

LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Misc. No.45595-B/2024

Rukhsar Ahmad

Vs

The State and others

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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16.09.2024 Hafiz Mubashar Ullah, Advocate, for the Petitioner.
Mr. Nauman Khalid, Assistant Attorney General for Pakistan,
with William John/SI, FIA.

Tariq Saleem Sheikh, J. – The Petitioner, Rukhsar Ahmad, is under arrest in connection with FIR No. 79/2024, dated 18.04.2024, registered at Police Station FIA, District Gujrat, for offences under Sections 23, 27(1), and 27(4) of the Drugs Act, 1976 (the “Drugs Act”), read with section 27 of the Drug Regulatory Authority of Pakistan Act, 2012 (the “DRAP Act”). The prosecution’s case is that the Petitioner and his co-accused have established *Prime Pharmacy* on Sohawa Road, Mandi Bahauddin. The competent authority received source information that they were involved in the illegal trade of unregistered, unwarranted, and spurious drugs. Consequently, on 17.04.2024, it formed a special team led by the Complainant, District Drug Controller, which, in coordination with the FIA, conducted an inspection of Prime Pharmacy and its adjacent storage facility, both of which were under the control of the Petitioner and his co-accused.

2. During the inspection, the Complainant identified ten varieties of therapeutic goods at Prime Pharmacy, including allopathic drugs and alternative medicines that were either unregistered, suspected to be spurious, lacked essential manufacturing and enlistment details, or were without warranty. He seized these items, collected samples for testing and analysis, and duly prepared Form-4 and Form-5, securing the Petitioner’s signature and thumb impressions of the Petitioner, who was present on the spot. Following the inspection, both the pharmacy and the adjoining godown were sealed for violations of the Drugs Act and the DRAP Act.

3. On the same day, 17.04.2024, the Complainant submitted a preliminary report to the Secretary, District Quality Control Board, Mandi Bahauddin. The Board convened a meeting, reviewed the evidence, and

unanimously approved the registration of the FIR against the Petitioner and his co-accused. Consequently, FIR No. 79/2024 was lodged on 18.04.2024.

4. The Petitioner seeks post-arrest bail through this application under Section 497 Cr.P.C. He denies the allegation that the seized drugs were unregistered, spurious, or without warranty and contends that the Complainant lodged FIR No. 79/2024 without following the prescribed procedure. He maintains that the entire proceedings are without jurisdiction and lawful authority.

5. The Assistant Attorney General has vehemently opposed this application. He contends that the PWs, who have recorded their statements under Section 161 Cr.P.C., support the prosecution's case. He argues that the Petitioner is involved in the illicit sale of therapeutic goods, including both allopathic drugs and alternative medicines. The Law Officer further states that the Complainant had no reason to falsely implicate the Petitioner in this case and that FIR No. 79/2024 was registered in accordance with the law.

6. We first address the issue of whether the prosecution has been lawfully initiated against the Petitioner. For this, we need to examine the legal framework in detail.

7. The Drugs Act regulates the import, export, manufacture, storage, distribution and sale of drugs.¹ Section 11(1) of the Act mandates that each Provincial Government establish a Provincial Quality Control Board (PQCB) consisting of such members, including a Chairman, as that Government may appoint from time to time. Section 11(5) outlines the PQCB's powers and functions, which include inspecting drug manufacturing or sale premises, recommending licence suspensions or cancellations for violations, reviewing reports of the Provincial Inspectors regarding contraventions of the Act and analyzing reports of the Government Analysts on drugs submitted for testing, and subsequently issuing instructions to the Inspectors as to the action to be taken on such reports. Section 11(6) allows the PQCB to delegate its powers and functions to one or more of its members.

8. Section 17 empowers the Federal or Provincial Government to appoint Inspectors, while Section 18 defines their powers. Section 19

¹ Preamble of the Drugs Act, 1976.

details the procedures they must follow when seizing any drug or article under Section 18. Notably, Section 19(6) requires that, upon identifying any contravention of the Act, the Provincial Inspector must always refer the case to the PQCB, unless directed otherwise, and seek instructions regarding the action to be taken for such violations.

