



IN THE COURT OF ASGHAR SHAH
SESSIONS JUDGE/JUDGE SPECIAL COURT, ORAKZAI
(AT BABER MELA)

SPECIAL CASE NO. : 7/3 OF 2020
DATE OF INSTITUTION : 20.11.2019
DATE OF DECISION : 20.06.2020

STATE THROUGH ISHTIAQ HASSAN SHO, POLICE STATION,
LOWER ORAKZAI

.....(COMPLAINANT)

-VERSUS-


1. MUHAMMAD HANIF S/O KHUSHAL KHAN, AGED ABOUT 40 YEARS, CASTE ALIKHEL, SUB-TRIBE SHERKHEL KAGNAYE, UPPER ORAKZAI.
..... (ACCUSED FACING TRIAL)
2. DILAWAR SHAH s/o GUL KHANI SHAH, R/O TRIBE ALI KHEL KAGNAYE, UPPER ORAKZAI
..... (ABSCONDING ACCUSED)

Present: Umar Niaz, District Public Prosecutor for state.
: Syed Muzahir Hussain and Abid Ali Advocates for accused facing trial.

FIR No. 36 **Dated:** 10.10.2019 **U/S:** 9 (d) KP CNSA
Police Station: Lower Orakzai

JUDGEMENT
19.06.2020

The story of the prosecution as per contents of Murasila Ex. PA/1 converted into FIR Ex. PA are that; on 10.10.2019 at about 1330 hours, the SHO Ishtiaq Hassan alongwith other police officials were busy in patrolling in the locality when an informer informed the SHO on mobile phone about smuggling of chars from Kagnayi Dabori through a tractor; that on receipt of information, the local police made barricade at the Shaho Khel check-post. At about 1330 hours the local police saw a tractor trolley marching from Dabori side which


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was signalled to stop. Upon the stoppage of tractor trolley, the same was searched and upon search, the police officials found a secret cavity beneath the trolley of the tractor. The wooden planks forming the secret cavity were removed by removing the screws with the help of screwdriver which led to the recovery of 20 packets of charrs garda (powder form). Upon weighing through digital scale, each packet came out 1220 grams (total 24200 grams) of charrs. The police officials separated 10/10 grams from each packet and packed and sealed the same into parcels no. 1 to 20 for chemical analysis of FSL, whereas remaining quantity of charrs was packed and sealed in separate parcel bearing no. 21. The local police took into possession the recovered charrs and tractor bearing no LES-10/7514 alongwith trolley through recovery memo. The accused disclosed his name as Muhammad Hanif who was accordingly arrested by issuing card of arrest Ex. PW 5/1. Murasila Ex. PA/1 was drafted and sent to the PS which was converted into FIR Ex. PA. Hence, the case in hand.



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(2). Upon the receipt of case file for the purpose of trial, notice was issued to the accused facing trial and upon his appearance, the proceedings were initiated and he was charge sheeted to which he pleaded not guilty and claimed trial, whereas accused Dilawar Shah who was found during the investigation to be the owner of tractor and trolley in question was avoiding his lawful arrest, hence he was proceeded u/s

512 Cr.P.C after recording statement of search witness.
During the trial, witnesses were summoned who appeared and
deposed in the following manner.

**Muhammad Shafiq SHO, Police Station
Lower Orakzai as PW-1 deposed;**

*“that on 02.12.2019, I submitted
complete challan against the accused facing
trial Muhammad Hanif and absconding
accused Dilawar Shah. Today I have seen
complete challan which is correct and correctly
bears my signature. The complete challan is Ex.
PW 1/1.”*

**Amir Nawaz constable, Police Station Lower
Orakzai as PW-2 deposed;**

*“that on 14.10.2019, in-charge
investigation Shal Muhammad Khan SI
handed over to me 20 parcels duly sealed
containing 10 grams chars in each parcel
alongwith application addressed to the in-
charge FSL and road permit certificate
(raseed rahdari) and I took the same to the
FSL Peshawar. I handed over the above-
mentioned parcels alongwith application and
road permit certificate to the official of FSL
who received the same and returned to me*



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road permit certificate duly signed and I handed over the road permit certificate to the in-charge investigation at PS on my returned to the PS. My statement was recorded by the IO u/s 161 Cr.P.C. The road permit certificate is Ex. PW 2/1."

