

**JUDGMENT SHEET**

**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR**

[JUDICIAL DEPARTMENT]

**Criminal Appeal No. 750-P/2020.**

**PRESENT: -**

For the appellant: - Mr. Yousaf Khan Mirzadher,  
Advocate.

For the State: - Mr. Muhammad Tariq Kakar, Special  
Prosecutor, for ANF.

Date of hearing. 16.02.2021.

**J U D G M E N T**

**MUHAMMAD NAEEM ANWAR, J.-** Hamid Ullah, the appellant, is accused in a case registered vide FIR No. 73, dated 06.05.2018, under section 9 (c) CNSA of Police Station, ANF, Peshawar, on the charges that he along with co-accused on 06.05.2018 was smuggling twelve kilograms' heroin in a motorcar bearing registration No. UE-133/Islamabad, driven by him. After completion of investigation, he was forwarded to the Judge, Special Court (CNS) Peshawar for trial, where, during pendency of the trial, the State through Special Public Prosecutor submitted an application for resampling of the narcotic lying in sealed condition in the "Malkhana" of the Police Station, which was allowed on 17.06.2020, consequently, SI Shamim Raza with the assistance of Naib Court, after de-sealing of the case property in the court, had drawn fresh 12 samples on 30.06.2020. Feeling aggrieved from

the process of the resampling of the narcotics, the appellant has filed the instant appeal on the ground that the trial court has not only accepted the request of the prosecution without issuing notice to him but such process, as held by the apex court, amounts to grant a premium to the prosecution to fill the lacuna in its case.

2. Arguments heard and record perused.

3. Perusal of the record reveals that during investigation of the case samples were separated from the recovered illegal stuff for chemical analysis on 06.05.2018, which were received by the concerned Lab on 07.05.2018 and result thereof was also submitted. The record further transpires that after commencement of the trial, four prosecution witnesses, including statement of Inspector Jawad Altaf Raja, the complainant, were recorded wherein the report of FSL was exhibited as Exh.PW 4/17 and, thereafter, the subject application for resampling of the narcotics was submitted by the State as, according to the prosecution, the report of FSL already received and exhibited sans the requisite protocols, therefore, does not meet the requirements as directed by the august Supreme court.

4. No doubt, Hon'ble the apex Court in the case titled **"The State vs. Imam Bakhsh (2018 SCMR 2039)"** has observed that the report of the Government Analyst, prepared in consequence of Rule 6, must provide for (i) tests and analysis of the alleged drug (ii) the results of test (s) carried out

and (iii) the test protocols applied to carry out these tests and non-compliance of rule 6 and absence of any of these mandatory elements frustrates the purpose and object of the Act thereby diminishing the reliability and evidentiary value of the report but it does not mean that during trial, if any flaw arises in the prosecution case, which gives benefit to the accused in shape of deficient report, as in the instant case, the prosecution should be given a chance to rectify the same. Relevant Para 6 of the judgment is reproduced herein below: -

6. Re-testing of the drug, as argued by the DPG, in case of a deficient report would amount to giving a premium to the prosecution for its mistakes and lapses. In any case any flaw in the case of the prosecution must only benefit the accused. Sending the alleged drugs for re-testing would be giving another chance to the prosecution to build its case, which is not the role or business of the court. Besides there is a likelihood that the chain of custody of the alleged drug is compromised with the passage of time. Regarding the objection that Imam Bakhsh may overturn hundreds of convictions, it is pointed out that the sole purpose of this Court is to dispense justice in accordance with law and it matters less if one or many convictions are overturned because of the correct interpretation and application of the law. Imam Bakhsh purposively interprets the Act and finds Rule 6 to be a mandatory provision regarding information to be reflected in the Report of the Analysts. Hence, the argument that Imam Bakhsh is per incuriam, is hopelessly misconceived and rejected. For completion of record it is pointed out that review filed in Imam Bakhsh was also dismissed vide an earlier order dated 06.02.2019.

Similarly, in the case of **Muhammad Naeem and another vs. the State and others (PLD 2019 SC 669)**, the august supreme court has observed that: -

5. An important dimension of this case is the role of a criminal court, in an adversarial system of justice. "The adversarial system is a two-sided structure under which criminal trial courts operate that pits the prosecution against the defence. Justice is done when the most effective and rightful adversary is able to convince the judge or jury that his or her perspective on the case is the correct one." The fundamental construct of our criminal courts is modeled on an adversarial system of justice

which decides on the strength of the evidence of the parties. However, in exceptional cases our criminal courts also exercise inquisitorial powers under certain provisions<sup>10</sup> of Criminal Procedure Code, 1898 (Cr. P.C) to secure the ends of justice, however, these provisions are not attracted in the facts of the present case. The court being a neutral arbiter has to dispassionately appreciate, appraise, examine and weigh the evidence placed before: it, rather than by ignoring the evidence and embarking on a probing journey guided by emotions, sentiments and sense of self-styled justice pegged on the lofty notion of societal reform. In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. The judge should not enter the arena so as to appear that he is taking sides. The court cannot allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence tendered by them. Any such step would tarnish the objectivity and impartiality of the court which is its hallmark. Such favoured intervention, no matter how well-meaning strikes at the very foundations of fair trial, which is now recognized as a fundamental right under Article 10-A of our Constitution.

6. In the present case the direction of the High Court for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner amounts to granting the prosecution a premium on its failure to put up a proper case in the first instance. Such judicial intervention is opposed to the adversary principle and offensive to the fundamental right of fair trial and due process guaranteed under the Constitution. See *Dildar v. State*; *Painda Gul v. State* and *State v. Amjad Ali*. The High Court has travelled beyond its lawful powers under section 423(1)(a) Cr. P.C. and has in fact directed to conduct re-investigation or further investigation of the case, which is not permissible under the law. Even otherwise, calling for fresh examination of the intoxicating substance at the appellate stage after all these years may frustrate the settled law as to safe custody and safe transmission of the recovered substance making the report of the chemical examiner suspect and unreliable.

**5.** Recently, in a case titled **Qaiser Javed Khan vs. The State through Prosecutor General Punjab, Lahore and another (PLD 2020 SC 57)**, Hon'ble the Supreme Court of Pakistan has settled and clear the uncertainty relating to the issue of resampling and retesting by holding that the trial Court while examining the Report has the power to summon the

Government Analyst in case there is any ambiguity in the said Report and seek clarification thereof and 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. Relevant Para 7 of the judgment, for convenience, is reproduced below: -

“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 legal position that the per se admissibility of the Report i.e., without examining the Analyst (expert) does not vouch for its evidentiary value, as observed in *Khair-ul-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.”

**6.** Thus, in view of the above discussion, and while driving guidance from the case law, *supra*, the order of learned trial court for retesting of the narcotics is not in accordance with law and, thus, liable to be set side. Hence, the appeal is allowed, resultantly, the impugned order of learned trial court

for resampling and retesting of the narcotics is set aside with the observation that the evidentiary value of the report of FSL already received and exhibited is to be seen by the trial court in view of the principle enunciated by the Hon'ble Supreme Court in Shazia Bibi's case (**2020 SCMR 460**) & Asmat Ali's case (**2020 SCMR 1000**) and Para 7 of the judgment of the Hon'ble Supreme Court in the case of Qaiser Javed Khan, *supra*.

**Announced**  
**16.02.2021.**  
 \*M.Zafra PS\*

**SENIOR PUISNE JUDGE**

**J U D G E**

(Hon'able Mr. Justice Rooh ul Amin Khan and  
 Hon'able Mr. Justice Muhammad Naeem Anwar).