

(57)

STATE VS MUHAMMAD ARIF
FIR No. 42 | Dated: 24.10.2022 | U/S: 9 (d) of the
Khyber Pakhtunkhwa CNSA, 2019 & 468/471 PPC |
Police Station: Mishti Mela

IN THE COURT OF SHAUKAT AHMAD KHAN
SESSIONS JUDGE/JUDGE SPECIAL COURT, ORAKZAI
(AT BABER MELA)

SPECIAL CASE NO. : 46/3 OF 2022
DATE OF INSTITUTION : 16.12.2022
DATE OF DECISION : 28.03.2023

STATE THROUGH MUHAMMAD YOUNAS SHO, POLICE STATION
MISHTI MELA

.....(COMPLAINANT)

-VERSUS-

MUHAMMAD ARIF S/O ALLAH KHAN, AGED ABOUT 46 YEARS,
R/O CASTE ZAKHA KHEL, SERI KANDAO, DISTRICT KHYBER

..... (ACCUSED FACING TRIAL)

Present: Umar Niaz, District Public Prosecutor for State.
: Sana Ullah Khan Advocate for accused facing trial.

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Pakhtunkhwa Control of Narcotic Substances Act, 2019 & 468/471 PPC
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JUDGEMENT
28.03.2023

The above-named accused faced trial for the offences
u/s 9 (d) of the Khyber Pakhtunkhwa CNSA, 2019 read with
468/471 PPC vide FIR No. 42, dated 24.10.2022 of Police
Station Mishti Mela.

- (2). The case of the prosecution as per contents of Murasila
based FIR is; that on 24.10.2022, the complainant, Younas
Khan SHO along with Constables Abdul Saif Khan, Haj Wali
Khan, Fazal Hameed and Muhammad Umar on receipt of
information regarding smuggling of narcotics via red colour
Honda 125 motorcycle, laid a picket on main road leading
from Mishti Bazar to Seroni near primary school, where at
about 1530 hours a motorcycle without registration number

Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela

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riding by a person on way from Seroni towards the picket was stopped for the purpose of checking. The rider of the motorcycle was deboarded but nothing incriminating was recovered from his personal search. The search of a white colour bag tied with a rope on rear seat of the motorcycle led the complainant to the recovery of 09 packets of chars, each weighing 1100 grams, making a total of 9900 grams, wrapped with yellow colour scotch tape. The complainant separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 9 whereas the remaining quantity of chars weighing 9810 grams along with the empty bag and a rope were sealed in parcel no. 10 by placing/affixing monograms of 'MY' on all the parcels. The accused disclosed his name as **Muhammad Arif** s/o Allah Khan who was accordingly arrested by issuing his card of arrest. The complainant took into possession the recovered chars and the motorcycle without registration number vide recovery memo. Murasila was drafted and sent to Police Station through constable Haj Wali which was converted into FIR by Muhammad Saeed MHC.

(3). After registration of FIR, it was handed over to Abdul Manaf OII for investigation. Accordingly, after receipt of FIR, he reached the spot, prepared site plan Ex. PB on the

pointation of the complainant and recorded the statements of PWs u/s 161 Cr.P.C. On 27.10.2022, the IO sent the samples

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of chars for chemical analysis to FSL vide his application Ex. PW 6/2 through constable Saeed Khan/PW-2 and road permit certificate Ex. PW 6/3, the result whereof Ex. PK was received and placed on file by him. The IO also drafted application to his high-ups for examination of the motorcycle in question through FSL and received the report of FSL which is placed on file by him as Ex. PK/1. In light of the report of FSL Ex. PK/1, the IO added section 468/471 PPC in the instant FIR. After completion of investigation, he handed over the case file to SHO who submitted complete challan against the accused facing trial.

(4). Upon receipt of case file for the purpose of trial, the accused was summoned through addendum-B, copies of the record were provided to him in line with section 265-C CrPC and formal charge was framed against him to which he pleaded not guilty and claimed trial. Accordingly, the witnesses were summoned and examined. The gist of the evidence is as follow;

- I. Constable Jamshid Khan is PW-1. He is marginal witness of the pointation memo Ex. PW 1/1 vide which on 26.10.2022 the accused have pointed out the spot to the IO.
- II. Constable Saeed Khan is PW-2. He is also the marginal witness of the pointation memo Ex. PW 1/1 vide which on 26.10.2022 the accused have


Jamshid Khan
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pointed out the spot to the IO. He has also taken the samples of chars in parcels no. 1 to 9 to the FSL for chemical analysis on 27.10.2022 and after submission of the same, he has handed over the receipt of the parcels to the IO.