9. Section 22(1) of the Drugs Act stipulates that when an Inspector submits a drug sample for testing and analysis to the Government Analyst, the Analyst shall deliver him a signed report in quadruplicate in the prescribed form and forward one copy to the designated authority. Section 22(3) requires that, upon receiving the report, the Inspector send a copy to the relevant board (Central Licensing, Registration, or PQCB) to seek their directions regarding the action to be taken on its basis.

10. Chapter III (Sections 23 to 26) of the Drugs Act lists the prohibitions, while Chapter IV (Sections 27 to 42) details the offences, penalties, and procedures. For our present purpose, Section 30(1) of the Act is relevant, which provides that, subject to Section 19, no prosecution under this Chapter shall be initiated except by a Federal or Provincial Inspector.²

11. The Punjab Government has framed the Punjab Drugs Rules 2007 (the “Drugs Rules”) while exercising powers under Section 44 of the Drugs Act. Rule 3 describes the constitution of the PQCB. Rule 4(1) authorizes the PQCB to constitute a committee in a district to be known as the District Quality Control Board (“DQCB”). Rule 4(4) states that the DQCB shall perform its functions under general supervision and subject to the control of the PQCB. Rule 5(3) stipulates:

- (3) The Provincial or the District Board shall examine a case referred to it by an Inspector and shall, if an action is proposed to be taken against a person under the Act or the rules, issue a show cause notice to the person and provide him an opportunity for hearing before taking the action about the prosecution of the person or recommending suspension or cancellation of his licence to the licensing authority.

² For ease of reference, Section 30(1) of the Drugs Act is reproduced below:

30. Cognizance of offences.- (1) Subject to the provisions of section 19, no prosecution shall be instituted under this Chapter except –

(a) by a Federal Inspector, where the prosecution is in respect of a contravention of clause (h) of sub-section (1) of section 23 or section 24 or any of the provisions of this Act or the rules relating to the import or export of drugs or the manufacture for sale, or sale, of a drug which is not for the time being registered or for the manufacture for sale of which a licence is not for the time being in force; or

(b) by a Provincial Inspector:

Provided that, where the public interest so requires, the Federal Inspector may, with the prior permission of the Federal Government, institute a prosecution for a contravention of any other provision of this Act.

12. In 2012, Parliament enacted the DRAP Act (XXI of 2012) to establish the Drug Regulatory Authority of Pakistan (DRAP)³ “to provide for effective coordination and enforcement of the Drugs Act and to bring harmony in inter-provincial trade and commerce of therapeutic goods, and to regulate, manufacture, import, export, storage, distribution, and sale of therapeutic goods.” Section 7 of the Act describes the DRAP’s powers and functions. Section 27(1) states that the offences shall be such as specified in Schedule-III, and Section 27(2) provides that the prohibitions specified in Schedule-II shall be punishable in accordance with Schedule-III.

13. Schedule-V of the DRAP Act outlines the powers of Inspectors. Clause (6) thereof stipulates that, unless otherwise directed, the Provincial Inspector must always refer any contraventions of the DRAP Act or the Drugs Act to the PQCB and seek instructions regarding the appropriate action to be taken. Section 29 stipulates that the Inspector shall take cognizance of the offences in the manner specified in Schedule-IV.⁴

14. It is essential to point out that Section 30 of the Drugs Act, Section 29 of the DRAP Act, and Schedule-IV of the DRAP Act bear the heading “Cognizance of offences”. The term “cognizance” has not been defined in any of these statutes – or even the Code of Criminal Procedure 1898. In *Wazir v. The State* [PLD 1962 (W.P.) Lahore 405], after an extensive deliberation, a Full Bench of this Court opined:

“ ... the police report by itself, when received by the Magistrate, does not constitute the taking of cognizance, and it is reasonable to expect that something more will be done to show that the Magistrate intends to start the proceeding ... He may keep the case waiting until the sanction arrives and then pass some order to show that he intends to hold a trial.”