Lubab Ali moharrir, Police Station Lower Orakzai as PW-3 deposed;

"that on 10.10.2019, constable Khan Wada brought Murasila from SHO Ishtiaq Hassan to the PS and I incorporated the contents of Murasila into FIR Ex. PA. After registration of the case, I handed over the copy of FIR and Murasila to the in-charge investigation Shall Muhammad Khan SI for onward investigation. After return of SHO to the PS, he handed over to me parcels no. 1 to 20 containing samples of chars, parcel no. 21 containing remaining quantity of chars 24200 grams. The tractor alongwith trolley was also formally handed over to me and I parked the same in the PS. After that I made the entry of the above-mentioned proceeding in the register 19. Today I have seen the attested copy of register 19 which is correct. The same is Ex.



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PW 3/1. Today I produced the original register 19 before this court (original seen and returned). My statement was recorded by the IO u/s 161 Cr.P.C.”

**Muhammad Imtiaz Judicial Magistrate,
District Courts Orakzai as PW-4 deposed;**

“that on 14.10.2019, accused Muhammad Hanif s/o Khushal Khan was produced by In-charge investigation SI Shal Muhammad Khan before me for recording his confessional statement u/s 164/364 Cr.P.C. Handcuffs of the accused were removed. All the codal formalities complied with and sufficient time was given to accused. Accused was ready to confess his guilt before me without any duress or coercion. Thereafter, the true confessional statement of the accused was recorded with his free will which was thumb impressed by him. After recording the confessional statement, original statement was handed over to IO while photo copy of the same was retained within the court in safe custody. Then after accused was handed over to Naib Court namely Mr. Izaz Ahmad and DFC Mr. Muhammad Khurshid to take him to the judicial



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lock-up/ sub-jail Orakzai at Baber Mela, Hangu which is at the walking distance from the Court. Today I have seen the confessional statement consist of 06 pages which is correct and correctly signed by me. The questionnaire consists of 03 pages Ex. PW 4/1, confessional statement of accused Ex. PW 4/2 while certificate is Ex. PW 4/3.”

Complainant, Ishtiaq Hassan SI, Security In-Charge Main gate Orakzai Headquarters as PW-5 deposed;

“that during the days of occurrence, I was posted as SHO of PS Lower Orakzai Kalaya. On 10.10.2019, I alongwith other police officials including Hakim Ali Shah ASI, Constable Fazal Hamid, constable Khan Wada and other police nafri were on routine patrol in the area. During patrol, I received information through my cellular phone that narcotics (chars) will be smuggled today through tractor from Kagnayi Dabori side. On this information, I alongwith other police officials conducted Naka bandi at Shaho Khel check-post. At about 1330 hours, one tractor alongwith trolley came from Dabori side and I



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signalled the driver of tractor to stop which was accordingly stopped. I alongwith police officials started search of the tractor. During search of the trolley of the tractor, I found one secret cavity beneath the trolley of the tractor which was opened by me through screw driver and I found and recovered 20 packets of chars from the secret cavity. I weighed the packets of chars with digital scale, resultantly each packet stood 1220 grams and the total quantity of chars came out 24400 grams. On the spot, I separated 10 grams of chars from each packet for FSL and packed and sealed them into separate parcels from 1 to 20 while packed and sealed the remaining quantity of chars weighing 24200 grams in parcel no. 21. I affixed monogram of MK on all the parcels mentioned above. I also took into possession the tractor Messi Ferguson bearing no. LES-107514 Punjab alongwith trolley and contraband chars. The driver of the tractor disclosed his name as Muhammad Hanif s/o Khushal Khan, r/o Ali Khel sub-tribe Sher Khel Ghiljo District Orakzai, who was arrested by me accordingly. The above-mentioned



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proceeding was carried out in presence of the police official present there. To this effect, I prepared recovery memo Ex. PC in presence of marginal witnesses, card of arrest Ex. PW 5/1 and Murasila Ex. PA/1. Today the case property i.e. tractor produced before the court alongwith trolley and parcel no. 21 containing 24200 grams chars. The tractor is Ex. P1 while the trolley with secret cavity is Ex. P2 and parcel no. 21 is Ex. P3 (STO by counsel of accused; there is no secret cavity in the trolley of tractor nor there is any sign of secret cavity in the trolley). Thereafter, I handed over the Murasila to constable Khan Wada who took the same to the PS for registration of the case. After registration of the case, the IO came to the spot and I pointed out the spot to him and the IO prepared site plan on my pointation. Case property alongwith accused were shown to the IO on the spot. After some time, I returned to PS and handed over the case property to the Moharrir of the PS. My departure from the PS and return to the PS has been duly entered by the Moharrir of the PS in daily dairy on 10.10.2019 (original seen and returned). The



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copy of the daily dairy is Ex. PW 5/2. The tractor was parked in the courtyard of the PS. On 25.10.2019, I submitted supplementary challan in the instant case against the accused which is Ex. PW 5/3. Today I have seen all the documents which are prepared by me are correct and correctly bear my signatures.”

Eyewitness Kaleem Ullah, In-Charge police check post Shaho Khel as PW-6 deposed on oath;

“that on 10.10.2019, I alongwith Ishtiaq Hassan SHO and other police nafri were present on naka bandi at Shaho Khel check-post at about 1330 hrs. one tractor alongwith trolley from Dabori side came which was signalled to stop by the SHO and the driver of the tractor stopped the tractor. SHO started search of the tractor and trolley. During search, SHO found one secret cavity beneath the tractor which was opened through screw driver and there were contraband chars in the secret cavity. The SHO on the spot weighed the packet of chars separately, each packet stood 1220 grams and the total 20 packets of chars weighed 24400 grams. The weight was carried out

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through digital scale. The SHO separated 10 grams from each packet for FSL and packed and sealed them into parcel no, 1 to 20 while the remaining quantity of chars 24200 grams were packed and sealed in separate packet no. 21. Accused disclosed his name as Muhammad Hanif who was arrested by the SHO. The SHO taken into possession the above-mentioned contraband chars alongwith tractor bearing no. LES-10/7514 Punjab and prepared the recovery memo Ex. PC which is correct and correctly bears my signature. On the spot, the SHO boarded the accused in his vehicle and also kept the case property i.e. chars in his vehicle. Murasila was drafted which was handed over to constable Khan Wada who took the same to PS for registration of the case. The investigation officer came to the spot for investigation and the IO recorded my statement u/s 161 Cr.P.C.”



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Shal Muhammad SI/In-Charge
Investigation Police Station Lower Orakzai
as PW-7 deposed;

“that on receipt of copy of FIR and Murasila, I visited the spot alongwith my police

nafri and there on the spot I prepared site plan Ex. PB on the pointation of SHO. The SHO have shown me the case property and accused on the spot and thereafter, I recorded statements of marginal witnesses of the recovery memo Kaleem Ullah SI and Sher Muhammad HC. Thereafter, the SHO returned to the PS and after completion of proceedings on spot, I alongwith police nafri returned back to the PS. In the PS, I recorded statements of moharrir Libab Ali and constable Khan Wada u/s 161 Cr.P.C. Accused was formally handed over to me for onward investigation who was behind the lock-up. On 11.10.2019, I produced accused before the court of Judicial Magistrate vide my application Ex. PW 7/1 for obtaining his five days physical custody, as a result of which three days police custody was granted. During course of investigation, accused confessed his guilt to me and I recorded his statement u/s 161 Cr.P.C. On 14.10.2019, I handed over parcels no. 1 to 20, each containing 10 grams of chars garda alongwith road permit certificate already Ex. PW 2/1 and application addressed to the in-charge FSL Ex.



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PW 7/2, who took the same to the FSL. On the same day, I produced accused Muhammad Hanif before the court of Judicial Magistrate vide my application Ex. PW 7/3 for recording his confessional statement. Accused confessed his guilt before the court and was sent to Judicial lock-up. I recorded statement of constable Amir Nawaz and received the FSL report on 04.11.2019. The FSL report is Ex. PK which is placed on file. I annexed attested copy of register no. 19 on the case file. Thereafter, I handed over the case to the SHO for submission for interim challan. As the accused Dilawar Shah s/o Gul Khani Shah tribe Ali Khel, Kagnaye Upper Orakzai was avoiding his lawful arrest, therefore I initiated absconding proceedings by submitting application u/s warrant 204 Cr.P.C, Ex. PW 7/4, against him and thereafter submitted application for issuance of proclamation notice u/s 87 Cr.P.C. During course of investigation, I have approached to my high-ups for verification of tractor in this respect addressed to the Excise and Taxation Officer Lahore is placed on file which is Ex. PW 7/5. After completion of



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investigation, I handed over the case file to the SHO for submission of challan. All the documents prepared by me are correct and correctly bear my signatures."

(3). Thereafter, prosecution closed their evidence where after statement of the accused was recorded U/S 342 Cr.P.C but the accused did not wish to be examined on oath, however he opted to produce defence evidence and requested the court to requisition the inquiry reports conducted against the police officials as well as conducted regarding the innocence of accused facing trial. However, the DPO informed the Court that no such inquiries were conducted, hence they are not in possession of any such record. Accordingly, the case was fixed for final arguments and accordingly, arguments of the learned DPP for the state and counsel for the accused facing trial heard and case file perused.

(4). From the arguments and record available on file it reveals that in the present case, the prosecution has relied upon the ocular account of PW-5 and PW-6, the confessional statement of the accused Ex. PW- 4/1 to Ex. PW-4/3, the expert opinion i.e. FSL report Ex. PK and other formal evidence available on the case file.

(5). As for as the confessional statement of the accused facing trial is concerned, in this regard it has to be noted that



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three-fold proof is required in order to prove the same i.e. the confession must be made voluntarily, it must be truly made and it must be made in fact while disclosing the real facts of the case. The Judicial Magistrate-II, Muhammad Imtiaz while appearing as PW-4 deposed that he has granted three days police custody before recording the confessional statement and that the accused was given 55 minutes for pondering. It was further deposed that during the time of pondering, the accused was present outside the Court and he was neither in handcuffs nor in custody of the police. However, when this statement is placed in juxta-position with the statement of investigating officer, Shal Muhammad SI PW-7, then it reveals that the investigating officer admitted in his cross-examination at page 22 that the accused facing trial was in his custody during the time of pondering and that only after 10/15 minutes of pondering, he was produced in the Court. Thus, neither proper time of pondering was provided to the accused facing trial nor free of police custody environment was provided to him which was mandatory for making a confession voluntarily. Moreover, had the accused was ready to confess his guilt voluntarily? he should have done so on the very first date of his production before the Judicial Magistrate where he was produced by the investigating officer for obtaining his physical remand. Thus, the recording of judicial confession



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after the accused being remained for three days in police custody and especially when even at the time of pondering, he was in police custody could not be termed as a confession made voluntarily. The other interesting fact of the confession is that the accused facing trial never admitted therein that either the recovered contraband were recovered either from the tractor trolley or from his immediate possession and rather it has been alleged therein that the local police arrested him and took him to the Shaho check-post where his eyes were fastened and he was taken to a room where he was handcuffed and when his eyes were unfastened then some packets of chars were found in front of him and he was informed by the police that the same have been recovered from his tractor trolley. Thus, neither the confession was made voluntarily nor all the formalities provided u/s 164/364 of the Cr.P.C were complied with, nor it was truly made to reflect the real face of the case and finally the accused never admitted the recovery of the same from the tractor trolley. As such the alleged judicial confession Ex. 4/1 to 4/3 is not worth believing and cannot be a base for recording conviction on the same against the accused facing trial. Hence, the same is discarded accordingly.

- (6). The alleged recovery of contraband was affected on 10.10.2019, whereas as per report of the FSL Ex. PK, the samples of chars were received in the FSL Peshawar on



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14.10.2019 i.e. after 4 days of the occurrence. The complainant in his statement as PW-5 has deposed that on the day of recovery he has handed over the recovered case property to the Moharrir of the Police Station and the Moharrir Lubab Ali as PW-3 also verified the said fact in his evidence but Ameer Nawaz Constable PW-2 deposed that on 14.10.2019, the investigating officer, Shal Muhammad Khan handed over to him the parcels of the chars for taking the same to the FSL and accordingly he received and handed over parcels of chars to the FSL Peshawar. The investigating officer, Shal Muhammad Khan PW-7 also in his evidence confirmed that on 14.10.2019 he handed over parcels of the chars to the constable Ameer Nawaz PW-2. However, the evidence is silent as to when the investigating officer received the parcels from the Moharrir and in this regard neither the moharrir PW-2 nor the IO PW-7 stated a single word. Thus, the very safe custody of the case property from the police station to FSL is doubtful. Moreover, it was not explained as to why the samples were dispatched to the FSL with delay of 04 days? and why it was not dispatched immediately to the FSL Peshawar? The late sending of samples of chars to the FSL Peshawar has created a doubt regarding the recovery and availability of the same for the purpose of FSL. It is also necessary to mention here that the local Police in the recovery memo Ex. PC as well as in



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Murasila Ex. PA/1 have mentioned that the recovered Chars were in Gardah (Powder) form but the report of FSL Ex. PK overleaf shows that the form of the contraband received and examined in the FSL was brown solid besides in the cross-examination of complainant PW-5 at the request of defence counsel when the case property was de-sealed, then chars in powder form (gardah) was found inside the parcel and to this effect, court has recorded observations in the cross-examination of PW-5 at page 14. Hence, the FSL report cannot be based as evidence for the conviction of accused facing trial as the same is not pertains to Chars Gardah which was allegedly recovered from the accused facing trial but it relate to brown solid form of chars which was never alleged to have been recovered from the possession of accused facing trial. Moreover, Rule 6 of Control of Narcotic Substances (Government analysts) Rules, 2001 provides that full protocols ought to be mentioned in the report of the government analysts and its non-compliance in such context would render the report as inconclusive and unreliable. Reliance is placed upon 2018 SCMR page 2039. In the present case no protocols are mentioned in the FSL report vide which the tests of the recovered case property were conducted besides the difference of nature of the recovered chars as mentioned in the Murasila and report of the FSL coupled with the late sending of samples to the FSL



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Peshawar has badly dented the version of the prosecution pertaining to the recovery of contraband, determination of its nature through FSL etc. Thus, the report of the FSL is inconclusive and unreliable.

- (7). The recovery memo Ex. PC is showing that as many twenty-one parcels were prepared at the spot which were sealed with seal having abbreviation of M.K. However, the seal of M.K is not mentioned in the Murasila Ex. PA/1 to determine that the recovered contraband was sealed and Murasila was prepared at the spot. The bare perusal of the murasila Ex. PA/1 and recovery memo Ex. PC would reveal that the hand-writings and ink used in the both are different and have been drafted by different persons which means that the proceedings are either not carried out at the spot or have been carried out by somebody else at some various unknown places. Thus, the very presence of the PWs and the mode and manner of the occurrence alleged at the relevant time is doubtful. The ocular account when further got scanned then it reveals that complainant, Ishtiaq Hassan PW-5 alleges recovery of contraband from the secret cavity beneath the tractor trolley, but however the eyewitness Kalim Ullah SI PW-6 in his examination in chief deposed that the recovery was affected from beneath the tractor. It was also alleged in the evidence of the ocular account that the secret cavity was formed through wooden planks closed with screws, however



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neither the said wooden planks and screws were taken into possession nor the same were produced in evidence to determine the formation of secret cavity. As such not only the recovery of contraband has been doubted by the ocular account from a particular place but also, they failed to establish that there was any secret cavity where from the alleged chars have been recovered. Another interesting factor of the case is that it was alleged in the Murasila Ex. PA/1 that the Murasila was sent through constable Khan Wada, however neither his presence is shown in the site plan Ex. PB nor in the daily diary Ex. PW-5/2 nor he was produced for evidence to determine the facts alleged by the prosecution. No investigation was carried out to prove the connection of the tractor trolley with the accused facing trial.


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- (8). Moreover, accused facing trial is neither previous convict nor involved in any such case in the past besides despite prior information no private person was associated with recovery proceedings. Also, no evidence was brought on record to prove his connection with the recovered contraband or tractor trolley rather the evidence led by the prosecution is full of doubts and contradictions which have denied the very presence of the witnesses and their proceedings at the spot at the relevant time. It seems that either the witnesses were not present at the relevant place on the relevant date and time or have not deposed in the mode

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and manner in which the occurrence was alleged to have had been committed.

- (9). Accordingly, in the light of above, the above-named accused is acquitted of the charges levelled against him through the FIR in question. Accused is in custody, he be released forthwith if not required in any other case. The case property i.e. chars and tractor trolley be kept intact till the arrest of absconding accused.
- (10). However, prima facie case exists against the absconding accused, Dilawar Shah and he is accordingly declared proclaimed offender. Perpetual warrant of arrest be issued against him and DPO Orakzai be asked to enter his name in the register of proclaim offenders. The proclaimed offender be brought before the Court whenever arrested.
- (11). File be consigned to Sessions Record Room after its necessary completion and compilation.

Announced
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CERTIFICATE

Certified that this judgment consists of twenty (20) pages. Each page has been read, corrected where-ever necessary and signed by me.

Dated: 20.06.2020.



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