Stereo. HCJDA 38

JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Writ Petition No.48984/2024

National Accountability Bureau

Vs.

Ch. Parvez Elahi etc.

JUDGMENT

Date of hearing:	**21.8.2024**
For the Petitioner:	Mr. Waris Ali Janjua, Special Prosecutor NAB.
For Respondent No.1:	Mr. Muhammad Nawaz, Advocate, with Mr. Anwaar Hussain, Advocate.
For Respondent No.2:	Mr. Amir Saeed Rawn, Advocate, assisted by M/s Mukhtar Ahmad Ranjha and Mohsin Rabbani, Advocates.

"Society wins not only when the guilty are convicted but when the criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

– Brady v. Maryland, 373 U.S. 83, 87, (1963)

Tariq Saleem Sheikh, J. – The Petitioner, National Accountability Bureau (NAB), has filed Reference No. 06/2023 (the "Reference") under section 24(b) of the National Accountability Ordinance, 1999 ("NAO"), against Respondents No. 1 & 2 and others, alleging corruption and corrupt practices. The Reference is currently pending trial before Accountability Court No. X, Lahore.

2. On 01.02.2024, the Accountability Court provided copies of the Reference along with the annexed documents/evidence to Respondents No. 1 & 2, as well as the other accused, in terms of section 24(b) of the NAO, read with section 265-C of the Code of Criminal Procedure, 1898 ("Cr.P.C."), and scheduled the case for indictment on 14.02.2024. However, the charges were not framed on that date, and the case was adjourned.

3. On 19.03.2024, Respondents No. 1 & 2 filed two separate applications before the Accountability Court. Respondent No.1 submitted that when the NAB initiated the proceedings, Mahr Azmat Hayat and Sohail Akram were among his co-accused and participated in the inquiry as accused persons. Subsequently, both received pardons and became approvers. Now, they are listed as prosecution witnesses in the Reference. Respondent No.1 asserted that the prosecution had deliberately failed to append the previous statements of these approvers with the Reference and had not provided their copies to him.

4. In his application, Respondent No.2 stated that several persons joined the inquiry and investigation of the case. The Inquiry Officer's report dated 06.07.2023 reflected that he had recorded the statements of eleven (11) persons, namely Amir Allah Ditta, Farman Iqbal, Asjad Ali, Gulfam Shahzada, Malik Imran, Khurram Sultan, Waqas Shaukat, Muhammad Usman, Tariq Perviaz, the Secretary C&W, and Mahr Azmat Hayat. Respondent No. 2 alleged that the prosecution had intentionally withheld these statements when providing documents under section 265-C Cr.P.C. on 01.02.2024. He claimed he had a right to have these statements and requested the Court's intervention to ensure their copies were furnished to him.

5. The Petitioner/NAB contested both applications, contending that Respondents No.1 & 2 had no right to have copies of the aforementioned statements.

6. The Accountability Court accepted both applications by consolidated order dated 15.05.2024 (the "Impugned Order"). NAB has challenged that order before this Court through this petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution").

The submissions

7. Mr. Waris Ali Janjua, Special Prosecutor for NAB, contends that the Impugned Order is perverse. He argues that it disregards key provisions of the NAO, particularly sections 24(b), 3, and 17, which prescribe a special procedure for filing references and conducting trials in Accountability Courts. He maintains that when a statute prescribes a

particular process for prosecuting an offence, it must be adhered to strictly. Mr. Janjua further argues that "inquiry" and "investigation" are distinct legal concepts. The NAO differentiates between these two stages, with an inquiry as a preliminary step to determine whether the case should proceed to investigation or be dropped. He submits that section 265-C Cr.P.C. mandates only the provision of statements recorded during the investigation phase, not those recorded during the inquiry. He asserts that the Accountability Court overstepped its jurisdiction by ordering the supply of statements recorded during the inquiry phase. Mr. Janjua concludes that the Court's failure to recognize this distinction has resulted in a miscarriage of justice and prays that the instant writ petition be accepted and the Impugned Order be set aside.

8. The counsel for Respondent No.1, Mr. Muhammad Nawaz, Advocate, contends that Respondent No.1 is entitled to copies of the statements made by the approvers/witnesses, Azmat Hayat and Sohail Akram, before the grant of pardon, as these fall within the scope of "previous statements" under Article 140 of the Qanun-e-Shahadat 1984 (QSO). He asserts that the failure to provide copies of these statements not only violates the statutory provisions of section 265-C Cr.P.C. but also infringes upon the fundamental rights to treatment in accordance with the law, due process, life, liberty, and a fair trial, as guaranteed by the Constitution.