³ Parliament enacted this Act pursuant to the resolutions under Article 144 of the Constitution passed by the Provincial Assemblies of Khyber Pakhtunkhwa, Punjab and Sindh.

⁴ Section 29 of the DRAP Act reads as follows:

29. Cognizance of offences.- Cognizance of offences shall be taken by the Inspector in the manner specified in Schedule-IV.

Clause (1) of Schedule-IV to the DRAP Act provides:

(1) Subject to the provisions of Schedule-V, no prosecution shall be instituted under this Act except,—

(a) by a Federal Inspector, where the prosecution is in respect of a contravention of Clause (h) of Paragraph (1) of heading A of Schedule-II or any of the provisions of this Act or the rules relating to the import or export of therapeutic goods or the manufacture for sale, or sale, of a therapeutic good which is not for the time being registered or for the manufacture for sale of which a licence is not for the time being in force; or

(b) by a Provincial Inspector:

Provided that, where the public interest so requires, the Federal Inspector may, with the prior permission of the Registration Board or Licensing Board as the case may be, institute a prosecution for a contravention of any other provision of this Act and the Drugs Act, 1976 (XXXI of 1976).

15. The ratio of the *Wazir* case has been consistently followed.⁵ The Supreme Court of Pakistan also endorsed it in *Ali Gohar and others v. Pervaiz Ahmed and others* (PLD 2020 SC 427).

16. In *Haq Nawaz and others v. The State and others* (2000 SCMR 785), the Supreme Court discussed the term “cognizance of a case” and clarified that it is distinguishable from the “commencement of a trial.” The Court held that taking cognizance of a case by a court is the first step in the criminal process, but it is not equivalent to the beginning of the trial. Cognizance is an early procedural step that may or may not lead to a trial. The trial begins when copies of the documents are supplied to the accused under Section 265-C Cr.P.C., and the charge is framed. In *Ali Gohar, supra*, the Supreme Court ruled that the Anti-Terrorism Court would be said to take “cognizance of the case” when, on the receipt of the challan along with the material placed therewith by the prosecution, it takes judicial notice thereon by the conscious application of mind and takes positive steps to indicate that the trial of the case is to follow. These steps need not necessarily be recorded as judicial orders. What is essential is that the orders so passed or steps taken reflect that ATC is to proceed with the trial.

17. However, the substantive provisions of Section 30 of the Drugs Act, Section 29 of the DRAP Act, and Schedule IV of the DRAP Act mandate that “no prosecution shall be instituted” unless certain conditions are complied with. In *State (CBI) v. Sashi Balasubramanian and another* [2006 (13) SCC 252], the Supreme Court of India (SCI) ruled that the terms “prosecution” and “cognizance” carry different meanings and are not interchangeable.

18. The word “prosecute”, which is derived from a Latin word *prosecutus*, past participle of *prosequi*, signifies not only “to follow”, but “to follow intensively” without intermission, thus, to follow or pursue with a view to reach, execute or accomplish. According to the *Black’s Law Dictionary*, “prosecution” means (i) the commencement and carrying out of any action or scheme; (ii) a criminal proceeding in which an accused person is tried. *Wharton’s Law Lexicon* states that “prosecution” means “a proceeding either by way of indictment or information in the criminal

⁵ Also see: *Alam Din v. The State* (PLD 1973 Lahore 304).

courts, in order to put an offender upon his trial. In all criminal prosecutions, the King is nominally the prosecutor.” In ***Magbool Hussain v. The State of Bombay*** (AIR 1953 SC 325), the SCI defined the aforesaid term to mean “an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.”

