

In the Supreme Court of Pakistan
(Appellate Jurisdiction)

Present:

Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Maqbool Baqar
Mr. Justice Syed Mansoor Ali Shah

Criminal Appeal No. 523, 524 & 525 of 2017.

(On appeal from judgment of Balochistan High Court, Quetta dated 30.6.2016, passed in CrI.A No. 114, 141 & 142/2016)

and

Criminal Appeal No. 494 of 2017.

(On appeal from judgment of Balochistan High Court, Quetta dated 23.5.2016, passed in CrI.A No. 84/2015)

and

Criminal Appeal No. 452 of 2017.

(On appeal from judgment of Balochistan High Court, Quetta dated 25.4.2016, passed in CrI. Jail Appeal No. 33/2015)

and

Criminal Appeal No. 22 of 2018.

(On appeal from judgment of Balochistan High Court, Quetta dated 19.12.2016, passed in CrI.A No. 269/2015)

and

Criminal Appeal No. 51 of 2017.

(On appeal from judgment of Balochistan High Court, Quetta dated 19.12.2016, passed in CrI.A No. 269/2015)

and

Criminal Petition No. 94-Q of 2017.

(On appeal from judgment of Balochistan High Court, Quetta dated 13.11.2017, passed in CrI.A(CNS) No. (T)58/2017)

The State through Regional Director ANF (in all cases)

Appellant/Petitioner

Versus

Imam Bakhsh (in CrI.A-523 to 525/16)
Fida Muhammad (in CrI.A-494/17)
Muhammad Yousaf (in CrI.A-452/17)
Mohsin (in CrI.A No. 22/2018 & CrI.P-94-Q/17)
Abdul Wahab & another (in CrI.A No. 51/18)

Respondents

For the State:

Raja Inam Ameen Minhas, Spl. Prosecutor ANF.
Ch. Aitsham-ul-Haq, Spl. Prosecutor ANF.
Mr. Tariq, DD (Law), ANF.

On Court Notice:

Syed Nayyab H. Gardezi, DAG.

For the respondents:
(in CrI.A-452/17 & 51/18)

Mr. M. Shabbir Rajput, ASC.

Other respondents:

N.R.

Date of hearing:

03.10.2018

JUDGMENT

Syed Mansoor Ali Shah, J. – Through this consolidated judgment we decide these appeals as they raise common questions of law.

Criminal Appeals No. 523, 524 & 525 of 2017

2. One Imam Bakhsh (hereinafter referred to as “**Respondent No. 1**”) was booked in FIR No. 04/2014, lodged at Police Station Anti-Narcotics Force, Turbat, Balochistan on 06.05.2014 under section 9(c) of the Control of Narcotic Substances Act, 1997 (“**Act**”). According to the crime report, Respondent No. 1 was driving a double cabin Vigo Pickup when it was stopped by the raiding party. On Respondent No. 1’s pointing out, 10.500 kilograms of opium was recovered from the rear of the Pickup in a bag. Out of the recovered opium, 200 grams was separated as sample for analysis and the remaining opium was sealed and taken into possession. The double door Vigo Pickup vehicle was also taken into possession. After investigation and regular trial, the Special Judge (Control of Narcotic Substances), Quetta convicted Respondent No. 1 through judgment dated 30.3.2016 under section 9(c) of the Act and sentenced him to 14 years’ imprisonment alongwith fine of Rs. 60,000/- or in default of payment of fine to further undergo three months’ simple imprisonment, with benefit of section 382-B, Cr.P.C.

3. In Criminal Appeal No. 523/2017 Respondent No. 1 challenged his conviction before the High Court. In Criminal Appeal No. 524/2017, the State sought enhancement of the sentence of Respondent No. 1 to capital punishment or at least imprisonment for life. In Criminal Appeal No. 525 /2017, the State prayed that the assets of Respondent No. 1 be frozen. The High Court through the

impugned judgment acquitted Respondent No. 1 on the ground that the report of the Federal Government Analyst, Quetta, Baluchistan, dated 13.05.2014 (Ex.P-3/E) did not conform to the requirement of section 36 of the Act, as well as, Rules 5 and 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ("**Rules**") and, in particular, protocols of the test applied were not mentioned in the Report. The High Court further held that even safe custody and safe transmission of the drug to the Federal Government Analyst were not established as the alleged recovery was effected on 30.03.2014, whereas the sample was received by the Government Analyst on 09.05.2014 and the intervening period and the mode of transmission were not explained.

