Form No: HCJD/C-121.

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

Criminal Appeal No.413 of 2019

Malik Atif Abbas.

Vs.

The State.

Criminal Appeal No.399 of 2019

Malik Atif Abbas.

Vs.

The State.

Appellant's by	**: Mr. Muhammad Inam Mughal, Advocate and Muhammad Yousaf Habib, Advocate (in Criminal Appeal No.413 of 2019).**
	Nemo for the appellant (in Criminal Appeal No.399 of 2019).
Respondent's by	**: Mr. Sadaqat Ali Jahangir, learned State Counsel.**
	Tahir Khan Niazi, S.I.
Date of hearing	**: 03.02.2020**

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AAMER FAROOQ, J. - The instant appeal as well as Criminal Appeal No.399 of 2019 are directed against judgment dated 11.11.2019, whereby the appellant was tried in case F.I.R. No.20/19, dated 11.01.2019, under Section 9-C CNSA, registered at Police Station Aabpara, Islamabad and was convicted and awarded sentence of one year imprisonment and payment of fine in the sum of Rs.30,000/-.

2. It seems that the appellant filed two appeals against the said judgment. Initially the appeal was filed on 06.12.2019 (Criminal Appeal No.399 of 2019) through Asma Shabbir Malik, Advocate. Subsequently, Criminal Appeal No.413 of 2019 was filed against the same judgment on 11.12.2019. Both the appeals were taken up for hearing, however, no one appeared in Criminal Appeal No.399 of 2019, whereas the learned counsel for the appellant in Criminal Appeal No.413 of 2019 submitted that the appellant had not authorized the counsel in Criminal Appeal No.399 of 2019. The examination of *Wakalatnama* appended with Criminal Appeal No.399 of 2019 shows that the same is duly attested by Deputy Superintendent (Judicial), so the referred submission of learned counsel for the appellant seems to be without any basis, however, without going into controversy, since the counsel appeared in Criminal Appeal No.413 of 2019, the findings shall be rendered in the same and it would be deemed that Criminal Appeal No.399 of 2019 is not pressed.

3. Case of the prosecution against the appellant is that the complainant alongwith other police officers were on regular patrolling, when they received spy information that the appellant is sitting in Honda Civic car, grey colour, bearing registration No.ICT-NT-116 before Post

Office Stop Sittara Market, G-7 Markaz, Islamabad; the complainant alongwith his team, at about 02:35 pm, raided the place and apprehended the appellant from the driving seat; he disclosed his name as Malik Atif Abbas and when the dashboard of the car was searched, a black shopping bag was recovered alongwith a box, which contained Charas weighing 1020 grams and Ice weighing 07 grams. Out of the quantity of Charas, 10 g was taken as sample and 02 g of Ice for chemical analysis. Separate parcels were accordingly prepared and were forwarded for further proceedings. In order to prove its case, the prosecution tendered in evidence Muhammad Afzal, ASI as PW-1, Malik Muhammad Farooq, ASI as PW-2, Muhammad Sharif, ASI as PW-3, Muhammad Rasheed S.I/I.O as PW-4 and Muhammad Asif as PW-5. The statement of the appellant was recorded under Section 342 Cr.P.C. In addition to the said evidence, F.I.R. was tendered in evidence as Ex-PA, Memo of recovery of contraband (Charas & Ice) as Ex-PB, Memo of recovery with respect to car as Ex-PC, the complaint as Ex-PE, site plan as Ex-PF and Certificate of test/analysis as Ex-PG/1 and Certificate of test analysis with respect to Ice as Ex-PG/2. Upon conclusion of the trial, the learned Trial Court vide judgment dated 11.11.2019 convicted the appellant and sentenced him as mentioned above.

