

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT: Mr. Justice Gulzar Ahmed
Mr. Justice Qazi Faez Isa
Mr. Justice Mazhar Alam Khan Miankhel

JAIL PETITION NO. 191 OF 2018

(On appeal against the judgment dated 15.02.2018 passed by the Lahore High Court, Rawalpindi Bench in Crl. A. No. 182/2017)

Minhaj Khan Petitioner(s)

Versus

The State Respondent(s)

For the Petitioner(s): Mr. M. Amjad Iqbal Qureshi, ASC
Syed Rifaqat Hussain Shah, AOR

For the State: Ch. Zubair Ahmed Farooq,
Additional Prosecutor General, Punjab.

Date of Hearing: 09.01.2019

JUDGMENT

QAZI FAEZ ISA, J. The petitioner was tried for being in possession of 1430 grams of narcotic substances (*charas*) and convicted under section 9(c) of the Control of Narcotic Substances Act, 1997 ("**the Act**") by the Special Court (CNS), Attock. The petitioner's appeal was dismissed by Lahore High Court, Rawalpindi Bench, and his conviction and sentence was maintained.

2. Mr. Muhammad Amjad Iqbal Qureshi, the learned counsel for the petitioner, stated that the 'Narcotics Analysis Report' issued by the Punjab Forensic Science Agency, Lahore ("**the Report**" and "**the PFSA**" respectively) did not mention the "*protocols of the test applied*" as mandated in Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 therefore the Report was unreliable and in this regard relied on the case of State v Imam Bakhsh (2018 SCMR 2039) wherein it was held that, "*Rule*

6 is mandatory to the extent that the full protocols ought to be mentioned in the Report of the Government Analyst." And, that *"Non-compliance of Rule 6, in this context, will render the Report of the Government Analyst inconclusive and unreliable"* (paragraph 20, page 2050EF).

3. Ch. Zubair Ahmed Farooq, the learned Additional Prosecutor General, Punjab ("**APG**"), representing the State submits that the cited precedent should be construed to be *per incuram* because neither in the Act nor in Form II, which is the prescribed form of the report issued pursuant to Rule 6 of the Rules, reference to "protocols" is made. The relevant provisions of the Act, the learned APG states, are sections 34, 35 and 36 and none of these sections (reproduced hereunder) refer to "protocols", let alone that "protocols" are to be mentioned in the narcotics analysis report:

34. Federal Narcotics Testing Laboratory, etc.

(1) The Federal Government may, as soon as may be after the commencement of this Act, set-up a Federal Narcotic Testing Laboratory and such other institutes and narcotics testing research laboratories or notify any other laboratory or institute to be a Federal Narcotics Testing Laboratory for carrying out the purposes of this Act.

(2) The Provincial Government may, wherever deems appropriate, set-up Provincial Narcotics Testing Laboratories.

35. Government Analyst. The Federal Government or a Provincial Government may, by notification in the official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Federal Government Analysts or, as the case may be,

Provincial Government Analysts, for such areas and in respect of such narcotic drugs, psychotropic substances or controlled substances as may be specified in the notification.

36. Reports of Government Analysts.

(1) The Government Analyst to whom a sample of any narcotic drugs, psychotropic substance or controlled substance has been submitted for test and analysis shall deliver to the person submitting it, a signed report in quadruplicate in the prescribed form and forward one copy thereof to such authority, as maybe prescribed.

(2) Notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by a Government Analyst shall be admissible as evidence of the facts stated therein without formal proof and such evidence shall, unless rebutted, be conclusive.

4. The learned AGP further submits that Rule 6 itself states that the report is "*specified in Form-II*" and the specified Form-II doesn't mention *protocols* or that *protocols* be attached with the Form-II report issued by narcotic testing laboratories. Therefore, if in the report *protocols* are not mentioned the report is "*inconclusive and unreliable*" (as held in the cited judgment) nor non-mentioning of *protocols* be made the basis of an acquittal. Elaborating further the learned counsel contends that subsection (1) of section 36 of the Act requires "*a signed report in quadruplicate in the prescribed form*" which is Form-II (reproduced hereunder) and it neither prescribes nor envisages *protocols*. Therefore, if a court stipulates that *protocols* are required to be mentioned in the Form-II report, or should be attached therewith, it would amount to substituting / amending subsection (1) of section 36 of the Act which, the learned

AGP states with respect, is not within the domain of the court but exclusively within that of the Legislature.

