Judgment Sheet
PESHAWAR HIGH COURT, BANNU BENCH
(Judicial Department)

Cr.A No.111-B/2020

State through Advocate General
Khyber Pakhtunkhwa
v.
Nawab Ali Khan.

JUDGMENT

For appellant: Mr. Umer Qayyum Khan, A.A.G.

For respondent: (in motion)

Date of hearing: 14.11.2023

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Dr. Khurshid Iqbal, J.-

1. This appeal challenges the judgment, dated 11.02.2020, rendered by the learned Additional Sessions Judge/Judge, MCTC, Lakki Marwat. By the judgment, the respondent was acquitted of the charges under Section 9(c) of the Control of Narcotic Substances Act, 1997 ("the Act") in the case FIR No. 865, dated 28.11.2017, registered at Police Station Naurang, District Lakki Marwat.

2. Briefly, on 28.11.2017, the complainant Karim Khan, SHO, received information that a person in Suzuki motorcar bearing Registration No. ABL-555/Sindh, traveling from Gandi Chowk to Karak, was engaged in trafficking charas for sale. In response, accompanied by a police contingent, he immediately rushed to the spot and laid a barricade. The mentioned motorcar was intercepted, and its driver, identified as Nawab Ali, son of Abul Jabbar, resident of Ghazni Khel, was deboarded. A search of the vehicle revealed 14 packets concealed in brown paper plaster within the side cover of the window, each containing

charas. Upon weighing, each packet was found to be 1000 grams (14kg in toto). The recovery was documented in a memo, dated 28.11.2017. The respondent, identified as Nawab Ali, was arrested on the same date through vide his arrest card of even date. A report (murasila) was drafted and forwarded to the police station for the registration of the case, which subsequently transformed into the ibid FIR.

3. Following the conclusion of the investigation, complete challan was submitted for trial against the respondent. Copies were provided to him in accordance with Section 265-C Cr.P.C. Subsequently, a charge was framed, and upon pleading not guilty, the respondent opted for a trial.

4. The prosecution produced a total of nine witnesses to substantiate its case. During the trial, the respondent's statement under section 342 Cr.P.C was recorded, wherein he asserted his innocence and refuted the allegations made against him. He, however, didn't opt to produce evidence in his defence or to record his statement on oath as outlined in section 340(2) Cr.P.C. Following the arguments, the learned trial court, through the impugned judgment, dated 11.02.2020, acquitted the respondent of the charges leveled against him.

5. We have heard the arguments of learned Assistant Advocate General for the State and perused the record.

6. The most significant lacuna in the prosecution's case is the failure to adhere to the necessary protocols during the chemical analysis of the contraband at the Forensic Science Laboratory (FSL). The report from the Chemical Examiner of narcotics substances, obtained under section 36 of the Act, highlights this lacuna. The section reads:

> **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 reporting quadruplicate in the prescribed form and forward one copy thereof to such authority, as maybe prescribed.
> [...]

7. The aforementioned analysis is conducted by the Government Analyst at the FSL in accordance with Rule-6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ("the rules"), which states:

> **6. Report of result of test or analysis.**--- 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 From-II.

8. A combined reading of the aforementioned provisions makes it clear that section 36 of the Act addresses the process concerning the reports submitted by Government Analysts. It delineates the steps that a Government Analyst must adhere to when handling samples of narcotic drugs, psychotropic substances, or controlled substances submitted for testing and analysis. It mandates that upon receiving a sample for testing, the Government Analyst must furnish a signed report quadruplicate in the prescribed form to the individual or entity submitting the sample. Additionally, one copy of the report must be forwarded to the designated authority as prescribed by law. At the same time, Rule-6 of the rules, in the context of section 36, elucidates the procedure for reporting the results arising from tests or analysis conducted by the Government Analyst. It serves as a complementary component to section 36, offering more nuanced insights into the content and delivery of

the test results. According to this rule, following the completion of the test or analysis, the result, along with the 'full protocols' detailing the applied testing methods, must be signed in quadruplicate. Subsequently, the signed result, accompanied by the protocols, is to be promptly supplied to the sender, as specified in Form-II. Essentially, the rule introduces additional procedural specifications regarding the content and delivery of test results. It ensures that the sender expeditiously receives not only the results, but also a comprehensive account of the testing protocols employed by the Government Analyst. This interplay between Section 36 and Rule-6 establishes a robust framework governing the reporting of test results in the broader context of the Act.

9. Turning back to the facts of the case, it transpires that the spaces on the back of the FSL report designated for relevant protocols and tests are not only blank, but also crossed out from top to bottom. This constitutes a complete violation of Rule-6 as outlined in the rules. According to section 36 of the Act, a Government Analyst, to whom a sample of a recovered substance is sent for examination, must provide a signed report in quadruplicate in the prescribed form. Failure to prepare the report in accordance with the prescribed manner and form disqualifies it as a report under section 36, preventing it from being treated as conclusive proof of the recovery of a narcotic substance from the accused person.

10. In the case of *Ikram Ullah & others v. The State* **(2015 SCMR 1002)**, the Supreme Court emphasized the importance of Rule-6, stating that the Government Analyst must refer to necessary protocols, mention applied tests, and present their results in the report. Failure to comply with this rule not only affects the reliability of the report, but also disqualifies it from

being considered a report under section 36, thereby lacking conclusive proof of the recovery of a narcotic substance from the accused person.