9. The counsel for Respondent No.2, Mr. Amir Saeed Rawn, Advocate, contends that Article 10A of the Constitution guarantees the right to a fair trial, which includes the full disclosure of evidence. He argues that an accused cannot effectively defend against charges if all evidence gathered during the inquiry or investigation is not disclosed. In particular, the prosecution is obligated to disclose exculpatory material to the defence. Mr. Rawn asserts that, in this case, the previous statements of 11 persons requested by Respondent No.2 are crucial to his defence, and he would be seriously prejudiced if they were not provided to him.

Opinion

10. The NAO is a special law that aims "to eradicate corruption and corrupt practices and hold accountable all those persons accused of

such practices."[1] Sub-section (a) of section 17 of the NAO stipulates that, notwithstanding any other law in force, the provisions of the Code of Criminal Procedure, 1898, shall apply *mutatis mutandis* to proceedings under NAO unless they are inconsistent with it. Sub-section (b) of section 17 states that, subject to sub-section (a), the provisions of Chapter XXII-A of the Code[2] shall apply to trials under the NAO.

11. Section 265-C Cr.P.C. mandates that in all criminal cases, copies of statements and documents must be provided to the accused free of charge not later than seven days before the commencement of the trial. In the context of the present case, sub-section (1) of section 265-C is relevant and is reproduced below for ready reference:

> **265-C. Supply of statements and documents to the accused.–** (1) In all cases instituted upon police report, copies of the following documents shall be supplied free of cost to the accused not later than seven days before the commencement of the trial, namely:
>
> (a) the first information report;
>
> (b) the police report;
>
> (c) the statements of all witnesses recorded under sections 161 and 164; and
>
> (d) the inspection note recorded by an investigating officer on his first visit to the place of occurrence and the note recorded by him on recoveries made, if any:
>
> Provided that, if any part of a statement recorded under section 161 or section 164 is such that its disclosure to the accused would be inexpedient in the public interest, such part of the statement shall be excluded from the copy of the statement furnished to the accused.

12. In ***Zulfikar Ali Bhutto v. The State*** (PLD 1979 SC 53), the Supreme Court held that where the police officer does not record the statement of a witness as required by section 161 Cr.P.C. but writes it in the diary maintained under section 172 Cr.P.C. (presumably as a statement of the circumstances ascertained through the investigation) its copy should also be given to the accused because it is to be reckoned as a statement under section 161 Cr.P.C.

13. The object of section 265-C Cr.P.C. is to enable the accused to know the evidence the prosecution will present against him at trial so that he may prepare his defence and is not taken by surprise. In ***Muhammad Riaz and another v. The State*** (PLD 2003 Lahore 290), a

---

[1] Preamble of the National Accountability Ordinance 1999.

[2] This Chapter deals with trials before High Courts and Courts of Session.

Full Bench of this Court observed that this section was introduced to address the gap created by the abolition of commitment proceedings (Chapter XVIII of the Cr.P.C.) and enunciated the following principles:

(a) The provisions of section 161, Cr.P.C. are independent of section 172 Cr.P.C. Section 161 requires an Investigating Officer to record statement of a person who is acquainted with the facts of the case separately and section 172 (which is independent) relates to maintenance of case diaries as record of the various stages through which the investigation has passed. It is only the case diaries which are meant to be treated as 'privileged' and shall not be made accessible to the accused. It clearly means that the statements recorded under section 161 of the Cr.P.C. are not privileged even if recorded in the body of the case diaries.

(b) Section 265-C(1)(c) Cr.P.C. has impliedly repealed section 162 Cr.P.C. to the extent that it enjoins that when the prosecution produces a witness at the trial whose statement has been recorded under section 161 Cr.P.C., the court shall on the request of the accused direct that a copy thereof be provided to him [in order that any part of such statement, if duly proved, may be used to contradict the said witness in terms of section 145 of the Evidence Act, 1872 (Article 140 of the Qanun-e-Shahadat, 1984)].

(c) The word "witnesses" appearing in section 265-C(1)(c) Cr.P.C. has been used in the broad sense. It covers all those persons who are acquainted with the circumstances of the case and are examined by the Investigating Officer during investigation.

(d) The accused is entitled, as of right, to get copies of the statements of all the witnesses recorded under section 161 Cr.P.C. irrespective of the fact whether they have been cited as witnesses in the calendar attached to the challan or not.