19. In ***Syed Alamdar Hussain Shah v. Abdul Baseer Qureshi and others*** (PLD 1978 SC 121), the Supreme Court of Pakistan observed:

“According to *Corpus Juris Secundum*, the term ‘prosecution’ has different meanings when used in different relations, and it is regarded as a word of limited or extended signification according to the intention of the lawmaker or the person using it. In its broadest sense, the term would embrace all proceedings in the course of justice or even elsewhere for the protection or enforcement of a right or the punishment of a wrong, whether of a public or private character. In a more limited sense, the term includes the act of conducting or waging a proceeding in court; the following up or carrying on of an action or suit already commenced until the remedy be attained; the institution and carrying on of a suit in a court of law or equity to obtain some right or to redress and punish some wrong. It includes commencing, conducting, and carrying a suit to a conclusion in a court of justice.”

20. The headings of Section 30 of the Drugs Act, Section 29 of the DRAP Act, and Schedule IV of the DRAP Act appear inconsistent with the substantive provisions of these sections and the schedule. According to Bennion, the court must prioritize the legislative intent in such a situation; it should not allow the heading to control the substantive provisions and override their plain meaning. He explains:⁶

“A heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate guide to the material to which it is attached.⁷ ... Headings are unamendable descriptive components. Like anything else in what Parliament puts out as its Act, a heading is part of the Act, despite dicta to the contrary. Harman J said ‘... the construction of an Act cannot be controlled by cross-headings.’⁸ However, it can often be assisted by them, and it is the court’s duty to take advantage of this aid when arriving at the legal meaning of an enactment.⁹ Nevertheless, a heading is of very limited use in interpretation because of its necessarily brief and

⁶ *Bennion on Statutory Interpretation*, Sixth Ed., pp. 694-95.

⁷ Henry LJ in *Oyston v. Blaker* [1996] 2 All ER 106 at 114.

⁸ *Esso Petroleum Co Ltd v. Ministry of Defence* [1990] Ch 163 at 167.

⁹ See Debtor (No 50A-SD-1995) [1997] Ch 310; R (*on the application of Toth*) v *Solicitors Disciplinary Tribunal* [2001] EWHC 240 (Admin), [2001] 3 All ER 180 at [27]; *ETI Euro Telecom International NV v. Republic of Bolivia* [2009] 1 WLR 665, 682.

inaccurate nature.¹⁰ Any heading can only be an approximation and may not cover all the detailed matters falling within the provision to which it is attached.¹¹ Furthermore, it may fail to get altered when some amendment made in Parliament to those provisions would justify this ... Where a heading differs from the material it describes, this puts the court on inquiry. However, it is most unlikely to be right to allow the plain literal meaning of the words to be overridden purely by reason of a heading.”¹²

21. Applying the above principle, the substantive provisions of the Drugs Act and DRAP Act should guide our interpretation, regardless of their inconsistency with the headings. Sections 19(6), 22(1), and 30(1) of the Drugs Act, along with Rule 5(3) of the Drugs Rules, establish a procedural framework that requires an Inspector to refer a case to the Provincial or District Board when a potential violation of the Act is identified. The Board must review the case and, if it finds that action is necessary, issue a show cause notice, giving the alleged offender an opportunity to explain his position before any formal measures, such as prosecution or suspension of licence, are taken. Similarly, the implication of Section 29 of the DRAP Act, read with Schedules IV and V, is that prosecution can only be initiated by a Federal or Provincial Inspector, who must refer the matter to the PQCB and seek directions on the appropriate course of action. However, since this procedural framework represents a significant departure from the standard criminal process, where an FIR may be registered directly when a cognizable offence is committed, the crucial question is whether the requirement of a show cause notice and the opportunity for a hearing under Rule 5(3) of the Drug Rules is mandatory.

22. A mandatory provision demands strict adherence, and failure to comply renders any subsequent action invalid or unlawful. In contrast, a directory provision is more flexible, and non-compliance does not necessarily invalidate the action, provided the essential purpose of the requirement is fulfilled. A general rule suggests that if a statutory provision is expressed in negative terms, indicating that an action must be performed in a specific way and no other, it is typically considered mandatory, and non-compliance will invalidate the process. Conversely, provisions expressed in affirmative terms are often seen as directory. However,

¹⁰ This sentence has been applied by a Northern Irish court: See also *Re Application by the Local Government Auditor* [2003] NIQB 21, [16].

