

Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed,

JJ

MUHAMMAD NAEEM and another---Appellants

Versus

The STATE and others---Respondents

Criminal Appeals Nos.81-L and 82-L of 2017, decided on 10th May, 2019.

(On appeal from the judgment of Lahore High Court, Lahore dated 27-1-2016, passed in
Crl.A.No.551 of 2009).

(a) Control of Narcotic Substances Act (XXV of 1997)---

----Ss. 2, 3 & 9(c)---Possession of narcotic---Liquid mixture---Percentage of narcotic, determination of---Requirement of calculating the percentage of narcotic drug in a liquid preparation or mixture was mandatory as per S. 3 of the Control of Narcotic Substances Act, 1997 read with the definitional test under S. 2 of the Act.

Muhammad Imran v. State 2011 SCMR 1954 and Taimoor Khan v. State 2016 SCMR 621 ref.

(b) Control of Narcotic Substances Act (XXV of 1997)---

----Ss. 3 & 9(c)---Possession of narcotic---Intoxicating liquid---Report of Chemical Examiner failing to mention the percentage of "morphine" found in the intoxicating substance---Effect---Such fatal omission made the report of the Chemical Examiner inconclusive, leaving it uncertain whether the substance passed for a narcotic drug, and the same was unreliable to support conviction under the Act.

(c) Administration of justice---

----Court being a neutral arbiter had 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.

(d) Constitution of Pakistan---

----Art. 10-A---Right to fair trial---Scope---Court could not 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 was its hallmark---Such favoured intervention, no matter how well-meaning, struck at the very foundations of fair trial, which was recognized as a Fundamental Right under Art. 10-A of the Constitution.

(e) Control of Narcotic Substances Act (XXV of 1997)---

----Ss. 3 & 9(c)---Constitution of Pakistan, Arts. 4 & 10-A---Criminal Procedure Code (V of 1898), S. 423(1)(a)---Possession of narcotic---Intoxicating liquid---Report of Chemical Examiner failed to mention the percentage of "morphine" found in the intoxicating substance---Trial Court acquitted the accused on the basis of such inconclusive Report---On appeal High Court gave directions for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner---Legality---Such direction of the High Court amounted to granting the prosecution a premium on its failure to put up a proper case in the first instance---Such judicial intervention was opposed to the adversary principle and offensive to the fundamental right of fair trial and due process guaranteed under the Constitution---High Court has travelled beyond its lawful powers under S.423(1)(a), Cr.P.C. and had in fact directed to conduct re-investigation or further investigation of the case, which was not permissible under the law---Even otherwise, calling for fresh examination of the intoxicating substance at the appellate stage after many years may frustrate the settled laws as to safe custody and safe transmission of the recovered substance making the report of the Chemical Examiner suspect and unreliable---Impugned judgment of High Court whereby the case was remanded to the

Trial Court for retrial was set-aside and acquittal recorded by the Trial Court was restored---Appeals were allowed accordingly.

Dildar v. The State PLD 2001 SC 384; Painsa Gul v. State 1987 SCMR 886; State v. Amjad Ali PLD 2007 SC 85; Mazhar Naeem Qureshi v. State 1999 SCMR 828; Amjad Ali v. State 2012 SCMR 577; Ikramullah v. State 2015 SCMR 1002 and State v. Imam Bakhsh 2018 SCMR 2039 ref.

Chaudhry Muhammad Din Ansari, Advocate Supreme Court for Appellants (in CrI.A.81-L of 2017).

Nemo. For Appellants (in CrI.A.82-L of 2017).

Irfan Malik, Special Prosecutor, ANF for the State (in both cases).

Date of hearing: 10th May, 2019.

JUDGMENT

SYED MANSOOR ALI SHAH, J.--A raid, on the basis of secret information; led to the alleged recovery of intoxicating injections. Intoxicating liquid and "Phenvil injections (collectively referred to as "intoxicating substance") from the appellants. In this background they were booked in FIR No.2/2008 under sections 9(c) and 15 of the Control of Narcotic Substances Act, 1997 ("Act"). After regular trial the appellants were acquitted of the charge. The ground that prevailed with the trial court was that the Reports of the Chemical Examiner failed to assess the percentage of morphine in the intoxicating substance in order to pass as a "narcotic drug," in violation of section 3 of the Act, hence the Reports were inconclusive and unreliable and could not sustain conviction. Additionally, the trial court also held that "Phenvil or pheniramine maleate did not fall under the definition of "psychotropic substance" under section 2(za) of the Act. Upon appeal before the High Court the judgment of the trial court was set aside and the case was remanded with the direction that fresh samples and fresh report of the Chemical Examiner be taken and a "fresh judgment" be passed in the case. Hence, these appeals with leave of the Court granted on 14.02.2017 to consider whether the High Court could assume the role of a prosecutor and fill the lacunas left by the parties during the trial.

