in juxtaposition because they react upon each other and that is the only course to keep the stream of justice flowing, uninterrupted and unsullied".
>
> [Emphasis supplied]

Fortified with above view, the Court cannot dawdle on the dillydallies of respondent/accused in appearing before the Court, and this appeal against acquittal cannot be kept in wait for indefinite period, it is, therefore decided accordingly while hearing the learned DPG and after perusal of record.

4. The present case for recovery of Charas weighing 1080-grams

from the accused was decided on 06.01.2020 and before that pursuant to direction of Supreme Court, in Imam Bakhash & Khair-ul-Bashir Cases supra, the Punjab Forensic Science Agency started issuing reports while mentioning required protocols. However, later a format/template for report of analyst was suggested by the Hon'ble Supreme Court in case reported as "*QAISER JAVED KHAN Versus The STATE through Prosecutor General Punjab, Lahore and another*" **(PLD 2020 Supreme Court 57)** like as under;

Test Applied	Protocols (applied to carry out the test)	Result of the test (s)

The PFSA Analysis Report in the present case did contain such information including protocols but not in a style/format/template as suggested later in Qaiser Javed Khan Case supra, yet the report-format used by PFSA was also considered by the Hon'ble Supreme Court in number of cases as sufficient to fulfill the requirement of Rule-6 of Government Analyst Rules, 2001. Cases reported as "*SHAZIA BIBI Versus The STATE*" **(2020 SCMR 460)**; "*MUSHTAQ AHMAD Versus The STATE* and another" **(2020 SCMR 474)** are referred; and in case reported as "*ASMAT ALI Versus The STATE"* **(2020 SCMR 1000)** it was held as under;

> "Alleged insufficiency of "protocol" mentioned in the forensic report is beside the mark; it conclusively establishes the narcotic character of the substance with sufficient details regarding the test carried out"

Even otherwise pursuant to case reported as "*MINHAJ KHAN Versus The STATE"* **(2019 SCMR 326)**, a three members' Hon'ble Bench of the Supreme Court of Pakistan has expressed concern over the mandatory form of Rule-6 of Government Analyst Rules, 2001 which judgment though was discussed in case reported as "*QAISER JAVED KHAN Versus The STATE through Prosecutor General Punjab, Lahore and another*" **(PLD 2020 Supreme Court 57)** supra but the same question was also pending in number of cases, therefore, in Criminal Appeals No. 43/2020 & Criminal Petition. No. 131/2018 titled ***Baz Khan & Baidullah Versus The State through PG Baluchistan & The State***

through Deputy Attorney General, a larger Bench of Supreme Court of Pakistan has been constituted and by virtue of order dated 16.09.2020, four learned Advocates of Supreme Court (ASC) & DG Punjab Forensic Science Agency were appointed as amicus curie; matter is yet pending.

5. What is the actual requirement of Rule-6 of Government Analyst Rules, 2001 is yet to be decided finally by the *Honourable* Supreme Court, therefore, to see what it runs like, it is given below:-

> "After **test or analysis**, the result thereof together with full protocols of the test applied, shall be signed in quadruplicate and supplied forthwith to the sender as specified in Form-II". **(emphasis supplied)**

Perusal of above Rule and Form-II transpire that the use of words "test or analysis" is meaningful; though both words sometimes used interchangeably yet maintain subtle difference due to which connotation is changed. Section 36 of Control of Narcotic Substances Act, 1997 (CNSA, 1997) talks about test and analysis of contrabands in the manner as may be prescribed. Therefore, it was prescribed through Government Analyst Rules, 2001 made under section 77 of CNSA, 1997 and perusal of Rule-6 of Government Analyst Rules, 2001 & Form-II throws light that an analyst shall either conduct **test** or **analyze** the contrabands. As per preamble read with section 6, 7 & 8 of CNSA, 1997, contraband is not limited to narcotic drug only rather there are three types of contrabands; Narcotic Drug, Psychotropic Substance and Controlled Substance which show that their identification either require test or analysis. For proper explanation, it is referred that CNSA, 1997 deals with certain prohibitions as under;

1. Prohibition of Possession etc.**(section-6)**
2. Prohibition of Import or export **(Section-7)**
3. Prohibition on trafficking or financing the trafficking **(Section-8)**

Prohibition focuses on following three types of contrabands:-

i. Narcotic Drug
ii. Psychotropic substance
iii. Controlled substance

These contrabands are defined in Section-2(s) & 2(za) & 2(k), of CNSA, 1997 respectively as under:-