FORM II

(See rule 6)

CERTIFICATIONS OF TEST OR ANALYSIS BY FEDERAL NARCOTIC TESTING LABORATORY GOVERNMENT ANALYST

1. Certified that the sample bearing on _____
purporting to be sample of _____ received on _____
with memorandum No. _____ dated _____
from _____ has been tested /
analyzed and the result of each test / analysis is
stated below:
2. The condition of the seal on the packet on receipt
was as follows:
Satisfactory / Unsatisfactory / None.
3. In the opinion of the undersigned the sample is
_____ as defined in the Section-2 of the CNS Act,
1997.
4. DETAILS OF THE RESULTS OF TESTS / ANALYSIS:
Sample No. _____
Gross Wt: _____ Net Wt: _____
F.I.R. No. _____ Dated: _____
Accused _____
Physical Examination: _____

CONCLUSION: _____

NOTE: In case of mixture the %age of each Alkaloids,
Opium derivatives, Opiates, Cannabis, Drugs
of abuse and the synthetic compounds are as
follows:

The sample identified as _____
and contains % _____

Signature of Government Analyst
Federal Narcotics Testing Laboratory

Signature of any other authorized
officer of the Laboratory.

5. The learned AGP alternatively contends that if, for the sake of argument it is accepted that, Rule 6 of the Rules mandates *protocols* then Rule 6 to such extent contradicts subsection (1) of section 36 of the Act and must yield to the statutory provision. Rules are to be made pursuant to the power granted to the Federal Government by the Legislature under section 77 of the Act and the

Federal Government cannot whilst exercising such power undo any provisions of the Act.

6. The matter of *protocols* is a technical matter in respect whereof the courts do not have the requisite expertise, argues the learned APG, and states that there are different *protocols* for testing which is not a matter of legal determination by courts. The matter of *protocols* concerns only technical experts therefore non-disclosure of *protocols* is inconsequential. The learned APG further states that thousands of cases have already been decided and convictions maintained even though *protocols* were not mentioned in the narcotic test reports. The non-mentioning of *protocols* in the reports does not cause any prejudice to the accused, and in the eventuality that an accused does not accept the determination that the seized substance is a narcotic substance or alleges that it was not properly tested then its retesting could be requested and the court may order it, the learned APG submits, however, if the report accords with the prescribed Form-II then merely because the particular *protocols* are not mentioned is inconsequential.

7. The learned counsel for the petitioner exercising his right of reply did not respond to any of the contentions of the learned APG and simply reiterated his reliance upon the case of State v Imam Bakhsh (above). He however states that on merits too the petitioner has a good case and in this regard referred to the material contradictions, discrepancies and other aspects of the testimonies of the prosecution's two main witnesses, namely, Constable Yasir Ali (PW-1) and Sub-Inspector and complainant Abid Hussain (PW-2).

8. We have heard the learned counsel for the parties and with their assistance examined the record. The petitioner's conviction primarily rests on the testimonies of police Constable Yasir Ali (PW-1) and Sub-Inspector and complainant Abid Hussain (PW-2). Both these witnesses stated that when they were deployed at Police Post Hattian they, in a private Honda car, drove to the place of occurrence where they saw in the petitioner's right hand a blue shopping bag which after it was searched had 1430 grams of suspected narcotic substance, which the chemical examiner's report states to be *charas*. Recovery memorandums were prepared and PW-1 was a witness to these recovery memorandums (Exhibits PA and PB) and the other witness to them was Constable Jehanzeb Khan, but the prosecution did not produce him as a witness. PW-1 stated that the place of occurrence, that is the place where the petitioner was apprehended and arrested, *"was at a distance of about 2/3 kilometers towards west from police post"* but PW-2 stated that, *"the place of occurrence is at a distance of 1 kilometer from the police post"*. The discrepancy in the distance becomes material when both these witnesses were shown to be performing duties in the area. PW-1 and PW-2 stated that in addition to them there was Constable Jehanzeb Khan and Constable Shoaib Afzal in the said car, but neither remembered who was sitting in the front seat next to the driving seat whilst remembering other minute details such as noting, that the petitioner was holding the blue shopping bag in his right hand. PW-1 did not know the owner of the car and PW-2 stated that he, *"had the private car from someone on the basis of curtsy"* [sic] but did not disclose the name of the owner of the vehicle. The petitioner had throughout maintained that he was roped into a false case because he and his wife ran