Criminal Appeal No. 494/2017

4. One Fida Muhammad (hereinafter referred to as "**Respondent No. 2**") was booked in FIR No. 55/2014 dated 25.06.2014, Police Station Anti-Narcotics Force, Quetta, under section 9(c) of the Act. According to the crime report, upon raiding a house, a polythene bag was recovered from Respondent No. 2 containing different pieces of dried opium, weighing 45 kilograms. Samples were sent to chemical analyst in sealed parcels. After investigation and regular trial, Respondent No. 2 was convicted vide judgment dated 23.2.2015 by the Special Judge (Control of Narcotic Substances), Quetta under section 9(c) of the Act and was sentenced to rigorous imprisonment for life with fine of Rs. 200,000/- or in default thereof to further undergo one year simple imprisonment with benefit of section 382-B, Cr.P.C. On appeal against the judgment of the trial court, the High Court acquitted Respondent No. 2 on the ground that samples were not taken from all the pieces of opium recovered, as a result 1100 grams of opium taken as sample could not

be considered as a representative sample and, thus, Respondent No. 2 could only have been convicted for 1100 grams of opium and placed reliance upon Ameer Zeb v. State (PLD 2012 SC 380) and Fareed Ullah v. State (2013 SCMR 302). In addition to this the High Court also held that the Report of the Government Analyst was not in accordance with section 36 of the Act and Rules 5 and 6 of the Rules. According to the impugned judgment the report of the Government Analyst under the Rules prescribed in Form II stipulates signatures of two officers of the laboratory but the Report bears only one signature of the Federal Government Analyst. The Report is also silent regarding necessary protocols of the test applied.

Criminal Appeal No. 452/2017

5. One Muhammad Yousaf (hereinafter referred to as "**Respondent No. 3**") was booked in FIR No. 65/2014 dated 29.08.2014 registered at Police Station Anti-Narcotics Force, Quetta. According to the crime report 90 kilograms of *charas garda* was recovered from Respondent No. 3, who was in the driving seat of a Corolla Car, which was intercepted by the Anti-Narcotics Force officials. Samples were taken from the recovered substance and were sent to the Government Analyst. After regular trial Respondent No. 3 was convicted by the Special Judge (Control of Narcotic Substances), Quetta under section 9(c) of the Act and was sentenced to suffer imprisonment for life and to pay fine of Rs. 200,000/- or in default to further undergo simple imprisonment for one year, with benefit of section 382-B Cr.P.C. Respondent No. 3 filed an appeal against the same before the High Court and vide impugned judgment dated 25.04.2016, he was acquitted of the charge on the ground that the Report of the Government Analyst was in violation of section 36 of the Act and Rules 5 and 6 of the Rules, inasmuch as, the report of the

Federal Government Analyst bears only one signature of the Government Analyst whereas the Rules stipulate signatures of two officers, and the Report is also silent regarding the necessary protocols of the test applied, therefore, the Report was not considered to be conclusive proof regarding the status of the recovered substance and could not be relied upon for sustaining conviction.

Criminal Appeal No. 22/2018 and Criminal Petition No. 94-Q of 2017

6. One Mohsin (hereinafter referred to as "**Respondent No. 4**") was booked in FIR No. 2/2014 dated 12.02.2014, Police Station Anti-Narcotics Force, Turbat under section 9(c) of the Act. The Anti-Narcotics Force officials recovered 87 kilograms of heroin from Respondent No. 4 who was driving a Toyota Surf. The samples were separated from each sack of the recovered substance and sent to the chemical analyst. After investigation and regular trial Respondent No. 4 was convicted by the Special Judge, Quetta vide judgment dated 11.08.2015 under section 9(c) of the Act and was sentenced to imprisonment for life with fine of Rs. 200,000/- or in default thereof to further imprisonment of one year with benefit of section 382-B, Cr.P.C. Respondent No. 4 preferred an appeal before the High Court wherein he was acquitted of the charge on the ground that the Report of the chemical examiner was not in accordance with section 36 of the Act and Rules 5 and 6 of the Rules, inasmuch as, the Report of the Federal Government Analyst bears only one signature of the Government Analyst whereas the Rules stipulate signatures of two officers. The Report was also silent about the protocol of the test applied. It was also held that safe transmission of the alleged drug to the laboratory was not established as the police officer who had taken the contraband to the office of the chemical examiner was not produced in court. In the connected petition, i.e. Criminal Petition No.