(e) The statements of the witnesses and other documents mentioned in section 265-C Cr.P.C. must be supplied to the accused at least seven days before the commencement of the trial.

(f) Section 265-C Cr.P.C. has no bearing on the question of admissibility of a document or the statement of a witness which is determined in accordance with the provisions of the Qanun-e-Shahadat, 1984.

14. The following two legal questions need to be answered before we address the issue raised in this case:

I. Are the provisions of section 265-C Cr.P.C. exhaustive, and an accused cannot demand documents other than those specified therein?

II. Is the prosecution obligated to disclose/turn over exculpatory evidence to the accused?

We take up these questions *seriatim*.

Question I

15. The procedure outlined in Chapters XX and XXII-A of the Cr.P.C.[3] ensures a fair trial not only for the accused but also for the prosecution and the complainant.[4] Section 265-C, which falls under Chapter XXII-A, plays a vital role in this process by ensuring that the accused is fully informed of the prosecution's case and provided with essential materials to prepare their defence, thereby preserving the integrity of the trial. While the supply of the listed documents is a mandatory legal requirement, the question whether the list is exhaustive must be considered in light of the fundamental rights guaranteed by the Constitution and broader principles of fairness. Section 265-C should be understood as providing the minimum essential materials for the accused to defend themselves and respond to the charges adequately. Courts must retain the discretion to order the disclosure of additional documents whenever necessary to uphold fairness and ensure that justice is served.

16. Section 265-C Cr.P.C. must be read in conjunction with sections 94(1)[5] and 265-F Cr.P.C.[6] Section 94(1) allows the court to make an order for the production of any document if it is necessary or desirable for the trial. In ***Om Prakash Sharma v. Central Bureau of Investigation, Delhi*** (AIR 2000 SC 2335), while interpreting section 91 of the Indian

---

[3] Chapter XX pertains to the trial of cases by Magistrates, while Chapter XXII-A deals with trials conducted before High Courts and Courts of Session.

[4] *Hakam Deen v. The State and others* [PLD 2006 SC (AJ & K) 43].

[5] The relevant part of section 94(1) Cr.P.C. is reproduced below for ease of reference:

> **94. Summons to produce document or other thing.–** (1) Whenever any Court, or any officer incharge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order:
>
> Provided that no such officer shall issue any such order requiring the production of any document or other thing which is in the custody of a bank or banker as defined in the Banker's Books Evidence Act, 1891 (XVIII of 1891) and relates, or might disclose any information which relates to the bank account of any person except:
>
> (a) for the purpose of investigating an offence under sections 403, 406, 408 and 409 and sections 421 to 424 (both inclusive) and sections 465 to 477-A (both inclusive) of the Pakistan Penal Code, with the prior permission in writing of a Sessions Judge; and
>
> (b) in other cases, with the prior permission in writing of the High Court.

[6] The relevant part of section 265-F Cr.P.C. reads as follows:

> **265-F. Evidence for prosecution.–** (7) If the accused or any one of several accused, after entering on his defence, applies to the Court to issue any process for compelling the attendance of any witness for examination or the production of any document or other thing, the Court shall issue such process unless it considers that the application is made for the purpose of vexation or delay or defeating the ends of justice such ground shall be recorded by the Court in writing.

Code of Criminal Procedure 1973, which is *pari materia* with our section 94 Cr.P.C., the Supreme Court of India held that the powers conferred under section 91 are discretionary and enabling in nature. The court should be allowed broad latitude in exercising this discretion, and higher courts should only intervene if the lower court's decision is unreasonable or inconsistent with established judicial principles.

17. The words "whenever" and "thing" in section 94 Cr.P.C. are significant. "Whenever" indicates that a court can exercise the power to require the production of any document or other thing at any stage during an inquiry or trial. The only condition is that it must be necessary or desirable for the proceedings. In ***The State v. Chaudhry Muhammad Usman*** (2023 SCMR 1676), the accused was facing trial for certain offences punishable under the Drugs Act 1976 and the Drug Regulatory Authority of Pakistan Act 2012. The Supreme Court of Pakistan considered the questions: (i) whether an accused can request the court, before the commencement of trial, to order the production of documents not covered under section 265-C Cr.P.C., and (ii) whether an accused can make such a request before presenting a defence, despite the existence of section 265-F(7) Cr.P.C., which provides that, after entering on his defence, an accused can apply to the trial court to issue any process for compelling the production of any document. The Supreme Court answered both questions in the affirmative. It ruled that any party may apply to the court for an order under section 94 Cr.P.C., which must allow its request if the condition mentioned above is satisfied (i.e., it is necessary or desirable for the proceedings). It clarified that section 265-F(7) does not control or limit the power of a court under section 94(1). "The provisions of these two sections differ from each other in their extent and scope. They are not opposed to each other. Section 94(1) affords both the parties to an inquiry or trial (not to the accused alone) the opportunity of causing the production of any document at any stage of such inquiry or trial, with the condition that the party applying for it must satisfy the court that the production of the required document is necessary or desirable for the purposes of the inquiry or trial. Section 265-F(7), on the other hand, only gives the accused another similar opportunity at the stage of his defence subject to a lesser condition, which is that his

