

Present: Asif Saeed Khan Khosa, C.J., Sardar Tariq Masood and Syed Mansoor Ali Shah, JJ

QAISER JAVED KHAN---Petitioner

Versus

The STATE through Prosecutor General Punjab, Lahore and another---Respondents

Criminal Petition No.733 and Criminal Miscellaneous Application No.1019 of 2019, decided on 18th December, 2019.

(On appeal against the judgment of Lahore High Court, Lahore dated 18-4-2019, passed in Criminal Appeal No.213202 of 2018).

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

---R. 6---Control of Narcotic Substances Act (XXV of 1997), S. 36---Report of Government Analyst---Essential requirements---Report of the Government Analyst must show that the test applied was in accordance with a recognized standard protocol---Any test conducted without a protocol lost its reliability and evidentiary value---To serve the purposes of the Control of Narcotic Substances Act, 1997 and the Control of Narcotic Substances (Government Analysts) Rules, 2001, the report of the Government Analyst must contain three elements, i.e the tests applied; the protocols applied to carry out these tests; and, the result of the test(s)---Report of the Government Analyst which did not specify the protocols of the tests applied did not meet the requirements of the law---Such a Report could not be relied upon for the conviction of an accused. [Context of 'protocols' as explained in the judgment reported as (Ikramullah's case 2015 SCMR 1002, Imam Bakhsh's case 2018 SCMR 2039 and Khair-ul-Bashar's case 2019 SCMR 930) further clarified].

2015 SCMR 1002; 2018 SCMR 2039 and 2019 SCMR 930 ref.

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

---R. 6---Control of Narcotic Substances Act (XXV of 1997), S. 36---Criminal Procedure Code (V of 1898), S. 510, proviso---Report of Government Analyst---Essential requirements---Power of Court to summon Analyst---Scope---To serve the purposes of the Control of Narcotic Substances Act, 1997 and the Control of Narcotic Substances (Government Analysts) Rules, 2001, the report of the Government Analyst must contain three elements, i.e the tests applied; the protocols applied to carry out these tests; and, the result of the test(s)---Once the said three requirements under R. 6 were 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 S. 510, Cr.P.C.---Said provision stated that the Court may, if it considered necessary in the interest of justice, summon and examine the person by whom such report had been made---Trial Court while examining the said report had the power to summon the Government Analyst in case there was any ambiguity in the said Report and seek clarification thereof---Such clarification could only be based on the existing record of the Government Analyst and did 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---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) did not vouch for its evidentiary value---Courts were free to examine the contents of the report and to assess its evidentiary value (weight), a matter distinct from its admissibility.

2019 SCMR 930 ref.

Malik Matee Ullah, Advocate Supreme Court for Petitioner.

M. Jaffar, Addl. P.G. for Respondents.

Date of hearing: 18th December, 2019.

JUDGEMENT

SYED MANSOOR ALI SHAH, J.--

Criminal Miscellaneous Application No. 1019 of 2019

For the reasons given in the application, this application is allowed and delay in the filing of the petition is condoned.

Criminal Petition No. 733 of 2019

2. The petitioner was apprehended in a search operation allegedly selling drugs on a public street and 1150 grams of charas garda was recovered from him. In this background, he was booked in FIR No.452 dated 23.10.2017, registered at Police Station Saddar, Mianwali. After regular trial, he was convicted by the Trial Court under section 9(c) of the Control of Narcotic Substances Act, 1997 ("Act") and sentenced to rigorous imprisonment for 04 years and 06 months along with fine of Rs.20,000/-, and in case of default in payment of fine to undergo simple imprisonment for further 05 months. On appeal, the High Court, upheld the said conviction and sentence vide the impugned judgment dated 18.04.2019.

3. We have heard the learned counsel for the parties and, at the outset, have examined the Report of the Government Analyst of the Punjab Forensic Science Agency dated 15.11.2017 and found it deficient in terms of Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ("Rules") as interpreted repeatedly by this Court in the cases of Ikramullah.¹ Imam Bakhsh² and Khair-ul-Bashar.³

4. In Ikramullah, this Court while referring to Rule 6 of the Rules observed that the Government Analyst is to refer the necessary protocols, and mention the tests applied and their results, in his report. The Court further observed that the failure in compliance of the said Rule affects the reliability of the report, and that such a deficient report does not qualify to be called a report in the context of section 36 of the Act, so as to be treated as a "conclusive" proof of recovery of narcotic substance from an accused person.

5. In Imam Bakhsh, the question of mandatory or directory nature of Rule 6 was considered in detail. The Court held that its compliance to the extent of mentioning the full protocols of the test applied in the Report, to be mandatory with the observation that its non-compliance can frustrate the purpose and object of the Act, and held that its non-compliance will render the report of the Government Analyst inconclusive and unreliable. The Court elaborated the expression "protocol" to mean an explicit, detailed plan of an experiment, procedure or test. With this elaboration, it was held that 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. In Khair-ul-Bashar this interpretation was reinforced.

6. The Report of the Government Analyst in this case specifies only the tests applied and not the protocols thereof. The term "protocol" has not been defined in the Rules. Its dictionary meaning is: "A plan of scientific experiment or other procedure."⁴ It is also referred to as "the precise method for carrying out or reproducing a given experiment"⁵. These definitions are in line with the elaboration of the term "protocol" given in Imam Bakhsh wherein the Court stated the expression "protocol" to mean an explicit plan of an experiment, procedure or test. It is clarified that "protocol" is, therefore, a recognized standard method or plan for carrying out the test applied to ascertain the nature of the substance under examination. No test can take place without a protocol. The Report of the Government Analyst must show that the test applied was in accordance with a recognized standard protocol. Any test conducted without a protocol loses its reliability and evidentiary value. Therefore, to serve the purposes of the Act and the Rules, the Report of the Government Analyst must contain (i) the tests applied (ii) the protocols applied to carry out these tests (iii) the result of the test(s). This sequence, for clarity and better understanding can be envisaged as follows:

	Protocols (applied	
Test	to carry out the	Results of
Applied	tests))	the test(s)

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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.

8. The Report of the Government Analyst in the instant case does not specify the protocols of the tests applied and thus does not meet the requirements of the law as interpreted by this Court in the cases of *Imam Bakhsh* and *Khair-ul-Bashar* (supra). The said Report cannot be relied upon for the conviction of the petitioner. Therefore, the petition is converted into an appeal and allowed. The conviction and sentence of the petitioner are set aside. He shall be released forthwith if not required to be detained in any other case.

9. We have observed in a number of cases before us that the import of the above cited judgments have not been fully understood in the context of "protocols", which has been further clarified in this judgment. Therefore, it will be appropriate if a copy of this judgment is dispatched to all the High Courts for their reference and for further circulation to the Trial Courts dealing with such matters and to the Forensic Science Laboratories in their respective areas.

MWA/Q-1/S Petition allowed.