94-Q/2017 the State has prayed for forfeiture of the property of Respondent No. 4.

Criminal Appeal No. 51/2018

7. One Abdul Wahab (hereinafter referred to as "**Respondent No. 5**") was booked in FIR No. 16/2015 dated 26.05.2015, registered at Police Station Anti-Narcotics Force, Quetta. According to the crime report, 9 kilograms of *charas (garda)* was recovered from Respondent No. 5 from his bag at Sada Bahar Coach Terminal and recovery was also made from his partner, i.e. one Noor-ud-Din. 200 grams were separated as a sample and sent in a sealed packet to the Chemical Analyst for examination, while the remaining recovered substance was sealed. After investigation and trial, Respondent No. 5 was convicted by the Special Judge (Control of Narcotic Substances) Quetta under section 9(c) of the Act vide judgment dated 30.11.2015 and was sentenced to undergo rigorous imprisonment for 11 years and fine of Rs. 50,000/- or in default thereof to further undergo simple imprisonment for three months, with benefit of section 382-B, Cr.P.C. In appeal before the High Court, Respondent No. 5 was acquitted of the charge vide impugned judgment dated 30.12.2016 on the ground that the Report of the Government Analyst was in violation of section 36 of the Act, therefore, there was no conclusive proof that the recovered substance was *charas (garda)*. Further, the Report also did not refer to any protocol of the test applied.

Opinion of the Court

8. We have heard the learned counsel for the parties and have gone through the record with their assistance. At the very outset, it is observed, that the controversy in these cases revolves around the consequence of non-compliance of Rules 5 and 6 of the Rules. In other

words, whether the said Rules are mandatory or directory and whether non-compliance of these Rules invalidates the Report of the Government Analyst. Another overlapping ground in some cases has been the lack of safe custody and safe transmission of the recovered substance from recovery till its receipt by the Narcotics Testing Laboratory.

Chain of Custody - Safe custody and safe transmission

9. We have noted above that in Criminal Appeals No. 523 to 525/2017 and No. 22/2018, safe custody and safe transmission of the alleged drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory are not satisfactorily established. The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the laboratory. The prosecution must establish that the chain of custody was unbroken, unsuspecting, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable.

Rules 5 and 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 – whether mandatory or directory ?

10. The Control of Narcotic Substances (Government Analysts) Rules, 2001 operationalizes the purposes of the Act to the extent of test and analysis of the recovered substance. These Rules do not spell out any consequence for their non-compliance, therefore, it needs to be determined whether these Rules are mandatory or directory and whether non-compliance of these Rules invalidates the Report of the Government Analyst or not.

11. To distinguish where the directions of the legislature are imperative and where they are directory, the real question is whether a thing has been ordered by the legislature to be done and what is the consequence, if it is not done. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. The duty of the court is to try to unravel the real intention of the legislature. This exercise entails carefully attending to the scheme of the Act and then highlighting the provisions that actually embody the real purpose and object of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceedings. Thus, some parts of a statute may be mandatory whilst others may be directory. It can even be the case that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision, is directory, owing to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. "In each case one must look to the subject matter and consider the importance of the provision disregarded and

the relation of that provision to the general object intended to be secured¹." Crawford opined that "as a general rule, [those provisions that] relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than of substance, are directory²." In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man. According to Maxwell, "Where the prescription of statute relates to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed or in other words as directory only. The neglect of them may be penal indeed, but it does not affect the validity of the act done in disregard of them³." Our Court has held while determining the status of a mandatory or directory provision that "perhaps the cleverest indicator is the object and purpose of the statute and the provision in question."⁴ And to see the "legislative intent as revealed by the examination of the whole Act."⁵

12. In order to apply the above test, it is essential to understand the legislative intent of the Act and the scope of the Rules framed thereunder. The title of the Act and its objective is to control the production, processing and trafficking of narcotic drugs and

¹ See N.S.Bhindra's - *Interpretation of Statutes* – 12th edition. Lexis Nexis. P.435

² Crawford, *Statutory Construction*, p.104.