application should not be for the purpose of vexation, delay, or defeating the ends of justice."

18. The principle of law that can be deduced from the above discussion is that while section 265-C Cr.P.C. mandates the supply of specific documents to the accused, the court may also direct the prosecution to produce additional materials not explicitly mentioned in the section, and let the accused have access to them. However, in each case, the court must first determine whether the documents the accused requests are necessary or desirable for the trial and would foster justice and fairness. Courts derive this authority from section 94(1) Cr.P.C., and Articles 4 and 10A of the Constitution, which obligate them to ensure that every accused is dealt with according to the law and receives a fair trial.

Question II

19. Exculpatory evidence is any information or material that is favourable to an accused in a criminal case. It can take many different forms. It could be direct evidence that points to the accused innocence, evidence that negates an element of the crime, evidence or information that undermines the credibility of prosecution witnesses, or evidence that reduces culpability or lessens the severity of the punishment. Exculpatory material can also encompass forensic evidence, surveillance footage, or investigative leads that suggest the involvement of other suspects/ offenders.

20. The prosecution's duty to disclose exculpatory evidence is fundamental to ensuring a fair trial and upholding the principles of natural justice. In an adversarial system, both the prosecution and the defence must have equal access to relevant evidence, with the prosecution bearing the responsibility not only to secure convictions but also to ensure justice. This includes disclosing evidence that may weaken its case if it serves the interests of truth and fairness. Given its vast resources and investigative machinery, the State wields more power than the average accused, particularly those with limited means. In many cases, the accused lacks the same level of legal expertise, investigative tools, or access to evidence that the prosecution possesses. This imbalance makes the disclosure of exculpatory evidence critical to ensuring a fair trial. Without such

disclosure, the accused may be deprived of essential information that could prove their innocence or weaken the prosecution's case. Historically, failures to disclose exculpatory materials, whether through negligence or deliberate suppression, have resulted in numerous wrongful convictions and serious miscarriages of justice.

21. In the United States, the prosecution's duty to disclose exculpatory evidence is not just a procedural; it reflects the broader constitutional principle of due process as guaranteed by the Fourteenth Amendment of the U.S. Constitution. The Amendment ensures that no individual shall be deprived of life, liberty, or property without fair legal proceedings. In the context of a criminal trial, the suppression of exculpatory evidence violates this fundamental right by denying the accused a fair opportunity to present a complete defence. In ***Brady v. Maryland***, 373 U.S. 83 (1963), the defence had requested extra-judicial statements made by Brady's accomplice, Boblit, but they were not provided. At trial, Brady admitted his involvement in the killing but testified that Boblit had strangled the victim. This version was supported by one of Boblit's confessions. The U.S. Supreme Court ruled that suppressing Boblit's statement violated Brady's due process, noting that the statement had been requested and was "material". The Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Court affirmed the Maryland Court of Appeals' decision, granting Brady a new sentencing hearing but not a new trial. It underscored that the goal of the criminal justice system is not just to convict but to ensure trials are fair and just, adding that a prosecutor should not be the "architect of a proceeding that does not comport with standards of justice."

22. Several cases have further refined and expanded the application of the principle established in *Brady*. In ***United States v. Agurs,*** 427 U.S. 97 (1976), the U.S. Supreme Court clarified that the prosecution's duty to disclose exculpatory evidence applies even if the defence has not made a specific request for it. The Court identified three situations in which a *Brady* claim might arise: (a) when undisclosed

evidence shows that the prosecution introduced testimony it knew or should have known was perjured; (b) when the prosecution fails to comply with a defence request for specific exculpatory evidence; and (c) when the prosecution fails to disclose exculpatory evidence, where the defence either makes a request for exculpatory evidence (such as asking for "all *Brady* material" or "anything exculpatory") or makes no request at all. The Court held that the prosecution's duty applies in the third scenario only if suppressing the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." The Court explained that the duty to disclose exculpatory evidence arises from its exculpatory nature, not from the specificity of the request. The *Brady* rule applies both before trial, when the prosecutor must decide what evidence to disclose voluntarily, and after trial, when a judge may need to assess whether non-disclosure deprived the defendant of due process. The same standard of materiality applies in both contexts: the prosecutor's omission must be significant enough to affect the fairness of the trial. No constitutional violation requires the verdict to be set aside if it did not.