'Muhammad Ali Public School' and an influential of the area who ran another school, 'Al-Meenar Public School', wanted to have the petitioner's school closed down as the petitioner and his wife's school competed with them. Both these witnesses professed complete ignorance about the schools, which is surprising considering they were serving in the area. Another significant contradiction was that whilst PW-1 in his cross-examination stated that upon seeing the policemen the, *"accused had not run. I and Shoaib Constable had over powered the accused"* PW-2 stated that when the, *"accused saw us, he tried to run away but he was over powered"*. An unusual facet of this case is that having apprehended and arrested the petitioner the PW-2 did not take him to police station Hazro to register the FIR and instead deputed Constable Jehanzeb Khan to take his written complaint, which he wrote out when the petitioner was apprehended, to police station Hazro Constable Jehanzeb Khan, *"left place of occurrence on feet"* [sic] to the police station which was at a distance of 15/16 kilometers and the FIR was registered on the basis of said written complaint. Constable Jehanzeb Khan was not produced as a prosecution witness. Since police station Hazro was at a distance of 15/16 kilometers from the place of occurrence it does not stand to reason that Constable Jehanzeb Khan was directed to go there on foot with the written complaint, whilst PW-2 (the complainant) himself could easily have driven there in the said car. Constable Jehanzeb Khan with the written complaint arrived at police station Hazro at 3:30 pm while PW-2 reached there much later, at 5:00 pm. No explanation was offered by PW-2 what he was doing in the intervening period. The manner in which this case was split up is inexplicable; Constable Jehanzeb Khan was sent off with the

written complaint to the police station on foot while the complainant with accused and the confiscated substance went there by car. Constable Jehanzeb Khan traveling by foot arrived at the police station an hour and a half earlier than the complainant PW-2.

9. The discrepancies in the testimonies of the two witnesses; the purported lack of knowledge about certain things which they ought to have remembered whilst having a photographic recollection of other insignificant things; not knowing those things which they should have; the fact that Constable Jehanzeb Khan reached the police station before the complainant PW-2; the non-production of Constable Jehanzeb Khan who took the written complaint and was an eyewitness of the occurrence and of the recovery memorandums; and the inexplicable conduct of the complainant PW-2 in not proceeding to the police station himself to register the FIR are matters of concern and collectively of incredulity. The conclusion therefrom that we draw is that the prosecution had failed to establish its case against the petitioner beyond reasonable doubt, or, at worst, that the petitioner was involved in a false case for ulterior reasons.

10. It would therefore not be safe to maintain the petitioner's conviction on the basis of such evidence. There is therefore no need to consider the technical plea initially taken by the learned counsel for the petitioner, in terms of the judgment in the case of State v Imam Buksh and the significant submissions of the learned APG.

11. The learned trial judge took note that the witnesses had contradicted themselves but brushed them aside, stating, that, the

contradictions were not material. The matter was also perfunctorily attended to by the learned judges of the High Court.

12. Therefore, for the reasons mentioned above we convert this petition into an appeal and allow it by setting aside the impugned judgments and by acquitting the appellant Minhaj Khan in the case arising out of FIR No. 371 dated 14th December, 2016 registered under section 9(c) of the Act at police station Hazro. The appellant be released immediately from jail, if not required to be detained in connection with any other case.

Judge

Judge

Judge

Bench-III
Islamabad
14.01.2019

Approved for Reporting
(Farrukh)