JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR

JUDICIAL DEPARTMENT

Cr. Misc:/Q.P No. 77-P/2022.

JUDGMENT

Date of hearing.....12.12.2022.....

Petitioners: (Mohibullah) By Mr. Fawad Afzal Safi, Advocate.

Respondents (State) By Mr. Muhammad Inam Khan Yousafzai, AAG,

Mr. Kamran-us-Salam Qazi, Amicus curiae.

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ISHTIAQ IBRAHIM, J.- This petition, under section 561-A Cr PC, calls for the evaluation of an order of Learned Additional Session Judge XVI/JSC Peshawar that discarded the defense objection on allowing the prosecution witness to refresh memory from the police record.

2. In the petitioner's trial for the offense under section 11 CNSA/ 9D CNSA (F.I.R No 1223 dated 1.8.2021 P.S Hayatabad, Peshawar), the trial court examined Ibad Wazir, the prosecution witness. Ibad Wazir is witness to the recovery of contraband. He testified to the alleged incident of 1.8.2021, the recovery of ICE weighing 5 grams from the personal search of accused Inamullah, six

packets of heroin weighing 3750 grams, and ICE weighing 06 Kg from the secret cavities of the car in which the accused traveled. He also testified to the separation of samples and the seal of the case property. He finally affirmed the correctness of the recovery memorandum Exhibit PW 4/1. At this juncture, the defense objected that without a formal request for refreshing memory, the witness had perused his statement on the file. The prosecutor resisted the objection claiming the rights of the witness under Article 155 of the Qanoon-e-Shahadat Order 1984. The trial court decided that the witness has the right to refresh memory under Article 155 of the Qanoon-e-Shahadat Order 1984 and that he may peruse his statement and the record he had endorsed.

3. In the first question in cross-examination, the defense asked the witness about answering from the police file. The witness admitted that he had perused his police statement and the contents of the recovery memorandum during examination-in-chief. To another

question that shortly followed, the witness answered he was reading the police file during cross-examination.

4. After a few questions in cross-examination, the defense objected again that the witness could not refresh his memory without a formal request and that the police file is before the witness when he is in the witness box. The trial court overruled the objection and ordered that the witness already had permission to refresh memory under Article 155 of the Qanoon-e-Shahadat Order 1984.

5. The petitioner counsel submits that the trial judge erred in allowing the witness to refresh his memory without a formal request from him or the prosecution. He contends that the method adopted in allowing the witness to have the whole police file before him while giving testimony cannot conceivably be called "refreshing memory. He urges that such practice, if permitted, would bring the exercise of cross-examination at naught, and would seriously prejudice defense rights, thus a flagrant violation of the right of a fair trial.

6. Arguments heard. Record perused.

7. The petition raises questions of significant legal import on the use of police files, the use and evidentiary value of statements under section 161 CrPC in evidence, and the scope, and method of refreshing the memory of the witnesses.

8. As a general rule, witnesses forget, and the use of aids to stimulate or jog the memory is permitted. The trial judge has discretion in allowing witnesses to refresh their memories, albeit circumscribed by the applicable law. It would be necessary, therefore, to put the law in context. The discussion shall proceed on all the documents that may have relevance to investigation.

9. Section 172 Criminal Procedure Code deals with police diaries. The section mentions that the investigation officer shall enter into it the day-to-day record of his investigation. It further mentions:

1. *Court may send for the diaries;*
2. *Court may use such diaries, not as evidence in the case but to aid in the inquiry or trial;*
3. *The accused is neither entitled to use such diaries nor entitled to see them;*
4. *The provisions of section 161 or section 145 of the Evidence Act, of 1872 (now Articles 157 and 140 of the Qanoon-e-Shahadat Order 1984) shall apply if the police officer*

who made them refreshes his memory or the court uses the diary to contradict such officer.

10. It follows, from above, the police diary is essentially a confidential record that the accused cannot see or use as evidence. However, the accused is entitled to use it when the court questions the witness about that diary or the police officer refreshes his memory. Furthermore that only the police officer who made the diary can use it to refresh his memory.