23. In ***United States v. Bagley,*** 473 U.S. 667 (1985), the U.S. Supreme Court held that the prosecution's failure to disclose evidence that could be used to impeach government witnesses does not automatically require reversal of a conviction. Instead, the Court ruled that such non-disclosure constitutes a constitutional violation only if the withheld evidence is "material." The standard of materiality requires a "reasonable probability" that, had the evidence been disclosed, the outcome of the trial would have been different. A "reasonable probability" is what is sufficient to undermine confidence in the trial's outcome. This standard applies regardless of whether the defence made no request, a general request, or a specific request for the evidence. The Supreme Court clarified that even if the prosecution's failure to respond fully to a specific request for exculpatory or impeachment evidence could impair the adversarial process, this impairment does not necessitate a different standard of materiality. Thus, the reviewing court can directly assess any adverse impact the non-disclosure may have had on the defence's preparation or case presentation. Consequently, the Court

reversed the lower court's decision, which had required automatic reversal for failing to disclose the impeachment evidence, and remanded the case for further determination based on the "reasonable probability" standard.

24. In ***Kyles v. Whitley,*** 514 U.S. 419 (1995), the Supreme Court emphasized four key aspects of materiality under *Brady* for determining when suppressed evidence violates due process. First, evidence is deemed material if there is a "reasonable probability" that its disclosure would have led to a different outcome in the trial, without requiring proof that it would have resulted in an acquittal. The focus is on whether the suppressed evidence could have reasonably affected the verdict. Second, the materiality test examines whether the undisclosed evidence would have cast the case in a different light and undermined confidence in the outcome rather than assessing whether the trial evidence was sufficient to convict. Third, once a constitutional violation is established under the *Bagley* materiality standard, no further harmless-error review is needed, as this standard is stricter than the harmless-error test. Finally, the prosecution's disclosure obligation depends on the cumulative effect of all suppressed evidence favourable to the defence, not on an item-by-item analysis. The prosecutor, who alone may know what evidence is undisclosed, is responsible for evaluating the overall impact and disclosing it once the "reasonable probability" threshold is met. This duty remains, regardless of whether the police fail to inform the prosecutor about the existence of favourable evidence.

25. ***Strickler v. Greene,*** 527 U.S. 263 (1999), once again highlighted the requirements for proving a violation of the *Brady* rule. In this case, the prosecution failed to disclose police notes and letters that could have been used to impeach a key witness's credibility in a capital murder trial. The Supreme Court reaffirmed that to prove a *Brady* violation, the accused must demonstrate three elements: (i) the evidence was favourable to the accused, either because it was exculpatory or impeaching; (ii) the evidence was suppressed by the prosecution, either willfully or inadvertently; and (iii) prejudice resulted, meaning there was a reasonable probability that the outcome would have been different if the evidence had been disclosed. The Court concluded that although Strickler

showed cause for not raising the claim earlier, the suppressed evidence was not material enough to undermine confidence in the verdict, given the weight of the other evidence presented at trial.

26. In ***Smith v. Cain***, 565 U.S. 73 (2012), the state did not dispute that the eyewitness's statements were favourable to Smith and were not disclosed to him. The Supreme Court held that, under *Brady*, evidence is material if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. A "reasonable probability" means that the likelihood of a different result is great enough to undermine confidence in the trial's outcome. Evidence impeaching an eyewitness's testimony may not be material if the state's other evidence is strong enough to sustain confidence in the verdict. In this case, the eyewitness's testimony was the only evidence linking Smith to the crime, and the undisclosed statements contradicted his testimony. Thus, the eyewitness's statements were material, and the state's failure to disclose them to the defence violated *Brady*.

27. ***Turner v. United States*** (2017)[7] dealt with a group of accused convicted of murder. The prosecution had failed to disclose several pieces of evidence, including witness statements that might have exonerated the accused or cast doubt on the prosecution's theory. Although the Court ruled that the suppressed evidence was not material in this case, *Turner* reaffirmed the importance of disclosure and demonstrated that the materiality of undisclosed evidence remains crucial in determining whether a *Brady* violation has occurred.