¹¹ This sentence was judicially approved by the Federal Court of Australia in *Liebert Corp v Australia Pty Ltd v Collector of Customs* [1993] FCA 525 at [26].

¹² See eg *Fitzgerald v Hall, Russell & Co Ltd.*, [1970] AC 984, per Lord Upjohn at 1000; *Pilkington Bros Ltd v IRC*, [1982] 1 WLR 136 at 145.

exceptions exist where even provisions framed in negative language have been interpreted as directory.¹³ In the *Province of Punjab and others v. Javed Iqbal* (2021 SCMR 328), the Supreme Court of Pakistan emphasized that the ultimate test for determining whether a provision is directory or mandatory lies in uncovering the legislative intent rather than merely focusing on the language used in the statute. The purpose and objective behind enacting the provision are strong indicators for understanding this intent. It is essential to interpret the provision not just based on its wording but also by considering its nature, the objectives it seeks to achieve, and the consequences that would follow from interpreting it in different ways. This requires a careful examination of the overall framework of the statute to discover its true purpose.

23. Courts generally interpret provisions that significantly affect individual rights or procedural safeguards as mandatory to ensure justice and fairness. In *Atta Muhammad Qureshi v. The Settlement Commissioner, Lahore Division, and others* (PLD 1971 SC 61), the Supreme Court held that, as a general rule, statutes that enable individuals to initiate legal proceedings under specified circumstances require strict compliance with those circumstances, even if the provisions are expressed in merely affirmative language. Based on this principle, the Court determined that sub-clause (5) of section 20 of the Displaced Persons (Compensation and Rehabilitation) Act, 1958 is mandatory, imposing a limitation on the revising authority by prohibiting it from making any adverse order against an individual without first giving him the opportunity to present his case. If an order is made without fulfilling this pre-condition, it would lack jurisdiction. In *Javed Iqbal*, *supra*, the Supreme Court further explained that, as a general principle, statutes regulating the manner in which public officials exercise their vested powers are typically construed as directory rather than mandatory, especially when no private or public rights are infringed. However, if the public interest or private rights require the exercise of such powers, the provision should be treated as mandatory despite the permissive and directory form of the language. Where non-compliance with a provision causes inconvenience or injustice, it must be considered obligatory.

¹³ *Atta Muhammad Qureshi v. The Settlement Commissioner, Lahore Division, and others* (PLD 1971 SC 61).

24. In Rule 5(3) of the Drugs Rules, the use of the word “shall” in phrases like “shall examine” and “shall issue a show cause notice” clearly suggests that the provision is mandatory, requiring strict adherence. Although the Rule does not explicitly outline penalties for non-compliance, its primary purpose is to protect individual rights by ensuring procedural fairness through the issuance of a show cause notice and the opportunity to be heard. As such, it must be treated as mandatory, and failure to comply with this Rule could render any actions taken invalid.

25. In C.P. 1861-L/2020 (titled: “*Province of Punjab v. M/s Flow Pharmaceuticals (Pvt) Ltd.*”) decided on 28.01.2021,¹⁴ it was argued that since a cognizable offence had been committed, the Board could proceed with registering the case without issuing a show cause notice to the concerned individual. However, the Supreme Court nixed the contention, holding that Rule 5(3) was mandatory. It held:

“The language of the above provision is unambiguous and requires that before prosecuting the person, the Board shall give a show cause notice to the concerned person and after granting a hearing to the said person, if required, the proposed action of prosecution will be adopted. The requirement of issuing a show cause notice is, therefore, mandatory under the said Rule. The above Rule meets the requirements of due process and fair trial under Articles 4 and 10A of the Constitution.”