> **Section-2(s) "narcotic drug"** means
>
> > coca leaf, cannabis, heroin, opium, poppy straw and all manufactured drugs**;**
>
> Narcotic drug does include 'manufactured drugs' therefore, its definition is mentioned in **section 2(q)** as under;
>
> "**manufactured drug**" includes: -
>
> > (i) all coca derivatives, medicinal hemp, opium derivatives, cannabis in any form and any mixture of stalks and flowering or fruiting tops of the Indian hemp plant (cannabis sativa L.) Acetic anhydride; and
> >
> > (ii) any other narcotic substance which the Federal government may, by notification in the official Gazette made in pursuance of recommendations of any International Convention or otherwise, declare to be a manufactured drug;
>
> **Section-2 (Za) "psychotropic substance**" means
>
> > the substances, specified in the Schedule to this Act and such substances as the Federal Government may, by notification in the official Gazette, declare to be a psychotropic substance;
>
> **Section-2 (k) "controlled substance"** means
>
> > any substance which may be used for the production or manufacture of narcotic drugs or psychotropic substance;

6. For the identification, Quantification, Purity Analysis, Adulterant Detection, and its confirmation with regulations, every contraband requires examination and proper inspection that can either be done through naked eye with spot testing including other like methods, or through microscopic analysis with the help of scientific equipment/machines which is also evident from a "Manual For Use By National Law Enforcement and Narcotics Laboratory Personnel" written at New York in year 1994 for '**RAPID TESTING METHODS OF DRUGS OF ABUSE'**, under the auspices of United Nations International Drug Control Programme, Viena, wherein for different kinds of contrabands, a series of tests are prescribed; like for **"Cannabis"**, Fast Blue B Salt Test and Duquenois-Levine Test, is suggested. Similarly, for **"Morphine, Codeine and Heroin"**, Marquis Test, Mecke Test, Nitric Acid Test & Ferric Sulfate Test; for **"Opium"**, Marquis Test & Ferric Sulfate Test; for **"Cocaine"**, Cobalt Thiocyanate Test, Modified

Cobalt Thiocyanate Test (Scott Test), Methyl Benzoate Test & Wagner Test. On the same go, for other narcotic drugs various tests are in practice. These tests are simply done by placing small amount of suspected material on a Spot Plate while adding required reagents. Such tests are regarded as **field test** for which no sophisticated equipment is required and they can be conducted by using a spot plate, test tubes, filter papers, test stripes or pre-measured and pre-packaged reagents in a test container (ampoules). It is told that only the colour (s) indicated for each test should be interpreted as a positive result and in any case means only the possible presence of the substance (s) for which the test is intended. In the said manual, it is mentioned that although Colour tests are used worldwide in the laboratories for screening purposes, they are not substitute of more specific identification techniques such as chromatography and spectroscopy. Rather they should be used in a logical combination with these techniques.

7. On go of above information, it depends upon the nature of contraband and demand of prosecution as to whether, test be conducted or the analysis be preferred. However, generally for identification and calculation of percentage in any material containing controlled substance or psychotropic substance a deep microscopic analysis is required, whereas a narcotic drug can even be identified through a presumptive test. That is the reason three types of tests mentioned in PFSA report in the present case like, (i) Analytical balance for weight (ii) Chemical Spot Test (iii) Gas Chromatography-mass spectrometry, are of international standards as cited above and were considered sufficient by the Supreme Court in number of cases, only for narcotic drugs. The cases reported "*SHAZIA BIBI Versus The STATE*" **(2020 SCMR 460)**; "*MUSHTAQ AHMAD Versus The STATE* and another" **(2020 SCMR 474) &** "*ASMAT ALI Versus The STATE"* **(2020 SCMR 1000)** are referred and the protocols demanded as per judgments reported as "*The STATE through Regional Director ANF Versus IMAM BAKHSH and others"* **(2018 SCMR 2039)**; "*KHAIR-UL-BASHAR Versus The STATE"* **(2019 SCMR 930)**; & "*QAISER JAVED KHAN Versus The STATE through Prosecutor General Punjab, Lahore and another*" **(PLD 2020 Supreme**

Court 57) are also in the same line.

8. Perusal of PFSA Analysis Report, reproduced in impugned judgment, shows that test applied, protocols carried out and result of test was mentioned. For clarity it is reproduced here as well:-

> **Internationally Recommended (Scientific Working Group for the Analysis of seized Drugs – SWGDRUG & United Nations Office on Drugs and Crimes – UNODC) full test protocols performed on received Item(s) of Evidence**
>
> 1. **Analytical balance** was used to weighing where net weight of the Evidence is 62.42 gram(s).
> 2. **Chemical Spot Test(s)** was/were used for presumptive testing. Suspected sample(s) and standard drug (s) were added, separately, in test tubes (or reaction plate wells) after the addition of respective reagent(s) in each tube/plate and noted the change in color. Positive result for suspected sample may produce similar color change as that of standard. Result of presumptive test indicated possible presence of Charas.
> 3. **Gas chromatography-mass spectrometry** was used for confirmation where Helium (carrier gas) was used with DB-SMS column using electron impact ionization on scan mode. For positive results, standard drug(s) and sample of suspected drug(s) extracted in organic solvent produce same chromatogram(s) and mass spectrum. Result of confirmatory test confirmed presence of Charas."