III. Muhammad Saeed MHC appeared in the witness box as PW-3. He has incorporated the contents of Murasila Ex. PA/1 into FIR Ex. PA. He has received the case property from the complainant duly packed and sealed which he had kept in mal khana in safe custody beside parked the motorcycle in the vicinity of the police station. The witness further deposed that he has recorded entry of the case property in Register No. 19 Ex. PW 2/1, handed over the samples of the case property and the motorcycle to the IO for sending the same to FSL on 27.10.2022 and 04.11.2022 respectively.

IV. Muhammad Younas SHO is the complainant of the case. He as PW-4 repeated the same story as narrated in the FIR.

V. Constable Haj Wali is PW-5. He besides being eyewitness of occurrence is marginal witness of recovery memo Ex. PC as well vide which the complainant has taken into possession the

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recovered chars. He also reiterated the contents of
FIR in his statement.

VI. Lastly, Investigating Officer Abdul Manaf SI was examined as PW-6 who in his evidence deposed in respect of the investigation carried out by him in the instant case. He has prepared the site plan Ex. PB on the pointation of the complainant, recorded the statements of witnesses on the spot, produced the accused before the court of Judicial Magistrate vide his applications Ex. PW 6/1 and Ex. PW 6/4, prepared pointation memo Ex. PW 1/1 on the pointation of accused, sent the representative samples to FSL along with application addressed to the incharge FSL Ex. PW 6/2 and road permit certificate Ex. PW 6/3 and result of the same Ex. PK was placed on file by him, drafted application Ex. PW 6/5 for verification of the motorcycle and received the FSL report of motorcycle which is placed on file by him as Ex. PK/1, added section 468/471 PPC against the accused facing trial, placed on file copy of Register No. 19 Ex. PW 6/9 and copies of daily diaries Ex. PW 6/10 and Ex. PW 6/11 and submitted the case file to SHO for its onward submission.

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District & Sessions Judge
Mela

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(5). Prosecution closed its evidence whereafter the statement of accused was recorded u/s 342 Cr.P.C but the accused neither wished to be examined on oath nor opted to produce any evidence in defence. Accordingly, arguments of learned DPP for the State and counsel for the accused facing trial heard and case file perused.

(6). Learned DPP for the State submitted that the accused facing trial is directly nominated in the FIR, huge quantity of chars has been recovered from possession of the accused facing trial, the recovered chars are sealed and sampled on the spot by the complainant, the IO has conducted investigation on the spot, the samples for chemical analysis, though have not been transmitted to the FSL within the prescribed period but the same have been found positive for chars vide report of FSL Ex. PK. The chassis number of the motorcycle has been found tempered and, in this respect, FSL report has been placed on file. The complainant, the witnesses of the recovery, the official transmitted the samples to the FSL and the IO have been produced by the prosecution as witnesses, whom have fully supported the case of the prosecution and their statements have been lengthy cross examined but nothing contradictory could be extracted from the mouth of any of the witness of the prosecution and that the prosecution has proved its case beyond shadow of any doubt.

Shaukat Ahmad Khan
District & Sessions Judge,
Muzai at Baber Mela
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(7). Learned counsel for the defence argued that though the accused facing trial is directly nominated in the FIR, the alleged chars have been shown recovered from his possession and the report of FSL support the case of prosecution; however, the accused facing trial is falsely implicated in the instant case and nothing has been recovered from his possession. He argued that the prosecution has failed to prove the mode and manner of recovery and the mode and manner of investigation allegedly conducted by the IO on the spot, as detailed by the prosecution on the case file. That no witness from the public has been associated with the process of search or recovery. That the representative samples have been sent to FSL with a delay of about 04 days. He concluded that there are various dents in the case of prosecution leading to its failure to bring home the charge against the accused facing trial.

(8). In the light of arguments advanced by learned DPP for the State, arguments of learned counsel for the defence and the available record, following are the points for determination of charge against the accused facing trial:

(i). Whether the occurrence has taken place and the investigation have been conducted in the mode and manner as detailed in the file?

(ii). Whether the recovered substance is proved through report of FSL as chars?


Ghulam Mustafa Khan
District Sessions Judge,
District Court Baher Mela
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(iii). Whether the motorcycle bearing Engine No. 8745043 and Chassis No. EA226200 has been forged and used in the commission of offence?