11. The earliest authority on the point, Allahabad High Court decision in **Queen-Empress vs Mannu on 13 July 1897**[1] dealt with this aspect and held:

"There is no provision in Section 172 of the Code of Criminal Procedure enabling any person other than the Police officer who made the special diary to refresh his memory by looking at the special diary, and the necessary implication is that a special diary cannot be used to enable any witness other than the Police officer who made the special diary to refresh his memory by looking at it. This is in truth a general principle of law. The Criminal Court, but not an accused person or his agent, unless

[1] Queen-Empress vs Mannu on 13 July, 1897 (indiankanoon.org)

the Police officer has been allowed to look at the diary in order to refresh his memory, can use the special diary for the purpose of contradicting the Police officer who made it, but before doing so the Court must comply with the specific enactment of Section 145 of the Indian Evidence Act, 1872, and call the attention of the Police officer to such parts of the special diary as are to be used for the purpose of contradicting him, otherwise such a use of the special diary would be illegal. There is no provision in Section 172 of the Code of Criminal Procedure enabling the Court, the prosecution or the accused to use the special diary for the purpose of contradicting any witness other than the Police officer who made it, and the necessary implication is that the special diary cannot be used to contradict any witness other than the Police officer who made it. Section 145 of the Indian Evidence Act, 1872, does not either extend or control the provisions of Section 172 of the Code of Criminal Procedure. It is only if the Court uses the special diary for the purpose of contradicting the Police officer who made it that Section 145 of the Indian Evidence Act, 1872, applies, and in such case it applies for that purpose only, and not for the purpose of enabling the Court or a party to contradict any other witness in the case, or to show it or any part of its contents to any other witness. No reading of Section 172 of the

Code of Criminal Procedure consistent with the rules of construction and a knowledge of the English language is possible by which the special diary is to be used to contradict any person except the Police officer who made it. It is not enacted in Section 172 of the Code of Criminal Procedure by reference to Section 145 of the Indian Evidence Act, 1872, or otherwise that if the special diary is used by the Court to contradict the Police officer who made it, it may thereupon or thereafter be used to contradict any other witness in the case."

12. As for the statements recorded under section 161 CrPC, their only use is for contradiction. Section 162 CrPC explicitly provides it. That is not to say, however, that the recovery memo also comes within the prohibition of section 162 CrPC. The distinction was admirably made clear in *"**Vishnu Krishna Belurkar V The State Of Maharashtra on 18 February 1974(1974) 76 BOMLR 627**"*

"Now if these are the purposes for which such panch namas are made, the question that arises for consideration is whether the fact that such record is scribed by the police officer investigating the offence or by a constable working under him during the course of such investigation converts such record into statements made by the panch to the police officer within the meaning of Section

162,Criminal Procedure Code, for, unless such record amounts to statements made to a police officer within the meaning of that section it would not fall within the ban contained therein. It was not disputed before us that Section 157 of the Evidence Act is controlled by the special provisions of Section 162, Criminal Procedure Code, and therefore, if the statements, though falling under Section157 of the Evidence Act, were also to fall under Section 162, Criminal Procedure Code such statements would become inadmissible and could be made use of only for the purpose mentioned in the proviso to Section 162, that is to say, for contradicting the witness after following the procedure indicated in Section 145 of the Evidence Act.....In our view, having regard to the primary and essential purpose for which these panchanamas are made during the course of investigation of an offence, it is not possible to come to the conclusion that there is an element of communication, that is to say, there is an intention to communicate to the police officer the subject-matter of the things seen and heard by the panchas which are recorded in these documents.....In our view, there is a clear distinction between a narration made to the police officer with a view to communicate or impart knowledge of the subject-matter of such narration to the police officer and a mere record of what the panchas have seen and heard which is intended to serve as aid memoir to the panchas when they give evidence at the trial".

13. The last and most significant question involves the correct application and procedure of refreshing memory. Article 155 Qanoon-e-Shahadat Order 1984 relates to the present recollection revived, and Article 156 Qanoon-e-Shahadat Order 1984 to the past recollection recorded.

14. The Court of Appeal Manitoba (Province of Canada) in **R v. Wilks, 2005 MBCA 99 (CanLII)** drew the distinction as:

> *"Witnesses often forget, and so it is permissible to use aids to assist the witness. The use of these aids will fall into one of two categories. They will either i) assist the witness by reviving his or her memory so that the witness, whose memory has been jogged by the aid, now has a present memory of the fact ("present memory revived"), or ii) be a record of the fact, previously made and now attested to as an accurate record ("past recollection recorded")"*
>
> "***In the case of present memory revived, the aid is not evidence, but is simply a facilitative mechanism which becomes irrelevant once the witness has had his or her present memory revived by the use of the aid. In the case of past recollection recorded, there is no present memory, so it is the evidence of the past recollection, recorded usually in the form of notes or the like, that is admitted***".

