Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Crl. Appeal No.08 of 2021

Anti Narcotics Force

Vs

Muhammad Waseem, etc

Appellant by	:	Rana Zulfiqar, Advocate. Mr Ali Tahir, SSP (ANF).
Respondents by	:	M/s Muhammad Fahad Shabbir, Muhammad Wasim, M Asad Khan and Syeda Malia Nasir, Advocates for the respondents.
Dates of Hearing	:	**25.02.2021**

ATHAR MINALLAH, C.J.- This appeal has been preferred by the Anti Narcotics Force, (hereinafter referred to as the ***"Appellant"***), under section 48 of the Control of Narcotic Substances Act 1997, (hereinafter referred to as the ***"Act of 1997"***), assailing order dated 14.12.2020. The impugned order was passed by the learned Judge, Special Court (CNS), Islamabad, whereby an application filed by the prosecution under section 540 of the Criminal Procedure Code, 1898 (hereinafter referred to as the **"Cr.P.C."**) seeking the summoning of the forensic/chemical analysis expert was dismissed.

2. The learned Law Officer who has appeared on behalf of the Appellant has argued that; the learned trial court has misinterpreted the judgment of the august Supreme Court titled "Qaiser Javed Khan vs. The State through Prosecutor General Punjab, Lahore and another", **PLD 2020 SC 57**; more than 08 Kilograms of a narcotic drug was recovered while in the possession of the respondents; the report, dated 10.07.2017, of the National Institute of Health, Drugs Control and Traditional Medicines Division, Islamabad (hereinafter referred to as the ***"Laboratory"***) has confirmed that the substance recovered from the possession of the respondents is covered under the definition of narcotic drug under the Act of 1997; the protocols applied for testing the substance are mentioned in the report, dated 10.07.2017; the learned trial court was not precluded from summoning the chemical analyst as a witness for clarification; the reasoning recorded by the learned trial court are in disregard to the scope of powers vested in a trial court under section 540 of the Cr.P.C.

3. The learned counsel for the respondents, on the other hand, has placed reliance on the judgment of the august Supreme Court titled "Qaiser Javed Khan vs. The State through Prosecutor General Punjab, Lahore and another", ***PLD 2020 SC 57*** and has argued that if the test applied is not mentioned in the report of the chemical analyst then summoning of a witness is barred because doing so would amount to allowing the prosecution to fill in the lacuna; likewise, in order to justify summoning a witness for clarification the learned trial court must be satisfied that protocols

which were applied and the results of the test are also mentioned in the report; if the aforementioned ingredients are not mentioned in the report then summoning a witness would amount to filling the lacunas in the prosecution case.

4. The learned Law Officer for the Appellant and the learned counsel for the respondents have been heard and the record perused with their able assistance.

5. The admitted facts are that on 24.05.2017 FIR No.50/2017 was registered at the Police Station, Anti Narcotics Force, North Rawalpindi. It was alleged that the respondents were arrested from the crime scene pursuant to the recovery of narcotic drugs, weighing more than 08 kilograms, from their possession. Samples were separated and later sent to the Laboratory for chemical analysis testing. After submission of the report under section 173 of the Cr.P.C the charge was framed. The report of the Laboratory, dated 10.07.2017, was placed on the record as Ex-PG. Perusal of the report shows that the Laboratory has confirmed that the samples contained narcotic drugs within the definition of section 2 of the Act of 1997. The report further mentions that the Laboratory had applied test analysis protocols in line with the United Nations Office on Drugs and Crime guidelines of 1987, 1994, 1998, 2006 and 2008. The Laboratory, in its report, has unequivocally concluded that the samples were identified as containing Charas (Garda). The test report is dated prior to the rendering of the judgment of the august Supreme Court in the case titled "The State through Regional Director ANF vs. Imam Bakhsh and others", ***2018 SCMR 2039***. The said

judgment was rendered by the august Supreme Court on 03.10.2018. It is noted that though it is implicit in the report of the Laboratory that in order to reach a conclusion some process of testing was carried out but the details thereof are not mentioned. The Appellant filed an application for summoning the chemical analyst who had prepared the report, dated 10.07.2017, as a witness. The learned trial court, vide impugned order dated 14.12.2020, dismissed the application and the relevant reasoning is reproduced as follows:-

> *"By now it is settled law that report of the Government analyst must contain (i) the tests carried out (ii) the protocols applied to carry out these tests and (iii) the result of the tests. Any ambiguity therein may be resolved by this court by exercising its power under Proviso to Section 510 Cr.P.C but when the report is silent about the tests carried out and the protocols applied then the same would amount to filling in the defects by summoning the forensic scientist/analyst."*