(9). The case of prosecution, as per contents of Murasila Ex. PA/1, court statements of Younas Khan SHO as PW-4 and constable Haj Wali as PW-5 is, that the complainant Muhammad Younas SHO/PW-4 along with Constables Haj Wali Khan/PW-5, Fazal Hameed and Muhammad Umar on receipt of information regarding smuggling of narcotics via red colour Honda 125 motorcycle, laid a picket on main road leading from Mishti Bazar to Seroni near primary school, where at about 1530 hours a motorcycle without registration number riding by a person on way from Seroni towards the picket was stopped for the purpose of checking. The rider of the motorcycle was deboarded but nothing incriminating was recovered from his personal search. The search of a white colour bag tied with a rope on rear seat of the motorcycle led the complainant to the recovery of 09 packets of chars, each weighing 1100 grams, making a total of 9900 grams, wrapped with yellow colour scotch tape. The complainant/PW-4 on the spot has shown himself separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 9 whereas the remaining quantity of chars weighing 9810 grams along with the empty bag sealed in parcel no. 10, affixing monograms of 'MY' on all the parcels.

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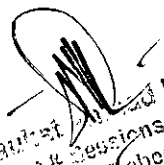
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The accused disclosing his name as **Muhammad Arif** s/o Allah Khan, has been shown arrested on the spot by issuing his card of arrest Ex. PW 4/1.

As per Murasila Ex. PA/1, the time of occurrence is 1530 hours, the broad daylight. The place of occurrence as shown in the Murasila is a main road leading from Mishti bazar to Seroni. The accused facing trial has been shown riding a motorcycle with a bag containing 09 packets of chars, each weighing 1100 i.e., 9900 grams of chars laden over the pillion seat of the motorcycle. Similarly, as per site plan the place of occurrence is a straight road surrounded by village Mishti bazar. The factum of the road being straight where the alleged occurrence has taken place, when put to the complainant/PW-4 in cross examination, he also admitted that a straight road is leading to the spot of occurrence. In these circumstances the question that why a person having in his possession 9900 grams of chars seeing a police party from a long-distance having opportunity of escape, would straight away go to the police, is not appealable to prudent mind.

Secondly, as per Murasila Ex. PA/1, the complainant/PW-4 after recovery of chars containing 09 packets has separated 10 grams from each of the packet, packed and sealed the same in parcels no. 1 to 9 but the colour, texture and shape of each of the packet is not mentioned by him in the Murasila. In this respect, the complainant/PW-4 in


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his cross examination stated that the texture of the alleged recovered chars was hard. Some of the packets were in slab form while some were in round shape, that he separated samples from the packets through knife and that the alleged recovered chars was not in powdered form rather it was in hard form. The case property produced in the court was opened at the request of counsel for defence in the presence of learned DPP for State where the 05 packets were found in slabs while 04 were in round shape. One of the packets was opened where the material was found in powdered form. All the packets were shown to the complainant/PW-4 and he admitted that there is no visible cut mark on any packet wherefrom 10 grams of chars would have allegedly been separated from parcel. The aforementioned facts left the court with no option expect to concur with the version of defence that had the complainant/PW-4 conducted the process of weighing and separation of 10 grams from each of the parcel and its packing and sealing on the spot, he would definitely know the texture of chars and there would be a visible cut mark on each parcel and the complainant/PW-4 would definitely know that a substance in powdered form need not to be cut through a knife.

With respect to investigation conducted on the spot the

case of the prosecution is, that after receipt of Murasila Ex.

PA/1 Abdul Manaf OII/PW-6 visited the spot and prepared the site plan Ex. PB on the pointation of complainant. The

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District & Sessions Judge
Rakzai Mishti Mela

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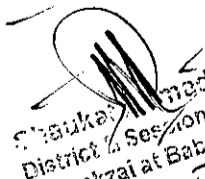
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complainant shown the case property and the accused to the IO who recorded the statements of witnesses u/s 161 Cr.P.C. The IO interrogated the accused who admitted his guilt before the IO during investigation and led the police party to the spot where he pointed out the spot to him. The IO prepared pointation memo Ex. PW 1/1 in presence of Saeed Khan and Jamshid Khan. On 27.10.2022 he collected parcels no. 1 to 9, duly packed and sealed, from Moharrir of the Police Station and handed over them to constable Saeed Khan for taking the same to FSL Peshawar along with application addressed to the incharge FSL Ex. PW 6/2 and road permit certificate Ex. PW 6/3. On the same day, the IO drafted application Ex. PW 6/5 to his high-ups for examination of motorcycle through FSL and Excise & Taxation Officer. The report of FSL regarding motorcycle is placed on file by the IO as Ex. PK/1. The chassis number of the motorcycle was found tempered; therefore, the IO added section 468/471 PPC in the instant case.

As per version of the PW-6, at the time of spot inspection on 24.10.2022 he was accompanied by two police officials namely, Jamshid Khan and Saeed Khan. This fact was also confirmed by PW-5, the eyewitness of the occurrence.

