

[Supreme Court of Pakistan]

Present: Asif Saeed Khan Khosa, C.J., Mushir Alam and Syed Mansoor Ali Shah, JJ

KHAIR-UL-BASHAR---Appellant

Versus

The STATE---Respondent

Criminal Appeal No. 94 of 2019, decided on 8th April, 2019.

(On appeal from the judgment of Lahore High Court, Rawalpindi Bench, dated 11.9.2018, passed in Criminal Appeal No. 05 of 2017)

(a) Control of Narcotic Substances (Government Analysts) Rules, 2001---

---R.6---Control of Narcotic Substances Act (XXV of 1997), S. 36(1)---Narcotics---Government analyst report, preparation of---Mandatory requirements---Report of the Government Analyst, prepared in consequence of R. 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001, must provide for, firstly, tests and analysis of the alleged drug; secondly, the results of the test(s) carried out, and, thirdly the test protocols applied to carry out these tests---Said three elements formed the fundamental and the core elements of a valid Report prepared by a Government Analyst---Non-compliance of R. 6 and absence of any of the said mandatory elements/requirements frustrated the purpose and object of the Control of Narcotic Substances Act, 1997 ('the Act'), thereby diminishing the reliability and evidentiary value of the Report---Under S. 36 of the Act, the report of the Government Analyst, whilst being admissible in evidence without formal proof, was rebuttable and could be questioned by the accused, inter alia, on the ground of non-compliance of the information required under R. 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001---Judgment reported as State v. Imam Bakhsh (2018 SCMR 2039) purposively interpreted the Act and (rightly) found R. 6 to be a mandatory provision regarding information to be reflected in the Report of the Analysts.

State v. Imam Bakhsh 2018 SCMR 2039 affirmed.

2015 SCMR 1002 ref.

(b) Control of Narcotic Substances (Government Analysts) Rules, 2001---

---R.6---Control of Narcotic Substances Act (XXV of 1997), S. 36(1)---Narcotics--- Government analyst report--- Deficiencies--- Whether prosecution should be allowed re-testing of samples in case of a deficient report prepared by the Government analyst---Held, that re-testing of the drug, in case of a deficient report would amount to giving a premium to the prosecution for its mistakes and lapses--- 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 was not the role or business of the court---Besides there was a likelihood that the chain of custody of the alleged drug was compromised with the passage of time.

(c) Control of Narcotic Substances (Government Analysts) Rules, 2001---

---R. 3---Control of Narcotic Substances Act (XXV of 1997), S. 35---Narcotics---Government analyst---Qualifications---Concept of testing under the Control of Narcotic Substances Act, 1997 ('the Act'), the establishment of the testing laboratories, tests and analysis and the report of the Government Analyst were premised on the assumption that the Government Analyst possessed the prescribed qualifications provided under S. 35 of the Act read with R. 3 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ('the Rules') which provided that the Government Analyst shall be a person who has a degree in Pharmacy or Pharmaceutical Chemistry or Medicine from a recognized University or of any other institution recognized by the Federal Government for such purpose and had not less than three years postgraduate experience in the test and analysis of drugs---Analysts who meet the said qualifications provided under the Act and the Rules must prepare these reports.

Ahsan Hameed Lilla, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellant.

Muhammad Jaffar, DPG for the State.

Date of hearing: 8th April, 2019.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---The appellant was stopped by the Police while driving a Suzuki van and upon searching the van, the Police allegedly recovered 1500 grams of heroin wrapped in black shopping bag stacked under the driving seat. With this allegation the appellant was booked in FIR No.18 dated 15.01.2016 under section 9(c) of the Control of Narcotic Substances Act, 1997 ("Act") at Police Station Westridge, Rawalpindi. After regular trial, the appellant was convicted under section 9(c) of the Act vide judgment dated 07.12.2016 and sentenced to rigorous imprisonment for six years with a fine of Rs.30,000/-. The appeal filed by the appellant before the High Court was dismissed. Hence this appeal with the leave of the Court granted on 04.02.2019.