4. Learned counsel for the appellant, *inter-alia*, contended that the samples were taken on 11.01.2019 but were sent for chemical examination on 17.01.2019, hence there is a delay in sending the same, which is in violation of the law and the conviction cannot be sustained in the referred facts and circumstances. He placed reliance on cases

reported as *"Rashid Vs. The State"* ***(2015 P Cr. L J 1430)***, *"Nasir Mehmood Vs. The State"* ***(2006 MLD 1555)*** and *"Asad Ali Vs. The State"* ***(PLD 2013 Islamabad 42)***. Reliance was also placed on *"Taimoor Khan and another Vs. The State and another"* ***(2016 SCMR 621)*** and ***"2018 SCMR 2039"***. It was also contended that the evidence tendered by the prosecution is discrepant. Learned counsel also pointed out that the vehicle was also not tendered in evidence neither the shopping bag in which the alleged narcotics substance was contained. Learned counsel further contended that even alleged contraband was not weighed properly at the time of recovery, which also makes the case of prosecution doubtful.

5. Learned State Counsel, *inter-alia*, contended that the delay in sending the parcels for chemical analysis is not fatal to the case of the prosecution; there is no material discrepancy in the case of prosecution; that since no proper sample had been taken from the Charas, hence the Court confined itself only to the extent of Charas out of which the sample was sent, hence the case was controverted from 9-C to 9-B CNSA, 1997. It was submitted that the prosecution proved its case beyond reasonable doubt and no interference is required.

6. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

7. It is an admitted position that the alleged recovery was effected from the appellant on 11.01.2019 at about 02:35 pm as is borne out from the F.I.R. (Ex-PA) as well as the statements of the witnesses

appearing on behalf of the prosecution. As per the evidence, the parcels were sent for examination after the lapse of seventy two hours on 17.01.2019, which is in violation of Rule 4 of the Control of Narcotics Substances (Government Analysts) Rules, 2001. There is diverging case law on the subject as to the effect of non-compliance of the said rule. In case reported as *"Tariq Mehmood Vs. The State through Deputy Attorney-General, Peshawar"* ***(PLD 2009 SC 39)***, the Hon'ble Supreme Court observed that Rules 4 & 5 of Control of Narcotics Substances (Government Analysts) Rules, 2001 have placed no bar on the Investigating Officer to send the samples beyond seventy two hours of the seizure. It was also observed that the very language employed in the rules and the effects of its breach provide that the rules are directory and not mandatory. The august Apex Court also held that the rules cannot control the substantive provisions of the Control of Narcotic Substances Act, 1997 to be applied in such a manner that its operation shall not frustrate the purpose of the Act. However, in *"Taimoor Khan and another Vs. The State and another"* ***(2016 SCMR 621)***, the august Apex Court ıeld that the procedure for sending sample to Narcotics Testing ⊥aboratory and the effect of Rules 3, 4 & 6 of Control of Narcotics Substances (Government Analysts) Rules, 2001 was such that they are ıandatory in nature and any chemical analysis conducted in derogation :o the said Rules could not be relied upon for convicting an accused. It was also observed that Rule 6 required that after test or analysis, the result thereof, together with full protocols of the test applied, shall be signed in quadruplicate and supplied forthwith to the sender as specified in Form-II, which shall be signed and stamped by the officer authorized

and notified by the Federal Government in the Official Gazette and the said legal requirements were obligatory/mandatory in nature. It was also observed that any test/chemical analysis conducted in derogation of or in disregard to the required procedure, the report of the Chemical Examiner would lose its sanctity and could not be acted upon for the purpose of convicting a person. The matter was re-visited by the august Apex Court in *"Criminal Appeals No.523, 524 and 525 of 2017 and others"* in case reported as ***(2018 SCMR 2039)***, the august Apex Court in paragraph 9 of the judgment observed as follows:-

> ***"9. We have noted above that in Criminal Appeals Nos. 523 to 525/2017 and No. 22/2018, safe custody and safe transmission of the alleged drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory are not satisfactorily established. The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the laboratory. The prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable."***

In paragraph 10 and subsequent paragraphs, the effect of Rules 5 and 6 of the Control of Narcotics Substances (Government Analysts) Rules, 2001 was discussed. The conclusion was drawn in paragraph 17. For sake of brevity, the said paragraph is reproduced below:-