15. The precondition for admissibility of the past recollection recorded from Article 156 of QSO is that the witness is sure that the facts were correctly recorded in

the document that is used to refresh memory. The **Wilks**[2] case refers here to **Wigmore** criteria:

1. *The past recollection, must have been recorded in some reliable way.*

2. *At the time, it must have been sufficiently fresh and vivid to be probably accurate.*

3. *The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".*

4. *The original record itself must be used if it is procurable."*

From the **Wilks**[3] case preconditions for the admissibility of present memory revived are as follows:

> *"Although no precise formula need be followed, the substance of what is dealt with in the following extract from Thomas A. Mauet, Donald G. Casswell & Gordon P. Macdonald,* Fundamentals of Trial Technique, *2nd Canadian ed. (Boston: Little Brown and Co., 1984), must be discernible from the evidence (at pp. 102-3):*
>
> *A certain litany must be followed to establish the foundation for refreshing recollection....*
>
> *The following elements must be demonstrated to establish a foundation for refreshing the*

[2] https://www.canlii.org/en/mb/mbca/doc/2005/2005mbca99/2005mbca99.html
[3] https://www.canlii.org/en/mb/mbca/doc/2005/2005mbca99/2005mbca99.html

recollection of a witness who is on the witness stand:

1. *Witness knows the facts, but has a memory lapse on the stand.*

2. *Witness knows his report or other writing will refresh his memory.*

3. *Witness is given and reads the pertinent part of his report or other writing.*

4. *Witness states his memory has now been refreshed.*

5. *Witness now testifies what he knows,* ***without further aid of the report or other writing****."*

It is on the aforesaid standard that the judges discarded the evidence in the **Wilks**[4] Case:

> *"But the problem in the case was that what went into evidence went well beyond the officer's current recollection. For example, "[t]he account of the murder was put into evidence word for word from the excluded ... transcript" (at para. 55).*

This, said Binnie J., should not have been permitted (at paras. 60-61):

> *... The officer was quite entitled to attempt to "refresh" his memory by an out-of-court review of the corrected transcript, but in the witness box his testimony had to be sourced in his "refreshed" memory, not the excluded transcript.*

[4] https://www.canlii.org/en/mb/mbca/doc/2005/2005mbca99/2005mbca99.html

In short, the problem with the corrected transcript as a stimulus to memory is not that it was itself inadmissible but that it failed to stimulate".

16. Applying the law to the facts, it is an inescapable conclusion that the trial court did not follow the legally acceptable procedure of permitting a witness to refresh memory. It is clear that before reading the record, the witness did not mention his memory lapse or that he needed a document to jog his memory as a prerequisite for invoking Article 155 QSO. There was no request from the prosecutor or the witness to lay the foundation for memory recall. He was an eyewitness to the recovery supposed to depose in the witness box from his memory, not from police or judicial file, authored by someone else. If this practice is not streamlined it would definitely have effect on the dispensation of criminal justice. Again, and more importantly, the trial court permitted the witness to record evidence while the police file was before him. Instead of using the record to stimulate witness memory, if at all it was exhausted, the trial Court

allowed him to have a full view of the file, regardless of the nature of the documents. The witness, as it appears, *regurgitated from the record, unbridled to read when and where wanted.*

There is no gainsaying that allowing the probative value of the recorded statement to prevail would be prejudicial to the rights of the accused and an infringement of a fair trial.

For the foregoing, I would allow the petition, set aside orders of the trial court dated 8.9.2022, and direct that the trial court shall record the evidence of PW-Ibad Wazir again in accordance with the guidelines given in this judgment. Consequently, the statement of PW Ibad earlier recorded in the case shall be considered inadmissible and of no legal effect.

Copy of this judgment be placed before Hon'ble the Chief Justice for his kind perusal and the approval for circulating copies of this judgment to all the Judicial Officers in the Province for their guidance.

Announced
Dated. 12.12.2022.

JUDGE

(S.B of)
Hon'ble Mr. Justice Ishtiaq Ibrahim.

(K.Ali)