28. Based on the case law discussed, the principles regarding the disclosure of exculpatory material in the United States may be summarized as follows:

> (i) The prosecution's duty to disclose exculpatory evidence applies even if the defence does not request it.
>
> (ii) The evidence must be disclosed in time for the defence to use it effectively at trial or sentencing. While the exact timing of disclosure is not rigidly defined, exculpatory evidence must be provided early enough for the defence to prepare adequately. Late disclosures that hinder the defence's ability to prepare may constitute a *Brady* violation.

---

[7] Also reported as 2017 SCMR 1489.

(iii) The prosecution is responsible for disclosing not only evidence in its possession but also evidence held by other government agencies, such as the police.

(iv) Materiality is central to determining whether a *Brady* violation has occurred. Courts assess whether there is a "reasonable probability" that the suppression of evidence undermines confidence in the trial's outcome.

(v) Evidence that could impeach the credibility of a key witness must also be disclosed, as it is considered exculpatory if it could affect the jury's perception of the witness's reliability.

29. In the U.K., the disclosure principle is governed by several statutes, with the Criminal Procedure and Investigations Act 1996 (CPIA) at its core. The CPIA establishes a framework where the prosecution is required to disclose material that could either assist the defence or undermine the prosecution's case. This obligation applies not only at the outset of the trial but also continuously throughout the proceedings, meaning that any new evidence discovered after the initial disclosure must be shared with the defence.

30. The U.K. legal system operates on several key principles. First, the duty of initial disclosure requires the prosecution to provide material that could undermine its case or reasonably assist the defence. This does not necessarily cover all evidence the prosecution intends to use in court, but only that which meets the statutory test for disclosure. Second, the duty of continuing disclosure ensures that this obligation extends beyond the initial phase. The prosecution must continuously review the case for additional material relevant to the defence and promptly disclose it. The standard for disclosing unused material in the U.K. is broader than in the U.S. It focuses on whether it might reasonably assist the defence or weaken the prosecution's case rather than strictly on whether it would affect the trial's outcome.

31. Under the CPIA, the defence is also required to submit a defence statement outlining its strategy and any legal issues it plans to raise. This helps the prosecution identify relevant exculpatory material. However, the prosecution's obligation to disclose exculpatory material remains, even if the defence does not submit a statement. The disclosure process is subject to judicial oversight, with judges empowered to intervene if there are disputes or the prosecution fails to fulfill its disclosure duties. The CPIA also mandates the use of "disclosure

officers" in police forces, who are responsible for identifying, retaining, and organizing evidence and ensuring that no exculpatory material is overlooked.

32. The consequences of non-disclosure can be serious, potentially leading to outcomes such as the exclusion of evidence, dismissal of charges, or the overturning of convictions. U.K. courts have taken a strict stance on this issue, recognizing that non-disclosure of exculpatory evidence can result in miscarriages of justice. For instance, in ***R v. Ward*** [1993] 1 WLR 619, the non-disclosure of scientific evidence that could have exonerated the accused ultimately led to the quashing of the conviction.

33. In recent years, the U.K. has re-examined its disclosure process, particularly after several high-profile wrongful convictions and trials that collapsed due to non-disclosure of crucial evidence. A notable example is the 2017 case of Liam Allan, a university student wrongfully accused of rape. In this case, the prosecution failed to disclose text messages from the complainant, which ultimately proved Allan's innocence. The case was dropped after the evidence surfaced, but it brought widespread criticism of the U.K.'s disclosure practices and sparked calls for reform.

34. As a result of cases like Allan, the Crown Prosecution Service (CPS) and police forces introduced new guidelines and procedures aimed at improving compliance with disclosure obligations. In 2018, the Attorney General published a review of disclosure practices and recommended enhancing training, increasing resources for police and prosecutors, and promoting a culture of openness and transparency in criminal investigations.

35. While the U.K. does not follow the U.S. *Brady* rule, it has developed a robust legal framework under the Criminal Procedure and Investigations Act 1996 (CPIA) for ensuring the disclosure of exculpatory evidence. The CPIA and subsequent guidelines place a clear responsibility on prosecutors to ensure that material relevant to the defence is promptly and comprehensively disclosed.