11. Similarly, in *The State through Regional Director-ANF v. Imam Bakhsh and others* **(2018 SCMR 2038)**, the Supreme Court addressed the mandatory nature of Rule-6, emphasizing that compliance, including mentioning the full protocols of the test applied in the report, is necessary. The Court held that non-compliance frustrates the purpose and object of the Act, rendering the Government Analyst's report inconclusive and unreliable. Since the Government Analyst did not adhere to the prescribed manner and form, it is concluded, based on the legal discourse and precedents cited, that the FSL report is inconclusive and unreliable. Therefore, no conviction can be recorded based on this report.

12. Another material weakness in the prosecution's case is the delayed dispatch of samples' parcels to the FSL. They were dispatched to the FSL after 13 days of the recovery, with no explanation at all. The secure custody of the seized substance during the intervening period lacks substantiation through a well-knit chain of custody. Consequently, the unexplained delay presents an additional factor that may weigh against the prosecution. This perspective aligns with the proposition adopted by this Court in the case of *State through Advocate-General Khyber Pakhtunkhwa v. Aqil Muhammad* **(2023 YLR 2599 Peshawar)**, wherein it was observed:

> **6. The recovery was shown as having effected on 18.05.2022. But the sample separated from it, was sent to the FSL on 24.05.2022. Thus, there is a delay of about 06 days in sending the representative sample to the FSL. Relevant in this regard is Rule 4(2) of the Control of**

Narcotic Substances (Government Analysts) Rules, 2001, which provides for the completion of such exercise within 72 hours of the recovery. The delay caused has not been plausibly explained, so keeping it in juxtaposition with the aforementioned facts and circumstances, the same could be considered as fatal to the prosecution case.

13. During the trial, 13 of the 14 packets comprising the case property were produced. Efforts were made to trace the remaining packet, and it was eventually traced. However, this circumstance unequivocally indicates that not all the packets were securely stored, as otherwise, they would have been produced collectively. In other words, the official concerned did not know as to where the said packet was lying. This aspect raises concerns regarding the safe custody of the case property.

14. While the Investigating Officer did receive the case property from the complainant/Seizing Officer and took representative samples from the packets, there was a notable omission. The I.O. did not cite the members of the investigation staff in the recovery memo. Instead, ASI Najibullah and HC Sardar Ali, both from the police operational staff, were cited. These officials could not be regarded as independent witnesses, as they were present with the complainant/seizing officer during the search.

15. While section 103 Cr.P.C is not applicable under the Act, the established precedents of the higher courts emphasize the importance of associating private witnesses with search and seizure proceedings when the seizing officers receive prior information about the trafficking of narcotic substances, ensuring fairness. This view aligns with what the Supreme Court observed in *Muhammad Aslam v. The State* **(2011 SCMR**

820). In the present case, the prosecution witnesses admitted the presence of private persons at the scene, yet none was associated with the proceedings.

16. While police witnesses are generally considered reliable, there is a judicial consensus that the inclusion of private witnesses in the recovery process adds an extra layer of caution, as observed in various cases. For instance, in *Hakim Ali v. The State* **(2001 PCr.L.J 1865 [Karachi])**, the conviction and sentence were set aside due to the absence of an independent witness despite the occurrence taking place during daylight. Similarly, in a 2013 case (*Ghulam Mustafa v. The State*, **2013 PCr.L.J 860 [Sindh]**), the court, while acquitting the accused, noted that the prosecution's failure to cite private witnesses, despite a significant number of people being present at the crime scene, made the story unnatural. This view was also expressed by this Court in *Imran v. The State* **(2013 PCr.LJ 640 Peshawar)**.

17. Upon a thorough scrutiny of the prosecution evidence, we have arrived at the inescapable conclusion that despite the recovery of significant narcotic substances, the prosecution has failed to substantiate the charges against the respondent. A fundamental principle of criminal law dictates that even a single, slight, but reasonable doubt is sufficient for the acquittal of the accused. Recently, the Supreme Court reiterated the significance of this principle in *Ahmed Ali v. State* **(2023 SCMR 781)**. Additionally, another cornerstone of criminal law is the presumption of innocence granted to an accused during trial. Upon acquittal, this presumption is doubled. It is imperative to state that an appellate court ordinarily refrains from overturning an acquittal unless it is manifestly perverse, fanciful, conjectural, glaringly inconsistent with the evidence

on record, and results in a miscarriage of justice. In this regard, the judgment of the Supreme Court in the case of *Jehangir vs. Aminullah & others* **(2010 SCMR 491)** is pertinent. However, the facts and circumstances before us differ.

18. Considering the aforementioned reappraisal of the evidence, we conclude that the prosecution has not succeeded in proving the charges against the respondent. Consequently, we uphold the acquittal, and, as a result, dismiss the present appeal in *limine*.

Announced
14.11.2023
(Ghafoor Zaman)

JUDGE

JUDGE

SCANNED
18 NOV 2023

(D.B)
Hon'ble Mr. Justice Fazal Subhan
Hon'ble Mr. Justice Dr. Khurshid Iqbal