Both these PWs have also accompanied the IO to the spot on 26.10.2022 where the accused facing trial has allegedly made pointation of the spot of occurrence. However, constable Jamshid Khan and Saeed Khan whom have been examined as


Saeed Khan
District Sessions Judge
Mirpur Mathel at Baber Mela
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PW-1 and PW-2 respectively have categorically denied that prior to their visit in the company of IO on 26.10.2022, they have never been to the spot of occurrence in the instant case.

In view of the aforementioned statements of both the PW-1 and PW-2, the factum of investigation allegedly conducted by the IO on 24.10.2022, is doubtful.

The fact that the accused was riding the motorcycle and the same has been used in the commission of offence is also doubtful for, the IO even in his examination-in-chief has stated that when he reached the spot, he was shown the case property in parcels no. 1 to 10 and the accused on the spot but not a single word is spoken by him regarding the fact that either the motorcycle was shown to him on the spot or the motorcycle was parked over there. Similarly, in the site plan Ex. PB the motorcycle has also not been separately shown.

With respect to transmission of the case property from the spot to the Police Station and sending of the representative samples to the FSL, the case of prosecution is, that after sampling and sealing of case property in parcels on the spot, these were brought by the complainant/PW-4 to the Police Station and handed over the same to MHC Muhammad Saeed/PW-3, who deposited the same in Mal khana. The representative samples were handed over by Moharrir of the Police Station to the IO on 27.10.2022 who transmitted the

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same to FSL through constable Saeed Khan/PW-2 vide road permit certificate.

In order to prove its case, the prosecution produced Muhammad Saeed MHC as PW-3, constable Saeed Khan as PW-2 and IO as PW-6. PW-3, though in his examination in chief stated that he had received case property from the complainant, made entry of the same in register no. 19, handed over parcels no. 1 to 10 to the IO and a copy of the same as Ex. PW 6/9 has been placed on file but the original register no. 19 has not been produced before the court. Perusal of the relevant entry of register no. 19 shows that all the columns of it are filled with same handwriting. In this respect when PW-3 was cross examined, he stated that the entry of case property in register no. 19 has been made by him but it does not bear his signature at the time of receipt of case property while at the time of handing over of parcels no. 1 to 9, it has been signed by IO. Hence in such circumstances, the photocopy of register no. 19 in absence of original is not admissible in evidence. Moreover, as discussed above, even the very fact of the separation of samples by the complainant is doubtful what to talk of their transmission and deposit in Mal Khana or thereafter their transmission to FSL. Similarly, the occurrence

has taken place on 24.10.2022 while as per report of the FSL Ex. PK the representative samples have been transmitted to

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FSL on 27.10.2022 with a delay of 03 days which has not been explained.

Hence, in view of what is discussed above, though the representative samples, as per report of FSL Ex. PK, have been found as chars but keeping in view the failure of the prosecution to prove the safe custody of the case property, its transmission to the Police Station and transmission of the representative samples to the FSL, it is held that the report of FSL cannot be relied for recording conviction.


- (10). With respect to forgery in the chassis number of motorcycle and its use in the commission of offence, as discussed earlier, the motorcycle has neither been shown to the IO on the spot nor it has been shown in the site plan Ex. PB. Though the Moharrir of police station as PW-3 in his examination-in-chief has stated that the complainant on his return to police station handed over the motorcycle to him which he parked in the police station and made entry of the same in register no. 19. However, careful perusal of the copy of register no. 19 shows that the engine and chassis number of motorcycle has later on been added with different ink. Moreover, neither any document regarding motorcycle has been recovered from accused nor the accused facing trial has claimed the ownership of motorcycle. Furthermore, the IO has made no effort to inquire into the factum of ownership of motorcycle.

Shaukat Ahmad Khan
District & Sessions Judge,
Zai at Baher Mela
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(11). In the light of aforementioned discussion, it is held that the prosecution has failed to prove the alleged recovery of chars from possession of the accused facing trial in the mode and manner as detailed in the report. Similarly, the prosecution has also failed to prove the alleged mode and manner of the investigation carried out by the IO on the spot. The prosecution also failed to prove the safe custody of case property and transmission of the representative samples to FSL. All these facts lead to the failure of prosecution to prove the case against the accused beyond shadow of doubt. Therefore, the accused namely, **Muhammad Arif** is acquitted of the charge levelled against him by extending him the benefit of doubt. Accused is in custody. He be released forthwith, if not required in any other case. The case property i.e., chars be destroyed after the expiry of period provided for appeal/revision in accordance with law. While the motorcycle be confiscated to State.

Consign.


Pronounced
28.03.2023


SHAUKAT AHMAD KHAN
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

CERTIFICATE

Certified that this judgement consists of fifteen (15) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 28.03.2023


SHAUKAT AHMAD KHAN
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