36. In Pakistan, Article 4(1) of the Constitution mandates that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being in Pakistan. Historically, Article 4 has been regarded through judicial interpretation as embodying the principles of due process. However, with the 18th Amendment, Article 10A was formally introduced, guaranteeing the right to a fair trial and due process. It stipulates: "For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process." Article 10A not only consolidated the procedural protections available to citizens but also explicitly recognized the importance of fairness in determining civil rights and criminal charges.

37. The concept of a fair trial is rooted in justice, where both the prosecution and the defence should have equal access to all relevant information. Articles 4 and 10A create a constitutional framework that demands transparency and fairness in criminal proceedings. The State, through the prosecution, cannot selectively present evidence that supports its case while withholding material that might assist the defence. Courts in Pakistan, in line with international legal standards, have recognized that the prosecution must act fairly, which includes an obligation to disclose any evidence that may help the defence. Reference in this regard may be made to ***Sharjeel Inam Memon and others v. National Accountability Bureau and others*** (2018 PCr.LJ Note 34), ***Mustafa Jamal Kazi and others v. National Accountability Bureau and others*** (2019 YLR 650), and ***Muhammad Safdar v. Presiding Officer, Accountability Court No. IV, Karachi, and others*** (2020 PCr.LJ 683).

The case at hand

38. Respondents No. 1 & 2 filed two separate applications before the Accountability Court seeking copies of the statements of prosecution witnesses. Respondent No.1 stated that Mahar Azmat Hayat and Sohail Akram were among the accused when the NAB initiated proceedings and joined the inquiry as such. Later, they were granted pardons, became approvers, and were listed as prosecution witnesses in the Reference. Respondent No. 2, on the other hand, requested copies of

the statements of 11 persons, including Mahar Azmat Hayat, recorded during the inquiry. NAB's primary contention is that the NAO distinguishes between "inquiry" and "investigation" and that section 265-C Cr.P.C., read with sections 3, 17, and 24(b) of the NAO, mandates the provision of copies only of the statements recorded under section 161 Cr.P.C. during the investigation phase, not during the inquiry.

40. There is no cavil that "inquiry" and "investigation" are two separate concepts. The *Black's Law Dictionary* defines "inquiry" as "(a) a question someone asks to elicit information; (b) the act or process of posing questions to elicit information."[8] On the other hand, it describes "investigation" as "the activity of trying to find out the truth about something, such as a crime, accident, or historical issue; esp., either an authoritative inquiry into certain facts, as by a legislative committee, or a systematic examination of some intellectual problem or empirical question, as by mathematical treatment or use of the scientific method."[9] According to the *Oxford Advanced Learner's Dictionary*, "inquiry" signifies "a solicitation for information", while "investigate" denotes "the comprehensive exploration and scrutiny of all facts surrounding a particular event, such as a crime or an accident, with the objective of ascertaining the truth."[10] The Code defines the two terms in section 4(1) as follows:

> (k) "**Inquiry**".– "Inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court.
>
> (l) "**Investigation**".– "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

41. Legal precedents also acknowledge the distinction between inquiry and investigation. In ***Muhammad Bilal Nawaz v. Director General, Federal Investigation Agency, and others*** (2024 LHC 3288), this Court held:

> "In summary, 'inquiry' and 'investigation' are distinct processes within legal proceedings, each serving specific purposes. An inquiry refers to a preliminary examination or fact-finding process conducted by a designated authority or agency to gather information regarding a

---

[8] Black's Law Dictionary, 11th Edn., p. 946.

[9] *ibid*, p. 989.

[10] Oxford Advanced Learner's Dictionary, Fifth Edn.

> particular matter. It aims to assess the situation and determine whether further legal action is warranted. Inquiries vary in scope and formality, ranging from informal discussions to formal hearings. On the other hand, an investigation involves a detailed examination of a specific matter or allegation to gather evidence and determine its truth or validity. Investigations are conducted by law enforcement agencies or authorized entities to collect evidence, identify suspects, and gather information for legal proceedings. Although both procedures entail scrutinizing facts and evidence, inquiries are preliminary, primarily focusing on information gathering. In contrast, investigations are more thorough and structured, geared explicitly towards accumulating evidence to support legal action."[11]

42. The NAO also recognizes the distinction between inquiry and investigation. Section 18(c) of the NAO stipulates that when the Chairman of NAB, or an officer duly authorized by him, deems it necessary and appropriate to initiate proceedings against a person, he shall first refer the matter for inquiry. If, upon completion of the inquiry, the allegations of an offense under the Ordinance are substantiated with material evidence, the matter shall be converted into an investigation.