Although said report was in the form as considered sufficient by the Hon'ble Supreme Court in judgments cited in preceding paragraph but the trial Court has rejected this report that no details of protocols performed for tests are mentioned therein.

9. Contours of section 265-K of the Code connotes no probability of conviction in any offence, it is reproduced as under:-

> **265-K. Power of Court to acquit accused at any stage**: Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused at any stage of the case, if, after hearing the prosecutor and the accused and for reasons to be recorded, it considers that there is not probability of the accused being convicted of any offence.
>
> **(emphasis supplied)**

The word "any offence" means that even if offence is not mentioned in the charge which interpretation stands in conformity with section 237 & 238 of the Code based on the principle that "no offence should go unchecked and no offender should go unpunished' but in this case even charge had not been framed. Possession of Charas is also an offence

under Article 4 of the Prohibition (Enforcement of Hadd) Order, 1979, therefore, offender can be tried under such Order if the requirement of section 36 of CNSA, 1997 read with Rule-6 of Government Analyst Rules, 2001 is not fulfilled because section 73 of CNSA, 1997 saves the prevailing Provincial and Special laws. In a case reported as "*PRESIDENT NATIONAL BANK OF PAKISTAN and others Versus WAQAS AHMED KHAN"* **(2023 SCMR 766)**; the Hon'ble Supreme Court has deprecated the practice of pre-mature termination of prosecution; relevant part is referred below;

> "It is settled law that even if the allegations levelled in the FIR are admitted to be false, even then without recording of evidence, it cannot be said that there was no probability of conviction of the accused. In order to ascertain the genuineness of the allegations, the Trial Court ought to have allowed the prosecution to lead evidence. Even otherwise, this Court in Model Customs Collectorate, Islamabad v. Aamir Mumtaz Qureshi (2022 SCMR 1861) and State v. Raja Abdul Rehman (2005 SCMR 1544) has categorically held that in appellate or revisional proceedings, the same sanctity cannot be accorded to acquittal at intermediately stage such as under section 249-A or 265-K, Cr.P.C. as available for those recorded and based on full-fledged trial after recording of evidence."

More so learned trial court has not focused on the philosophy behind "probability of conviction". Section 265-K of the Code does not say about strong or less probability, it is a complete theme and not mere a word; what probability connotes in law is defined in case reported as "*Raja MUHAMMAD YASIN Versus ZAITOON BEGUM and others"* **(1993 CLC 2448)**, as under;

> "Circumstantial deduction reaching "**probability**" is a mental cognition which leads to "supposition' regarding existence of a fact. This the law permits as an alternative to positive "belief" in its existence, "probability" is not lower than "likelihood": which is higher than a mere possibility, a surmise or a conjecture. And it is not a very difficult task to distinguish a "probability" from conjecture and even possibility. Thus, the Courts when applying some artificial rules of appreciation of evidence, which do not form part of statutory guidance, must also attach due and purposeful importance to the above aspect of a statutory mandate. It will be of some advantage to conclude this by reproducing from Monir's Law of Evidence (1974 Edition, page 27)". The authors of the Evidence Act in their wisdom did not mention the term "evidence" while defining the words "proved" and "disproved"; evidence means only statements and documents. The Court is therefore not bound to look

> for its findings on the "evidence" alone as defined in the Evidence Act, but has to see to the high probabilities regarding the existence or non-existence of a fact after considering "the matters before the Court".

Learned Deputy Prosecutor General has rightly said that if the report of PFSA was not amenable to be used as cogent evidence, prosecution still had some options to be exercised like calling of analyst pursuant to section 510 of Cr.P.C., and for re-examination of contraband or clarification of report as per section 11 & 12 of the Punjab Forensic Science Agency Act, 2007.

10. Keeping in view the above facts, the learned trial court has erred in law while passing the judgment of acquittal in hasty manner and created a room for premature termination of prosecution while anticipating the evidentiary value of PFSA Analysis Report which even had not been tendered in evidence. Consequently, impugned judgment dated 06.01.2020 is set aside, and on the strength of section 423 of the Code, the cases is sent back to the Court concerned for trial of the accused/respondent in accordance with law.

(ASJAD JAVAID GHURAL)
JUDGE

(MUHAMMAD AMJAD RAFIQ)
JUDGE

APPROVED FOR REPORTING

JUDGE ***JUDGE***

This judgment was announced on 13.11.2023 and after dictation and preparation it was signed on 22.11.2023.

*Jamshaid**