6. It is noted that the august Supreme Court, in the case titled "The State through Regional Director ANF vs. Imam Bakhsh and others", ***2018 SCMR 2039*** considered and has dealt with in great detail the principles and law relating to rules 5 and 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 (hereinafter referred to as the ***"Rules of 2001"***). The august Supreme Court has observed and held that non compliance of rule 6 can frustrate the purpose and object of the Act of 1997 i.e. control of production,

processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a report that is inconclusive or unreliable. It has been observed that the report must contain the details of the test and analysis in the shape of the protocols applied for the test and that any report failing to give details of the full protocols of the test applied could not be treated as conclusive or reliable and, instead, would be suspicious and untrustworthy. It would not meet the evidentiary assumption which ought to be attached to a report of the Government Analyst under section 36 (2) of the Act of 1997. It has been further held that even if a rule is directory, its substantial compliance as opposed to strict compliance is required. In the case titled "Taimoor Khan and another vs. The State and another", ***2016 SCMR 621***, the august Supreme Court has held that rules 3, 4 and 6 of the Rules of 2001 were mandatory in nature and, therefore, if the chemical analysis has been conducted in derogation then it cannot be relied upon for convicting an accused. In the case titled "Asmat Ali vs. The State", ***2020 SCMR 1000***, the august Supreme Court has observed and held that where a forensic report conclusively establishes the narcotic character of the substance with sufficient details regarding the test carried out, the insufficiency of protocols mentioned in the said report would then be inconsequential. In the case titled "Mushtaq Ahmad vs. The State and another", ***2020 SCMR 474*** it has been observed by the august Supreme Court that rule 6 of the Rules of 2001, being directory in nature, did not preclude an accused from summoning the Government Analyst so as to solicit specific details, if any, required by the latter to vindicate his position. In the case titled "Qaiser Javed

Khan vs. The State through Prosecutor General Punjab, Lahore and another", ***PLD 2020 Supreme Court 57*** the Supreme Court has held and observed as follows:-

> *"The Report of the Government Analyst must show that the test applied was in accordance with a recognized standard protocol. Any test conducted without a protocol loses its reliability and evidentiary value. Therefore, to serve the purposes of the Act and the Rules, the Report of the Government Analyst must contain (i) the tests applied (ii) the protocols applied to carry out these tests (iii) the result of the test(s). This sequence, for clarity and better understanding can be envisaged as follows;*

Test Applied	*Protocols (Applied to carry out the tests)*	*Results of the test(s)*

> *7. Once the above three requirements under Rule 6 are contained in the Report of the Government Analyst, any ambiguity therein may be resolved by the Trial Court by exercising its power under Proviso to section 510, Cr.P.C. The said provision states 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. Therefore, the Trial Court while examining*

the said Report has the power to summon the Government Analyst in case there is any ambiguity in the said Report and seek clarification thereof. This clarification can only be based on the existing record of the Government Analyst and does not mean to allow the Government Analyst to conduct a fresh test or prepare another Report, for that would amount to giving the prosecution a chance of filling the gaps and lacunas in the Report. The Trial Court must also be mindful of the Analyst (expert) does not vouch for its evidentiary value, as observed in Khairul Bashar. The Courts are free to examine the contents of the Report and to assess its evidentiary value (weight), a matter distinct from its admissibility."

7. It is obvious from the above precedent law that compliance with rule 6 of the Rules of 2001 is crucial. A conviction is not sustainable on a report that is inconclusive or unreliable. The chemical analysis report must contain the essential details of the test and analysis. If the report does not disclose the essential details then it cannot be treated as reliable and trustworthy. The compliance with rule 6 must be substantial and its strict compliance is not necessary. If the report conclusively establishes the narcotic character of the substance and sufficient details regarding the test carried out have been mentioned, then insufficiency of protocols would not be consequential. The report should show that the test applied was in accordance with the recognized standard protocols. The report must

contain three ingredients i.e. the tests applied, the protocols applied to carry out these tests and, lastly, the results thereof. In case the report contains the said three ingredients then any ambiguity can be resolved by exercising the power vested in a court under the proviso to section 510 of the Cr.P.C. However, the evidence tendered in such an eventuality has to be confined to the existing record of the Government Analyst. What cannot be done has been expressly stated by the august Supreme Court i.e. neither a fresh test can be conducted nor another report prepared.