³ Maxwell, *Interpretation of Statutes*, 11th edition, pp 369

⁴ *The Collector of Sales Tax, Gujranwala v. Super Asia Muhammad Din & Sons* (2017 SCMR 1427)

⁵ *Zia Haider Rizvi v. Deputy Commissioner of Wealth Tax* (2011 SCMR 420)

psychotropic substances. The Act substantively provides for prohibition of cultivation of narcotic plants⁶, prohibition of possession of narcotic drugs, etc.⁷ providing that “no one shall produce...possess, offer for sale, sell, purchase, distribute, deliver, transport, dispatch any narcotic drug or psychotropic substance or controlled substance, prohibition of import and export of narcotic drugs and prohibition of trafficking or financing of narcotic drugs.⁸ Punishments for contravention are provided under section 9 which range from imprisonment, extending to two years and moving up to capital punishment of death or imprisonment for life depending on the quantity of the narcotic drug, psychotropic or controlled substance.

13. Sections 34 to 36 of the Act provide for Narcotics Testing Laboratories, the Test Reports of the Government Analyst and their evidentiary value. Section 36 mandates that the Government Analyst after carrying out tests and analysis of the sample of any narcotic drug or psychotropic or controlled substance shall deliver a Report as prescribed under the Rules. This Report under section 36(2) enjoys the benefit of being admissible as evidence of the facts stated therein without formal proof and such evidence, unless rebutted, is conclusive. Credible testing and analysis of the alleged drug is fundamental to actualizing the provisions of the Act as it determines the true nature of the recovered substance or the seized drug. Section 36(2) underlines the importance of such a test Report. Report of the Government Analyst, is therefore, pivotal in realizing the objective and purpose of the Act.

14. The Rules are framed under section 77 of the Act to carry out the purposes of the Act. Rule 5 provides a process for proper

⁶ Section 4 of the Act.

⁷ Section 6 *ibid.*

⁸ Section 8 *ibid.*

examination of the sample in the Narcotics Testing Laboratory. This rule reflects the best practice to be adopted while dealing with examination of the sample. Substantial compliance of this Rule is sufficient as its non-compliance does not offend or upset the statutory regime of the Act. Non-compliance of Rule 5 will not cut so deep as to invalidate the Report of the Government Analyst.

15. Rule 6 on the other hand stands on a different statutory footing. It provides that the Report of the Government Analyst, after the test and analysis, is to furnish the result together with full protocols of the test applied. The accuracy of test and analysis⁹ and the correct application of the full protocols¹⁰ alone can determine if the recovered substance is a narcotic drug or a psychotropic or controlled substance. "Protocol" means an explicit, detailed plan of an experiment, procedure or test¹¹ or a precise step-by-step description of a test, including the listing of all necessary reagents and all criteria and procedures for the evaluation of the test data.¹² Rule 6 requires that full protocols of the test applied be part of the Report of the Government Analyst. Every test has its protocols, which are internationally recognized and a test without the observance of its protocols has no sanctity. "Full Protocols" include a description of each and every step employed by the Government Analyst through the course of conducting a test. Hence, the Report under Rule 6 must specify every test applied for the determination of the seized substances with the full protocols adopted to conduct such tests.

16. Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e. control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot

⁹ Some examples of techniques/methods used as standard protocol for the analysis of Opium, Charas and Heroin are color tests, Gas chromatograph-mass spectrometer (GC-MS) and Fourier transform infrared spectrophotometer (FTIR) etc.

¹⁰ More than one protocol may be applied in a given test or analysis.

