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JUDGMENT SHEET

LAHORE HIGH COURT, MULTAN BENCH, MULTAN

JUDICIAL DEPARTMENT

Crl. Appeal No. 654/2023

Asadullah

Vs.

The State etc.

JUDGMENT

Date of hearing:	20.7.2023
For the Appellant:	Mr James Joseph, Advocate.
For the Respondents:	Mr Muhammad Sadiq Rehman, Additional Prosecutor General, with Rana Gulfraz Ahmad/SI.

Tariq Saleem Sheikh, J. – The Appellant is on trial in case FIR No.13/2021 dated 8.1.2021 registered at Police Station Chab Kalan, Mian Channu, District Khanewal, for an offence under section 9(c) of the Control of Narcotic Substances Act, 1997 (the “Act”). The charge against him is that on 8.1.2021 at 5:00 p.m., he and his co-accused Yasir alias Yasri Chahdar and Rajad Hussain alias Rajadi were transporting 75 packets of *charas* weighing 1200 grams each (total: 90 kgs.) in an unregistered Toyota Corolla GLI car (Model 2019) when a police party led by Rana Gulfraz/ASI arrested them at Stop 102/15-L. Out of the said 75 packets, allegedly 35 were with the Appellant. During the proceedings, the prosecution called Rana Gulfraz/ASI as PW-2 to testify about the recovery. He produced the case property, which was exhibited as P-1/1-75. During his cross-examination on 4.5.2023, the Appellant’s counsel requested the court to de-seal the case property which was allowed. When the 35 packets recovered from the Appellant were opened, it was discovered that 13 of them contained a mixture of soil and *charas*, while no sample was collected from 20. Samples were drawn from only two packets. On 20.5.2023, the Deputy District Public Prosecutor filed an application praying that the complete case property be sent to the Punjab Forensic

Science Agency (PFSA) for analysis. The Additional Sessions Judge, Mian Channu, accepted that application vide order dated 3.6.2023 (the “Impugned Order”). Aggrieved, the Appellant has filed this appeal under section 48 of the Act.

2. The learned counsel for the Appellant contends that re-analysis of the material cannot be allowed in the peculiar facts and circumstances of the case. The Impugned Order is patently illegal and not sustainable.

3. The learned Additional Prosecutor General has supported the Impugned Order. He contends that analysis of the entire case property would help the court arrive at the correct decision, thus fostering the ends of justice.

4. Arguments heard. Record perused.

5. The prosecution is required to prove the charge against an accused beyond a reasonable doubt. In drugs cases, it cannot succeed unless the report from the Government Analyst supports the witnesses who testify regarding the recovery and confirms that the recovered substance is contraband. The courts have issued guidelines from time to time to ensure that the report of the Government Analyst is authentic and reliable. Generally, they have opposed re-testing of the substance. In *The State v. Amjad Ali* (PLD 2007 SC 85), the Supreme Court observed that unscrupulous litigants are increasingly manoeuvring substitution of the substances and articles stored in the *Malkhana*. Following the replacement, these people request for the re-examination of the material, and the consequence is that what was originally tested as contraband is found to be something else. As a result, offenders get acquitted. The Supreme Court concluded: “It was about time the learned courts came alive to the said clandestine *modus operandi* adopted to screen offenders and made sure that once a substance had been tested, then extraordinary reasons must exist and must be given before directing fresh examination of such a substance.” This view was reaffirmed in *Muhammad Aslam (Amir Aslam) and others v. District Police Officer, Rawalpindi and others* (2009 SCMR 141), and *Ameer Zeb v. The State* (PLD 2012 SC 380).

6. In *Muhammad Naeem and another v. The State and others* (PLD 2019 SC 669), during the hearing of an appeal, the High Court directed fresh sampling of the alleged intoxicating material and sought a new report from the Chemical Examiner/Government Analyst. The Supreme Court set aside that order, holding as under:

“Such judicial intervention is opposed to the adversary principle and offensive to the fundamental right of fair trial¹ and due process² guaranteed under the Constitution. See *Dildar v. State*³; *Painda Gul v. State*⁴ and *State v. Amjad Ali*.⁵ The High Court has travelled beyond its lawful powers under section 423(1)(a) Cr.P.C. and has, in fact, directed to conduct a re-investigation or further investigation of the case, which is not permissible under the law.⁶ Even otherwise, calling for a fresh examination of the intoxicating substance at the appellate stage after all these years may frustrate the settled law⁷ as to safe custody and safe transmission of the recovered substance making the report of the Chemical Examiner suspect and unreliable.”

7. In *Qaiser Javed Khan v. The State and another* (PLD 2020 SC 57), the Supreme Court stated that the Government Analyst’s report must show that the contraband was tested in accordance with a recognized standard protocol. Any test conducted without a protocol loses its reliability and evidentiary value. Therefore, the said report must specify (i) the test applied, (ii) the protocols applied to carry out those tests, and (iii) the results of the tests. It further stated that once these requirements, which are outlined in Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001, are included in the Government Analyst’s report, any ambiguity can be resolved by the trial court by exercising its powers under the Proviso of section 510 Cr.P.C. which stipulates that the court may if it considers necessary in the interest of justice, summon and examine the person by whom such report has been made. Hence, while reviewing the report, the trial court can summon the Government Analyst to clarify any ambiguities. However, the Supreme Court cautioned that this does not allow the Government Analyst to conduct a fresh test or prepare a new report because doing so would

¹ Article 10A of the Constitution.

² Article 4 *ibid*.

³ *Dildar v. State* (PLD 2001 SC 384).

⁴ *Painda Gul v. State* (1987 SCMR 886).

⁵ *State v. Amjad Ali* (PLD 2007 SC 85).

⁶ *Mazhar Naeem Qureshi v. State* (1999 SCMR 828).

⁷ *Amjad Ali v. State* (2012 SCMR 577); *Ikramullah v. State* (2015 SCMR 1002); and *State v. Imam Bakhsh* (2018 SCMR 2039).

provide the prosecution with an opportunity to fill the gaps and lacunas in the report.

8. Let's get back to the case at hand. The trial court was required to describe the extraordinary circumstances that necessitated a re-examination of the case property. The Impugned Order is completely silent on this aspect. Even during the hearing of this appeal, the Additional Prosecutor General has failed to persuade us that any such circumstances exist.

9. As adumbrated, all 35 packets (recovered from the Appellant) were opened with the trial court's permission. It was found that samples were drawn from only two of them. That 13 packets had a mixture of soil and *charas*, and no sample was collected from the remaining 20. The trial court's direction for sending the entire material to the PFSA gives the prosecution a premium to fill the lacunas. Such judicial intervention is contrary to the adversarial concept. It violates the fundamental right of fair trial and due process guaranteed by the Constitution as well as the principles settled by the above-mentioned judgments.

10. In view of the above, we allow this appeal and set aside the Impugned Order dated 3.6.2023.

(Abid Aziz Sheikh)
Judge

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge