

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

SPECIAL CASE NO. : 39/3 OF 2022
DATE OF INSTITUTION : 11.11.2022
DATE OF DECISION : 17.04.2023

STATE THROUGH SHAL MUHAMMAD SHO, POLICE STATION
KALAYA

.....(COMPLAINANT)

VERSUS-

BAIT ULLAH S/O MUHAMMAD JAMIL KHAN, AGED ABOUT 24
YEARS, R/O FERAZ KHEL, TAPA GHAIKAT KHEL, DALAYE

..... (ACCUSED FACING TRIAL)

Present: Umar Niaz, District Public Prosecutor for State.
: Abid Ali Advocate, the counsel for accused facing trial.

FIR No. 93 **Dated: 30.09.2022** **U/S: 9 (d) of the Khyber**
Pakhtunkhwa Control of Narcotic Substances Act, 2019
Police Station: Kalaya

JUDGEMENT
17.04.2023

The above-named accused faced trial for the offence
u/s 9 (d) of the Khyber Pakhtunkhwa CNSA, 2019 vide FIR
No. 93, dated 30.09.2022 of Police Station Kalaya.

- (2). The case of the prosecution as per contents of Murasila
based FIR is; that on 30.09.2022, the complainant Shal
Muhammad SHO along with Constables Abdul Sattar and
Muhammad Rasool during routine patrolling laid a picket at
Indara Khula Utman Khel, where at about 1400 hours a person
having a blue colour plastic bag in his right hand on way from
Yarli Khel Bazar towards the picket was stopped for the
purpose of checking. Nothing incriminating was recovered
from his personal search. The search of the bag led the

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complainant to the recovery of 06 packets of chars, wrapped with yellow colour scotch tape, each weighing 1000 grams, making a total of 6000 grams. The complainant separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 6 whereas the remaining quantity of chars weighing 5940 grams along with the empty bag weighing 32 grams were sealed in parcel no. 7 by placing/affixing monograms of 'SH' on all the parcels. The accused disclosed his name as **Bait Ullah** s/o Muhammad Jameel Khan who was accordingly arrested by issuing his card of arrest. The complainant took into possession the recovered chars vide recovery memo. Murasila was drafted and sent to Police Station through constable Muhammad Rasool which was converted into FIR by Humayun Khan MM.

- (3). After registration of FIR, it was handed over to Muhammad Hanif 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 04.10.2022, the IO sent the samples of chars for chemical analysis to FSL vide his application Ex. PW 5/3 through constable Gul Karim/PW-1 and road permit certificate Ex. PW 5/4, the result whereof Ex. PK was received and placed on file by him. After completion of investigation, he handed over the case file to SHO who submitted complete challan against the accused facing trial.

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(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 Gul Karim is PW-1. He has also taken the samples of chars in parcels no. 1 to 6 to the FSL for chemical analysis on 04.10.2022 and after submission of the same, he has handed over the receipt of the parcels to the IO.
- II. Humayun Khan MM appeared in the witness box as PW-2. 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. The witness further deposed that he has recorded entry of the case property in Register No. 19. Ex. PW 2/1 and he has handed over the samples of the case property for sending the same to FSL on 04.10.2022. He has also made entry of departure and return of SHO and IO from and to the police station and arrival of Murasila carrier to the police station, in DDs which are Ex. PW 2/2 to Ex. PW 2/4.

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- III. Shal Muhammad SHO is the complainant of the case. He as PW-3 repeated the same story as narrated in the FIR.
- IV. Constable Muhammad Rasool is PW-4. 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 recovered chars. He also reiterated the contents of FIR in his statement.
- V. Lastly, Investigating Officer Muhammad Hanif was examined as PW-5 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 5/1 and Ex. PW 5/2, sent the representative samples to FSL along with application addressed to the incharge FSL Ex. PW 5/3 and road permit certificate Ex. PW 5/4 and result of the same Ex. PK was placed on file by him, placed on file copy of Register No. 19 Ex. PW 2/1 and copies of daily diaries Ex. PW 2/3 and Ex. PW 2/4 and submitted the case file to SHO for its onward submission.


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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 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.

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

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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 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 in the mode and manner as alleged by the prosecution?
- (ii). Whether the investigation has been carried out in the mode and manner as alleged by the prosecution?
- (iii). Whether the recovered substance is proved through report of FSL as chars?

(9). The case of prosecution, as per contents of Murasila Ex. PA/1, court statements of Shal Muhammad SHO as PW-3

and constable Muhammad Rasool as PW-4 is, that the complainant Shal Muhammad SHO/PW-3 along with

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Constables Muhammad Rasool/PW-4 and Abdul Sattar during routine patrolling laid a picket at Indara Khula Utman Khel, where at about 1400 hours a person having a blue colour plastic bag in his right hand on way from Yarli Khel Bazar towards the picket was stopped for the purpose of checking. Nothing incriminating was recovered from his personal search. The search of the bag led the complainant to the recovery of 06 packets of chars, wrapped with yellow colour scotch tape, each weighing 1000 grams, making a total of 6000 grams. The complainant/PW-3 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 6 whereas the remaining quantity of chars weighing 5940 grams along with the empty bag weighing 32 grams sealed in parcel no. 7, affixing monograms of 'SH' on all the parcels. The accused disclosing his name as **Bait Ullah** s/o Muhammad Jameel Khan, has been shown arrested on the spot by issuing his card of arrest Ex. PW 3/1. The Murasila Ex. PA/1 has been transmitted by constable Muhammad Rasool/PW-4 to police station where, after registration of FIR by Humayun Khan/PW-2, it was handed over to Muhammad Hanif/PW-5, the IO of the case. The IO visited the spot and conducted investigation by making a site plan Ex. PB on pointation of Shal Muhammad SHO/PW-3 and recorded the statements of marginal witnesses. With respect to presence of the

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complainant and the police officials Abdul Sattar and Muhammad Rasool named in the Murasila Ex. PA/1, the prosecution has put forward a story that on the day of occurrence they had come to District Headquarter Orakzai for giving evidence in a criminal case and on their return, they laid a picket on the spot where the occurrence took place. In support of its stance, the prosecution has placed on file daily diary no. 03 of 30.09.2022 and daily diary in respect of return of the complainant party to the police station. But this fact is not mentioned in the Murasila. Similarly, the complainant/PW-3 also failed to give particulars of the case in which he was summoned to give evidence, even the name of the court was not remembered to him. He also failed to produce any summons or notice of court in this respect. Even if the story of the prosecution regarding arrival of the IO to District Headquarter Orakzai at Hangu in connection of giving evidence in a criminal case is admitted as true, there is no justification of the presence of the other two witnesses with the complainant. With respect to process of search, recovery and other proceedings conducted on the spot, though the statement of complainant as PW-3 is consistent; however, when the eyewitness as PW-4 was cross examined in this respect he stated that he has participated in the proceedings of the case with the complainant to the extent that he was present with him for protection. He has further stated that in his presence the

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complainant has not opened the packets of chars. PW-4, the eyewitness of the occurrence, has also taken the Murasila and other documents of the case to the police station for registration of FIR. In this respect, when he was cross examined, he stated that he left the spot at 1450 hours and reached to the police station at 1620 hours. When he was asked about the time of his return to the spot, he stated that he returned to the spot at 1610 hours which is not appealable to prudent mind that as to how he had returned to the spot prior to arrival at the police station. Even his statement to that extent contradicts the FIR Ex. PA which has been registered at 1540 hours i.e., prior to the arrival of the PW-4, the carrier of Murasila in the police station.

With respect to process of investigation conducted on the spot as per site plan Ex. PB, the occurrence has taken place on a main road leading from Headquarter to Anjani at *Dana Khola, Utman Khel* but when the IO was cross examined in this respect he stated that the place of occurrence is *Indara Khola, Utman Khel* which is a different place which makes the case of prosecution doubtful as to the fact that either the IO has not visited the spot at all or the occurrence has not taken place in the mode and manner as narrated by the prosecution.

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


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sampling and sealing of case property in parcels on the spot, these were brought by the complainant/PW-3 to the Police Station and handed over the same to MM Humayun Khan/PW-2, who deposited the same in Mal khana. The representative samples were handed over by Moharrir of the Police Station to the IO on 04.10.2022 who transmitted the same to FSL through constable Gul Karim/PW-1 vide road permit certificate.

In order to prove its case, the prosecution produced Humayun Khan MM as PW-2, constable Gul Karim as PW-1 and Muhammad Hanif OII as PW-5. PW-2, 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 6 to the IO and a copy of the same as Ex. PW 2/1 has been placed on file but the original register no. 19 has not been produced before the court. Hence in such circumstances, the photocopy of register no. 19 in absence of original is not admissible in evidence. Moreover, the occurrence has taken place on 30.09.2022 while as per report of the FSL Ex. PK the representative samples have been transmitted to FSL on 04.10.2022 with a delay of 04-days which has not been explained.

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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). 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, **Bait Ullah** 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. Consign.

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CERTIFICATE

Certified that this judgement consists of twelve (12) pages. Each page has been read, corrected wherever necessary and signed by me.

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