8. A distinction also must be drawn between the trial and appellate stages, respectively. During the trial the court is empowered to entertain evidence if it is satisfied that doing so would be essential to the just decision of the case. It is settled law that a trial court cannot allow the prosecution to fill up a lacuna in its case. A lacuna in the case of the prosecution obviously refers to an inherent weakness. A mistake, error, omission or oversight in preparing a report in disregard to the existing record cannot be ruled out. Such an omission, error or ambiguity can by no stretch of the imagination be treated as an irretrievable lacuna. The principles of safe administration of criminal justice are dictated and governed by fair play and good sense which may appear to be so to a trial court, depending on the facts and circumstances of each case. A trial court, therefore, has ample power to summon a witness provided it is satisfied that it would not amount to filling a lacuna in the prosecution case. In the case in hand we have carefully perused the report, dated 10.07.2017. It refers to the protocols applied and the

result of the test. It does not mention the nature of the test applied. But a plain reading of the report, dated 10.07.2017, unambiguously shows that it is implicit therein that the test was conducted. The learned trial court was not precluded from summoning the Government Analyst along with the existing record to tender evidence for removing the ambiguity and to give clarification. What the Government Analyst is barred from doing is to conduct a fresh test or to alter or change the report, dated 10.07.2017. Likewise, the existing record cannot be tampered with nor any addition can be made thereto.

9. It is noted that section 540 of the Cr.P.C is an independent and distinct provision which empowers a trial court to summon a witness provided the legislative intent expressly mentioned therein is fulfilled i.e. if it appears to the court that summoning of the evidence is essential to the just decision of the case. This provision is distinct from and in addition to the power contained in the proviso to section 510 of the Cr.P.C. The learned trial court, therefore, in the case in hand was empowered to consider the application and pass an order, having regard to the principle settled by the august Supreme Court, even if one of the ingredients had been omitted from being recorded in the report, dated 10.07.2017. This Court, in the case titled "Murad Ameer Shah vs. Samar Pervaiz and 3 others", ***2017 P Cr. L J 1319,*** after examining the precedent law laid down by the august Supreme Court, has summarized the principles and law relating to the summoning of a witness under section 540 of the Cr.P.C and the same are reproduced as follows:-

i. *"The power cannot be used either to advance the case of the prosecution or that of the defense.*

ii. *It is obligatory upon the Court to allow the production and examination of evidence, where it is essential for the just decision of the case.*

iii. *Once it appears to the Court that the evidence was essential for a just decision then delay in moving the application was not relevant.*

iv. *The Court has suo motu powers to exercise jurisdiction under the provisions if it appears to it that doing so would be essential for a just decision.*

v. *The application under section 540 of Cr.P.C cannot be dismissed summarily by holding that either the witness was not mentioned in the Challan or that it was belated or it might fill up lacuna in the prosecution case, unless the totality or material placed before the Court was considered to find out whether exercising powers would be essential for a just decision of the case.*

vi. *The Court has to form its opinion as to whether the evidence of any person is*

essential to the just decision and any order passed ought to reflect an application of a judicial mind.

vii. The Court is vested with wide powers and the same can be exercised at any stage of the case.

viii. The Court shall form its opinion by taking into consideration the facts and circumstances of each case.

ix. The Court has to exercise such powers judiciously and for a just decision of the case. Where a Court finds after an application of mind that the investigations carried out were defective then in such an event it cannot sit idle and becomes a duty to exercise all the enabling provisions under the law including section 540 of Cr.P.C.

x. The object and purpose of exercising powers under section 540 of Cr.P.C is to reach the truth and meet the ends of justice.

xi. *Courts must guard against exploitation of this power by the parties, so as not to allow one of them to be in a position of advantage."*

10. Reference is made and reliance placed for the above principles and law on judgments "Muhammad Azam v. Muhammad Iqbal" ***PLD 1984 SC 95***, "Muhammad Murad Abro v. The State", ***2004 SCMR 966***, "Muhammad Saleem v. Muhammad Azan and

another", ***2011 SCMR 474***, "Nawabzada Shah Zain Bugti and others v. The State", ***PLD 2013 SC 160***, "Painda Gul and another v. The State and another", ***1987 SCMR 886***, "Dildar v. The State", ***PLD 2001 SC 384***, "Sh. Muhammad Amjad v. The State", ***PLD 2003 SC 704***, "Abdul Salam v. The State", ***2000 SCMR 102*** and "Shahbaz Masih v. The State", ***2007 SCMR 1631***.

11. For the above reasons, the appeal in hand is allowed and consequently the impugned order, dated 14.12.2020, is hereby set aside. The application filed by the Appellant shall be treated as pending. The learned trial court, after affording an opportunity of hearing to the parties, is expected to decide the application at the earliest, inter alia, having regard to the principles and law highlighted hereinabove.

(CHIEF JUSTICE)

(BABAR SATTAR)
JUDGE

Approved for reporting.

Asif Mughal/.