> ***"17. Rule 6 also requires the issuance of quadruplicate copies of the Report and the requirement of two signatures on the Report of the Government Analyst in Form-II. Section 36 states that the Report shall be signed by the Government Analyst only, therefore the requirement of two signatures and the issuance of quadruplicate copies, are at best, a good practice, but are merely directory provisions, as their non-compliance does not offend the Act. At this stage it is important to point out that this Court, in a series of judgments, has considered the scope of Rule 4(2) of the Rules, which provides that the samples be dispatched to the Government Analyst not later than 72 hours of its seizure and has held it to be a directory provision. Reliance is placed on Muhammad Sarfraz v. State (2017 SCMR 1874), Gul Alam v. The State (2011 SCMR 624) and Tariq Mehmood v. The State (PLD 2009 SC 39). In Taimoor Khan v. State (2016 SCMR 621) this Court has additionally held that Rules 3, 4 and 6 are mandatory. Deeper examination of this judgment reveals that reference was only being made to Rule 4(1), whereas, Rule 4(2) was not discussed, separately. This understanding falls in line with the consistent view of this Court regarding Rule 4(2) as referred to above."***

8. The august Apex Court also issued certain directions to the Federal and Provincial Governments for complying with international standards. The effect of the above judgment of the august Apex Court is that the safe custody and transmission of the narcotic substance is to be duly proved by the prosecution. The august Apex Court held that the

chain of custody begins with recovery of the seized drug and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. It was observed that the prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure, any break will cast doubts and shall impair and vitiate the case of the prosecution.

9. In so far as Rule 4(2) of the above mentioned Rules is concerned, the august Apex Court acknowledged that there is a difference of opinion in the judgments of the august Apex Court as to the said Rule being mandatory or directory. It was submitted and concluded that Rule 4(2) which requires that a sample be sent for chemical analysis within seventy two hours of the seizure is directory, however, also observed that even if the rule is directory, its substantial compliance as opposed to strict compliance is required. It was also held that non-compliance of the Rule might not invalidate the Act but its substantial compliance is necessary. The Hon'ble Supreme Court held that Rule 6 is mandatory to the extent that full protocols ought to be mentioned in the Report of the Government Analyst and non-compliance of Rule 6 will render the Report of the Government Analyst inconclusive and unreliable.

10. In view of the above case law, the certificates/reports dated 05.03.2019 show that protocols were duly followed inasmuch as the test conducted, the dissolving solvent, Mobile Phase, TLC Plate, Spraying Reagent all were duly mentioned but the latter part of it regarding sign and stamp of same by authorized officer seems not to have been complied with.

11. In so far as evidence by the prosecution is concerned, there is nothing on record to show that the car from which the alleged contraband substance was recovered was exhibited. It is only the recovery memo of the vehicle which was tendered in evidence. The prosecution witnesses did not mention the number of *lithers* and failed to do so in cross-examination, however, the alleged parcels were de-sealed before the learned Trial Court, three *lithers* of Charas were found (EX-P/1) and the examination showed that only sample was recovered from one of them. No sample was taken from the remaining *lithers*, hence the learned Trial Court reduced the quantity only to the extent of which the samples were taken, which was done rightly, hence charge was changed from Section 9-C to 9-B of CNSA, 1997. The case of the prosecution is that the alleged contraband substance was recovered from the dashboard of the car, the car having not been tendered in evidence makes the case of the prosecution doubtful and the said omission places fatal dent in its case. No explanation is available on record as to failure on part of the prosecution to tender in evidence the car. In fact, the learned Trial Court also has not mentioned anything to the effect in the impugned judgment. In view of the referred position, the conviction awarded to the appellant cannot be sustained and is liable to be set-aside. Reliance is placed on **"Agha Qais versus The State (2009 PCrLJ 1334), Abrar Hussain versus The State (2013 PCrLJ 14) and Amjad Ali versus The State (2012 SCMR 577)"** .

12. For what has been stated above, the instant appeal is **allowed** and the impugned judgment dated 11.11.2019 is **set-aside**;

consequently the appellant is acquitted of the charges in the above-mentioned case. He is ordered to be released from jail forthwith, if not required in any other case.

(GHULAM AZAM QAMBRANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in Open Court this 27th **day of March, 2020.**

JUDGE

JUDGE

M Zaheer Janjua