26. In the present case, the Government Analyst issued reports regarding the seized therapeutic goods on various dates after the registration of the FIR, i.e., on 04.06.2024, 15.06.2024, and 25.06.2024. The DQCB proceeded without waiting for these reports, although they were necessary to determine what action should be taken against the Petitioner. Furthermore, it failed to issue a show cause notice to the Petitioner or provide him with an opportunity to present his defence. In view of the law and judicial precedents discussed above, we uphold the Petitioner’s contention that the Complainant lodged FIR No.79/2024 without following the prescribed procedure. As a result, the entire proceedings are *coram non judice* and without lawful authority.

27. In *Muhammad Anwar and others v. Mst. Ilyas Begum and others* (PLD 2013 SC 255), the Supreme Court of Pakistan held that Article 4 of the Constitution of Pakistan (1973) mandates that it is the inalienable right of every citizen to enjoy the protection of the law and to be treated in accordance with the law. Therefore, if any forum or court,

¹⁴ Unreported judgment.

including a revisional court, passes an order that is patently illegal or violates the express provisions and spirit of the law, allowing such an order to remain intact would result in a serious breach of the litigants' legal rights and cause prejudice to them. In such cases, the High Court, while exercising its constitutional jurisdiction, has the authority to rectify the illegality, correct the violation of law, and undo the harm caused by the order of the revisional court. In **Syed Raza Hussain Bukhari v. The State and others** (PLD 2022 SC 743), the Supreme Court held that even when hearing a bail petition under Sections 497/498 Cr.P.C., the High Court retains both its inherent jurisdiction under Section 561-A Cr.P.C. and its constitutional jurisdiction as a guardian of the accused's fundamental rights. No sub-constitutional legislation can circumscribe this protective constitutional jurisdiction of the High Courts. In **FIA through Director General, FIA, and others v. Syed Hamid Ali Shah and others** (PLD 2023 SC 265), the Supreme Court held that Article 199(1)(a)(ii) of the Constitution empowers the High Courts to judicially review the actions and proceedings of persons performing functions related to the affairs of the Federation, a Province, or a local authority. If such actions or proceedings are found to have been taken without lawful authority, the High Courts can declare them invalid and without legal effect. This includes the registration of an FIR and the conduct of investigations, which are actions carried out by officers of the police department – a provincial law enforcement agency – and thus fall under the High Courts' jurisdiction as per Article 199(1)(a)(ii) of the Constitution. The High Courts can declare such acts of the police officers to have been made without lawful authority and of no legal effect if found so, and can also issue any appropriate incidental or consequential orders to effectuate their decision, such as quashing the FIR and investigation proceedings.

28. Since FIR No. 79/2024 dated 18.04.2024 has been registered without following the prescribed procedure, we are inclined to quash it while exercising our constitutional jurisdiction.

29. The object of an order in the nature of a writ of *certiorari* and *mandamus* is to foster justice and right a wrong.¹⁵ Courts of law are not supposed to perpetuate what is unjust and unfair. Instead, they should

¹⁵ *Nawab Syed Raunaq Ali etc. v. Chief Settlement Commissioner and others* (PLD 1973 SC 236) and *Khali Khan v. Haji Nazir and others* (PLD 1997 SC 304).

explore ways and means to undo what was unjust and inequitable.¹⁶ Therefore, we quash FIR No. 79/2024 and direct that the Petitioner be released from the jail forthwith, if not required to be detained in another case. However, his case shall be placed before the DQCB within a week from the date hereof for *denovo* proceedings. The DQCB shall issue him a show cause notice in terms of Rule 5(3) of the Drug Rules, afford him an opportunity of hearing and decide whether any action about his prosecution should be taken.

30. Since we have remitted the matter to the DQCB, we have refrained from expressing any opinion on the factual aspects of the case.

31. Disposed of in the above terms.

(Muhammad Amjad Rafiq)
Judge

(Tariq Saleem Sheikh)
Judge

Ahsan

Announced in open court on _____

Judge

Judge

Approved for reporting

(Muhammad Amjad Rafiq)
Judge

(Tariq Saleem Sheikh)
Judge

Ahsan

¹⁶ *Muhammad Nawaz alias Nawaza and others v. Member Judicial Board of Revenue and others* (2014 SCMR 914).