¹¹ Dorland's Medical Dictionary for Health Consumers. 2007

¹² McGraw-Hill Concise Dictionary of Modern Medicine. 2002

be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under section 36(2) of the Act underlines the statutory significance of the Report, therefore details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any Report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under section 36(2). Resultantly, it will hopelessly fail to support conviction of the accused. This Court has already emphasized the importance of protocols in Ikramullah's case (*supra*).

17. Rule 6 also requires the issuance of quadruplicate copies of the Report and the requirement of two signatures on the Report of the Government Analyst in Form-II. Section 36 states that the Report shall be signed by the Government Analyst only, therefore the requirement of two signatures and the issuance of quadruplicate copies, are at best, a good practice, but are merely directory provisions, as their non-compliance does not offend the Act. At this stage it is important to point out that this Court, in a series of judgments, has considered the scope of Rule 4(2) of the Rules, which provides that the samples be dispatched to the Government Analyst not later than 72 hours of its seizure and has held it to be a directory provision. Reliance is placed on Muhammad Sarfraz v. State (2017 SCMR 1874), Gul Alam v. The State (2011 SCMR 624) and Tariq Mehmood v. The State (PLD 2009 SC 39). In Taimoor Khan v. State (2016 SCMR 621) this Court has additionally held that Rules 3, 4 and 6 are mandatory. Deeper examination of this judgment reveals that

reference was only being made to Rule 4(1), whereas, Rule 4(2) was not discussed, separately. This understanding falls in line with the consistent view of this Court regarding Rule 4(2) as referred to above.

18. It is important to underline that even if a rule is directory, its substantial compliance as opposed to strict compliance is required. Non-compliance of such a rule might not invalidate the act but as it provides a legislative process based on public interest, transparency and good governance, its substantial compliance is necessary.

Directions to the Federal and Provincial Governments

19. Efficient, credible and proficient Narcotics Testing Laboratories are integral for successful execution of the Act and the Rules. The said laboratories have to be manned by competent analysts having prescribed qualifications. Rule 3 provides for the qualifications of a Government Analyst and it has already been held to be a mandatory provision by this Court.¹³ Further, the obligations of the Government Analysts under these Rules must be complied with for ensuring accurate and meaningful chemical analysis. In order to standardize the Narcotics Testing Laboratories across the country, the protocols and tests applied by these laboratories must meet common international standards, e.g. Guidelines issued by the United Nations Office on Drugs and Crime (UNODC) or Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) or the International Organization for Standardization (ISO) – 17025:2017. We, therefore, direct the Federal Government and the respective Provincial Governments to ensure that the Government Analysts in the Narcotics Testing Laboratories are qualified as per Rule 3, the tests and their protocols are common across the country are as per International guidelines. The officials of the National and Provincial Narcotics Testing Laboratories shall follow the Rules in the best

¹³ *Taimoor Khan's case* (supra)

manner possible so that efficient and meaningful chemical analysis can be achieved. In case of failure, disciplinary action be taken against the officials, in accordance with law.

20. We conclude that Rule 5 of the Rules is directory while Rule 6 is mandatory to the extent that the full protocols ought to be mentioned in the Report of the Government Analyst. Non-compliance of Rule 6, in this context, will render the Report of the Government Analyst inconclusive and unreliable. The representative samples of the alleged drug must be in safe custody and undergo safe transmission from the stage of recovery till it is received at the Narcotics Testing Laboratory.

21. In all the above appeals we have observed that there has been non-compliance of Rule 6 to the extent of absence of the full protocols of the tests applied. Additionally, in Criminal Appeals No. 523-525 of 2017 and No. 22 of 2018, safe custody and safe transmission of the seized drugs had also not been established.

22. For the above reasons, the main appeals No. 523, 494, 452 of 2017, and No. 22 & 51 of 2018, against acquittal are dismissed. As a consequence, Criminal Appeal No. 524 of 2017 for enhancement of sentence and Criminal Appeal No. 525 of 2017 & Petition No. 94-Q/2017 for forfeiture of property, are also dismissed.

Judge

Judge

Islamabad,
03rd October, 2018.
Approved for reporting.

Judge

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