

**JUDGMENT SHEET**  
**PESHAWAR HIGH COURT, PESHAWAR**  
JUDICIAL DEPARTMENT

**Cr.M (QP) No. 71-P/2020**

**Aqib Ali V/s the State.**

**Date of hearing   21.12.2020**

**Mr. Noor Alam Khan Advocate, and Ms. Shabbina Noor,  
Advocate, for the petitioner.**

**Mr. Tariq Kakar, Special Prosecutor ANF, for the  
respondent.**

**JUDGMENT**

**SYED ARSHAD ALI, J.** My this judgment is aimed to dispose of this petition as well as the connected petition i.e. Cr.M (QP) No.74-P/2020, as essentially in both the cases adjudication of a common question of law are involved.

**2.** Brief facts of the case are that the petitioner Aqib Ali is an accused in the case FIR No.107 dated 14.08.2019, registered under Section 9-C of the Khyber Pakhtunkhwa CNSA, 1997, for having in his possession amphetamine weighing 4.975 KGs.

**3.** The accused Hayat Ullah is charged in the case FIR No.120 dated 05.09.2019, under Sections 9-C/15 of the Khyber Pakhtunkhwa CNSA, 1997, for having in his possession heroin weighing 6 KGs.

4. In both the cases, the learned Trial Court has allowed the application of the prosecution for collecting further samples from the recovered contraband for chemical analysis. Needless to mention that at the time of recovery of the contraband by police, samples were collected from the said contraband and were sent to the chemical examiner and the report whereof is available on the file.

5. The learned counsels for the petitioners has argued that the learned Trial Court had no jurisdiction to allow the investigation for collecting further samples from the alleged contraband for chemical analysis as it amounts to filling *lacuna* in the prosecution case which is contrary to law. The learned counsel has relied upon the law laid down in this regard by the Apex Court in the case of “**Muhammad Naeem (PLD 2019 Supreme Court 669)**” and “**Oaiser Javed Khan (PLD Supreme Court 57)**”.

6. On the other hand, the learned Special Prosecutor on behalf of the State has relied upon the judgment of the Apex Court in the case of “**Hussain Shah (PLD 2020 Supreme Court 132)**”, wherein, the collection of re-sampling was approved by the Apex Court.

7. Arguments heard and record of the case was perused.

8. Admittedly, in both the cases, investigation is complete and the Trial Court has taken cognizance of the matter. Thus, the essential issue before this Court whether learned Trial Court had any jurisdiction to allow the

investigation/prosecution to collect further samples from alleged recovered Narcotics for the report of chemical analysis. In this regard, it is the argument of the learned prosecutor that the said samples were collected prior to the judgment of the Apex Court emphasizing upon observing the protocol while examining the contraband by the expert. This argument has not impressed this Court because in our judicial dispensation, which is adversarial in its nature and character, the Court acts as a neutral arbiter and has to dispassionately apprise, appreciate, examine and weigh the evidence placed before it rather than by ignoring the evidence and embarking on a probing journey. “**Muhammad Naeem case** (PLD 2019 Supreme Court 669)”.

9. The case law referred by the learned prosecutor (*Hussain Shah's case*), in my humble view, is not applicable to the present case. In the said case the police had recovered chars weighing 12000 KG contained in 600 bags, each bag containing 20 packets were recovered and samples of the recovered substance were returned by the chemical examiner and had required the investigation that the sample had to be taken from each and every packet of the substance recovered. Thus, in the said case there was no FSL report available and in this background the Trial Court had allowed taking of sample

from all the parcels. Whereas, in the present case the samples were already collected by the investigation officer/police officer and it was sent to the report for chemical analysis which is available on file. The issue of retaking samples has been elaborately answered and deprecated by the Apex Court in the latest judgment reported as “**Qaiser Javed Khan Vs the State** (PLD 2020 Supreme Court 57)”, wherein, the Hon’ble Apex Court has held that:-

*“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 Tribunal 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”. (Underline is for emphasis).*

10. Thus, the impugned order of the Trial Court in both the cases is contrary to the law laid down by the Apex Court in

(*Qaiser Javed Khan's*) case supra, which is, thus, not sustainable and is, accordingly, set aside. The learned Trial Court shall proceed in the matter strictly in accordance with law.

11. Thus, both the petitions are disposed of, in the above terms.

**Announced**  
**21.12.2020**

**J U D G E**