43. Section 18(g) of the NAO is another provision pointing to the aforementioned distinction. It states that the Chairman NAB, or an authorized officer, must evaluate the material and evidence gathered during the inquiry and the investigation. If they determine that it would be just and proper to proceed further and there is sufficient material to justify the filing of a reference, he shall refer the matter to a court.

44. Even though "inquiry" and "investigation" are distinct legal concepts, they are interconnected. Both stages are crucial in legal procedures, and findings from an inquiry often lead to an investigation. Under the NAO, while inquiry and investigation are separate stages preceding the filing of a reference, they are inherently linked. An inquiry is the first step, which may lead to the second step, i.e., investigation, and then to the final step, i.e., the preparation and filing of a reference against the accused.

45. In general, the accused is not automatically entitled to all the evidence collected during an inquiry, especially in cases where the inquiry is preliminary and has not led to formal charges or an investigation. However, once an investigation has been initiated and

---

[11] Also see: *Adamjee Insurance Company Ltd. v. Assistant Director, Economic Enquiry Wing* (1989 PCr.LJ 1921).

charges are brought, the accused typically has the right to access the evidence against them to prepare an effective defence. This principle is rooted in the right to a fair trial and due process, which is guaranteed by Article 10A of the Constitution. It is significant that the proviso to section 18(c) of the NAO mandates that the inquiry report shall be provided to the accused. The "report" would include all the evidence, including the statements of witnesses, on which it is based. Therefore, the accused is entitled to receive the inquiry report and the underlying evidence as a constitutional and statutory right.

46. NAB's reliance on section 265-C Cr.P.C. to refuse to provide the statements of the witnesses recorded during the inquiry to Respondents No. 1 & 2 is misconceived for various reasons. First, section 265-C Cr.P.C. cannot restrict the right to a fair trial guaranteed by Article 10A of the Constitution. Second, the proviso to section 18(c) of the NAO explicitly mandates that the NAB must provide the inquiry report to the accused if the inquiry is converted into an investigation. We have held that the "report" includes all evidence, such as witness statements, on which it is based. Section 265-C Cr.P.C. is a general law. It cannot override the NAO, which is a special law. In fact, section 3 of the NAO provides that the provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force. Thirdly, Respondents No.1 & 2 are entitled to the requested statements under section 94 Cr.P.C. (Refer to ***Chaudhry Muhammad Usman's case***). Lastly, the said statements fall within the category of "previous statements" mentioned in Article 140 of the QSO.[12] Section 162 Cr.P.C. states: "When any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid the court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Evidence Act, 1872 (Read: Article 140 of the QSO). When any part of such statement is so used, any part thereof may also be used in the

[12] Section 145 of the Evidence Act 1872.

re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

47. Mr. Rawn contended that the NAB is reluctant to provide the above-mentioned previous statements of the witnesses to Respondents No.1 & 2 because they have exculpatory material. We need not go into this controversy at this stage. Suffice it to say that, in light of the law discussed above, NAB cannot withhold exculpatory evidence from the accused.

48. We have noted that NAB is particularly reluctant to provide the earlier statements of Mahr Azmat Hayat and Sohail Akram, which they made before becoming approvers. It cannot withhold them in view of the law settled in ***Hazara Singh and others v. Emperor*** (AIR 1928 Lah 257). Speaking for Court, Dalip Singh, J. said:

> "The first point taken by Mr. Iftikhar Ali was that the learned Sessions Judge had refused to allow the accused the statement made by the approver to the police before he was tendered a pardon. The learned Sessions Judge held that this statement was made by the approver as an accused person and not as a witness, and that, therefore s. 162, Criminal P.C., did not apply to the case. In my opinion the case is covered by S. 162, but even if the learned Sessions Judge were correct in holding that this statement was not within S. 162, Criminal P.C., it would be a previous statement of a witness and it could be used either to corroborate him or to contradict him under the ordinary provisions of the Evidence Act. Counsel for the Crown has relied on S. 172, Criminal P. C., as barring this statement. I do not think that S. 172 applies in any way to the statements of persons, and certainly does not override the provisions of the Evidence Act. I, therefore, think that the statement should not have been refused in evidence. In these circumstances we hold that counsel should be furnished with a copy of the statement and any contradictions between this statement and those made in Court by the approver should be taken as left unexplained by the approver."

49. In view of the above, we have dismissed this petition, with costs of Rs.200,000/- by our short order dated 21.08.2024. These are the reasons for our decision.

(Shakil Ahmad)
Judge

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge Judge