2. At the very outset we have noticed that the Report of the Punjab Forensic Agency dated 18.02.2016 is deficient in material particulars, i.e. while it mentions the names of the three tests performed, it does not provide results of these tests (except a consolidated result) and there is no mention of the test protocols applied in carrying out the said tests. In *State v. Imam Bakhsh* (2018 SCMR 2039) while discussing Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ("Rules") this Court held that the information required under the said Rule is mandatory. Hence, 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 the test(s) carried out and (iii) the test protocols applied to carry out these tests. These three elements form the fundamental and the core elements of a valid Report prepared by a Government Analyst. Non-compliance of Rule 6 and absence of any of these mandatory elements/requirements frustrates the purpose and object of the Act thereby diminishing the reliability and evidentiary value of the Report. Rule 6, inter alia, requires that the Government Analysts must specify the test protocols applied and, therefore, the Report must signify (by name) the protocols applied to carry out the test(s)/analysis, which would certify that full protocols have been followed while conducting the tests/analysis. In case the veracity of the Report is challenged by the accused or is being examined by the Court, compliance of full protocols can be called for from the Government Analyst and verified.

3. Recent judgment of this Court in *Minhaj Khan v. The State* (2019 SCMR 326) handed down after *Imam Bakhsh*, was pointed out to us to highlight certain objections raised by the prosecution against *Imam Bakhsh*. These objections were recorded in *Minhaj Khan*, as argued by the APG in that case, but were not addressed as the case was decided on merits. These objections have been raised before us through reference. DPG, relying on the objections raised in *Minhaj Khan* pointed out that *Imam Bakhsh* is per incuriam on the ground that it goes against the clear provision of the statute as the requirement of protocols is not mentioned in sections 34, 35 and 36 of the Act or FORM II under the Rules, therefore, the same could not have been read into the Report of the Analyst as that would fall in the domain of the legislature; Rule 6 contradicts section 36(1) of the Act and, therefore, must yield to the Act; Protocols being a technical matter in respect whereof the courts do not have the requisite expertise and is not a matter of legal determination; Thousand of cases have been decided and convictions maintained even though protocols were not mentioned in the Report; Non-mentioning of the protocols does not prejudice the prosecution as they can always request for re-testing.

4. It appears that the import of *Imam Bakhsh* has not been fully understood. In *Imam Bakhsh* the question before this Court, other than the chain of custody of the drugs, was whether Rules 4, 5 and 6 of the Rules were mandatory or directory. This determination was important because these Rules dealt with the Report of the Government Analyst which is the pivotal evidence for awarding conviction under the Act. This Court in *Imam Bakhsh*, while discussing the nature of Rule 6 of the Rules held that

"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 In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation o that provision to the general object intended to be secured. Crawford opined that 'as a general rule, [those provisions that] related to the essence of the thing to be performed or matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than substance, are directory .perhaps the cleverest indicator is the object and purpose of the statute and the provision in question." After examining the entire scheme of the Act, it was held that "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 Report of the Government Analyst is, therefore, pivotal in realizing the objective and purpose of the Act." And "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." Thus, holding that tests and analysis, results and test protocols to be a mandatory requirement under Rule 6 and the same must be reflected in the Report.