2. We have heard the learned counsel for the parties and have examined the record of the case with their able assistance. "Narcotic drug"¹ means "coca leaf, cannabis, heroin, opium, poppy straw and all manufactured drugs" while "manufactured drug"² includes:-

- (i) All coca derivatives, medicinal hemp, opium derivatives, cannabis in any form and any mixture of stalks and flowering or fruiting tops of the Indian hemp plant (*cannabis sativa* L.), Acetic Anhydride; and
- (ii) any other narcotic substance which the Federal Government may, by notification in the official Gazette made in pursuance of recommendations of any International Convention or otherwise, declare to be a manufactured drug.

"Opium"³ means:-

- (i) Poppy straw, that is to say, all parts of the poppy plant (*Papaver somniferum* or any other species of *Papaver*) after mowing, other than the seeds;
- (ii) The spontaneously coagulated juice of capsules of poppy which has not been submitted to any manipulations other than those necessary for packing and transport; and
- (iii) Any mixture, with or without natural materials, of any of the above forms of opium, but does not include any preparation containing not more than 0.2 per cent of morphine; (emphasis added)

"opium derivatives"⁴ includes:-

- (i) Medicinal opium, that is, opium which has undergone the process necessary to adapt it for medicinal use;
- (ii) Prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking, and the dross or other residue remaining after opium is smoked;

- (iii) Morphine, that is, the principal alkaloid of opium having the chemical formula $C_{21}H_{23}NO_5$ and its salts;
- (iv) Diacetylmorphine, that is, the semi-synthetic substance, also known as diamorphine or heroin having the chemical formula $C_{21}H_{23}NO_5$ and its salts; and
- (v) All preparations containing more than 0.2 per cent of morphine, or containing any diacetylmorphine.

3. Any mixture or preparation (liquid in this case) with any form of opium or opium derivative shall not pass for "opium" or "opium derivative" and finally as a "narcotic drug," if the quantity of morphine in the mixture or preparation is less than 0.2 percent. Morphine is the principal alkaloid of opium having the chemical formula $C_{21}H_{19}NO_3$ and its salts⁵ or an alkaloid extracted from opium to relieve moderate to severe pain,⁶ used in medicine as an analgesic and sedative, although repeated use causes addiction.⁷ Similarly, under sections 2(g) and 2(h) a percentage of cocaine is required in the mixture and preparations to constitute "coca derivative" or "coca leaf." The method of calculating percentages in the absence of any rules is given in proviso to section 3 of the Act which provides that one percent (1%) of a substance means a preparation in which one milliliter of the substance is contained in every one hundred milliliter of the preparation and so in proportion for any greater or less percentage. For a liquid preparation or liquid mixture to pass for opium or opium derivative, the liquid preparation or liquid mixture must have morphine in excess of 0.2 percent. Thus, the requirement of calculating the percentage of narcotic drug in a liquid preparation or mixture is mandatory as per section 3 of the Act read with the definitional test under section 2 of the Act. See: *Muhammad Imran v. State* (2011 SCMR 1954) and *Taimoor Khan v. State* (2016 SCMR 621).

4. The three Reports of the Chemical Examiner, all dated 15.02.2008 (Ex-PK, Ex-PL, Ex-PN) show the following results:

"Morphine detected in all samples" (Ex-PK) "Morphine detected in all above samples" (Ex-PL) "(i)-(iii) Morphine detected in all unlabeled glass ampules and unlabeled plastic bottle. (ii) Pheniramine Maleate is detected in the above bottle labeled with phenvil (Ex-PN)

The Reports of the Chemical Examiner hopelessly fail to mention the percentage of morphine found in the intoxicating substance, leaving it uncertain whether it passes for a narcotic drug. This fatal omission makes the Reports of the Chemical Examiner inconclusive and unreliable to support conviction under the Act.

5. An important dimension of this case is the role of a criminal court, in an adversarial system of justice.⁸ "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."⁹ 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 provisions¹⁰ of Criminal Procedure Code, 1898 (Cr.P.C) to secure the ends of justice,¹¹ 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 trial¹² and due process¹³ guaranteed under the Constitution. see *Dildar v. State*¹⁴; *Painda Gul v. State*¹⁵ and *State v. Amjad Ali*.¹⁶ The High Court has travelled beyond its lawful powers under section 423(1)(a) Cr.P.C. and has infact directed to conduct re-investigation or further investigation of the case, which is not permissible under the law.¹⁷ Even otherwise, calling for fresh examination of the intoxicating substance at the appellate stage after all these years may frustrate the settled law¹⁸ as to safe custody and safe transmission of the recovered substance making the report of the chemical examiner suspect and unreliable.

7. For the foregoing reasons, we allow these appeals and set aside the impugned judgment whereby the case was remanded to the trial court for retrial and restore the acquittal recorded by the trial court. These are the reasons for our the short order dated 10.05.2019, which is reproduced hereunder for convenience and completion of record:

"For detailed reasons to follow, the instant criminal appeals are allowed. The impugned judgment of the learned High Court dated 27.01.2016 is set aside. Consequently the judgment by the learned trial Court dated 21.03.2009 is restored.

MWA/M-36/S Appeals allowed.