5. Section 36(1) of the Act also mandates that the Report must be in the prescribed form. This Court, in Ikramullah,¹ while discussing the scope of Rule 6 of the Rules held that " a complete mechanism is to be adopted by the Chemical Examiner upon receipt of samples and a report is then to be submitted by him referring to the necessary protocols and mentioning the tests applied and their results Section 36 of the Control of Narcotic Substances Act, 1997 requires a Government Analyst to whom a sample of recovered substance is sent for examination to deliver to the person submitting the sample a signed report in quadruplicate in "the prescribed form" and, thus if the report prepared by him is not prepared in the prescribed manner then it may not qualify to be called a report in the context of section 36 of the Control of Narcotic Substances Act, 1997 so as to be treated as a "conclusive" proof of recovery of narcotic substance from an accused person."² A signed report in the prescribed form under section 36(1) of the Act does not refer to FORM-II, as argued by the DPG, but to the form, structure, design and content of the Report provided in the Rules. This is also so because the Act was promulgated³ on 11.07.1997 while the Rules were framed and gazetted on 28.11.2001 under the title of Control of Narcotic Substances (Government Analysts) Rules, 2001, almost after four years. Therefore, FORM-II was not known to the legislature at the time of the promulgation of the Act, hence section 36(1) simply required that the structure and content (form) of the Report must be as provided in the Rules. FORM II, hereunder, is a manifestation of Rule 6 but does not have a stand alone existence.

FORM II (See rule 6) CERTIFICATION OF THE TEST OR ANALYSIS BY FEDERAL NARCOTIC TESTING LABORATORY GOVERNMENT ANALYST

1. Certified that the sample bearing on _____ purporting to be sample of _____ received on _____ with memorandum No. _____ dated _____ from _____ has been test/analyzed and the result of each test/analysis is stated below: 2. That the condition of the seal on the packet on receipt was as follows; Satisfactory/Unsatisfactory/None. 3. In the opinion of the undersigned the sample is _____ as defined in the Section 2 of the CNS Act, 1997. 4. DETAILS OF THE RESULTS OF TESTS/ANALYSIS: Sample No. _____ Gross Wt : _____ Net Wt: _____ FIR No. _____ Dated _____ Accused _____ Physical Examination _____ Conclusion _____ NOTE: In case of mixture the %age of each

Alkaloids, Opium derivatives, Opiates, Cannabis, Drugs of abuse and the synthetic compounds are as follows: The sample identified as _____ and contain % Signature of Government Analyst Federal Narcotics Testing Laboratory Signature of any other authorized officer of Laboratory

The general head of DETAILS OF THE RESULTS OF TESTS/ANALYSIS provides only for Physical Examination and Conclusion, and does not mention of tests or their results. This would hardly be of any significance unless the Report provides the information required under Rule 6 in order to establish the culpability of the accused. Hence, for the Report to serve the purposes of the Act and the Rules, it must contain (i) the tests and analysis of the alleged drug (ii) the result of each test(s) carried out and (iii) the test protocols applied (the name(s) of protocols applied) to carry out these tests. It is important to underline that protocols are an intrinsic part of the tests and analysis. A test conducted without following the protocols does not pass for a test or meet the requirement of Rule 6.

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 filed⁴ in Imam Bakhsh was also dismissed vide an earlier order dated 06.02.2019.

7. It is also important to underline that the Government Analysts while giving the details of tests/analysis, the results for each test and the test protocols applied in the Report, must remember that under section 36 of the Act, the report of the Government Analyst, whilst being admissible in evidence without formal proof, is rebuttable and can be questioned by the accused, inter alia, on the ground of non-compliance of the above information required under Rule 6. Further more, the admissibility of the Report in evidence under section 36(2) of the Act does not per se vouch for its evidentiary value. The court is free to examine the Report and to assess whether it meets the requirements of the Report under the Act and the Rules, even if the Report is not rebutted by the accused. The concept of testing under the Act, the establishment of the testing laboratories, tests and analysis and the report of the Government Analyst are premised on the assumption that the Government Analyst possesses the prescribed qualifications provided under section 35 of the Act read with Rule 3 of the Rules which provides that the Government Analyst shall be a person who has a degree in Pharmacy or Pharmaceutical Chemistry or Medicine from a recognized University or of any other institution recognized by the Federal Government for this purpose and has not less than three years postgraduate experience in the test and analysis of drugs. Analysts who meet the qualifications provided under the Act and the Rules must prepare these reports. This was echoed in Imam Bakhsh in the following words:

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.⁵ 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 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. (emphasis supplied)

8. The emphasis that the Report of the Government Analyst must carry the information required in Rule 6 is to ensure that convictions under the Act are based on reliable and credible reports. Courts can apply purposive interpretation of the statute to bridge the gap between the law and the safe administration of criminal justice system based on prudence, caution, circumspection and judiciousness. We cannot deny that the "the aim of interpretation in law is to realize the purpose of the law, the aim in interpreting a legal text is to realize the purpose the text serves. Law is, thus, a tool designed to realize a social goal. It is intended to ensure the social life of the community, on the one hand, and human rights, equality, and justice on the other.⁶" Professor Barak has argued that there is a subjective and an objective purpose of a statute. Subjective purpose reflects the actual intention of the legislature, in contrast to the intention of the legislature when applied to the times of the day. Mere focusing on the legislative intent alone fails to regard the statute as a living organism in a changing environment making it insensitive to the existence of the system in which the statute operates. "It is not capable of integrating the individual statute into the framework of the whole legal system. It makes it difficult to bridge the gap between law and society. Thus, it does not allow the meaning of the statute to be developed as the legal system develops. Rather, it freezes the meaning of the statute at the historical moment of its legislation, which may no longer be relevant to the meaning of the statute .If a judge relies too much on legislative intent, the statute ceases to fulfill its objective. As a result the judge becomes merely a historian and an archaeologist and cannot fulfill his role as a judge. Instead of looking forward, the judge looks backward. The judge becomes sterile and frozen, creating stagnation instead of progress . The objective purpose of the statute means the interests, values, objectives, policy, and functions that the law should realize The judge should not narrow interpretation to the exclusive search for subjective legislative intent. He must also consider the "intention" of the legal system for the statute is always wiser than the legislature. By doing so the judge gives the statute a dynamic meaning and thus bridges the gap between law and society.⁷"

9. Not so far back this Court required taking of separate samples from every packet of the substance recovered, proof of safe custody and safe transmission of the samples of the recovered substance and proof of conscious possession on the part of a passenger of a vehicle. Apart from that, safeguards were insisted upon in holding of a test identification parade and in recording of a confessional statement under section 164, Cr.P.C. In Ameer Zeb case⁸ this Court held that for "safe administration of criminal justice some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defence and to obviate the chances of miscarriage of justice Such minimum standards of safety are even otherwise necessary for safeguarding the Fundamental Rights of the citizens regarding life and liberty which cannot be left at the mercy of verbal assertions of police officers which assertions are not supported by independent evidence provided by a Chemical Examiner." Purposive interpretation of the Act and the Rules promotes the protection of constitutional and fundamental rights under Articles 4, 9 and 10A of the Constitution. Employing prudence, practice

and caution as interpretive tools to help actualize and operationalize the purpose of the statute, we realize its objective purpose and ensure safe administration of justice so that the convictions under the Act are based on Reports of the Government Analyst that are technically sound and credible.

10. In the present case examination of the report of the Government Analyst mentions the tests applied but does not provide their results except a concluding result, presumably of all the tests, which is not sufficient. The Report also does not signify the test protocols that were applied to carry out these tests. Hence, the mandatory requirement of law provided under Rule 6 has not been complied with and, thus, it is not safe to rely on the Report of the Government Analyst dated 18.02.2016. As a conclusion, it is reiterated, that the Report of the Government Analyst must mention (i) all the tests and analysis of the alleged drug (ii) the result of the each test(s) carried out along with the consolidated result and (iii) the name of all the protocols applied to carry out these tests.

11. For what has been discussed above, we extend the benefit of doubt to the appellant and set aside his conviction and sentence under the section 9(c) of the Act. He is ordered to be released from custody forthwith if not required in any other case. This appeal is allowed accordingly.

MWA/K-3/SC Appeal allowed.