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

CNSA CASE NO. : 5/3 OF 2019
DATE OF INSTITUTION : 26.08.2019
DATE OF DECISION : 08.10.2019

STATE THROUGH MUJAHID KHAN SHO POLICE STATION
LOWER ORAKZAI KALAYA

.....(COMPLAINANT)

-VERSUS-

1. SYED UMAR S/O YAAR MUHAMMAD KHAN AGED ABOUT 18/19 YEARS RESIDENT OF TRIBE STORI KHEL, SUB TRIBE MULA KHEL, TEHSIL LOWER, DISTRICT ORAKZAI
2. HAMEED ULLAH S/O ASTRA KHAN AGED ABOUT 24/25 YEARS RESIDENT OF TRIBE STORI KHEL, SUB TRIBE MULA KHEL, PO TAZIKHEL TEHSIL LOWER, DISTRICT ORAKZAI
3. HAMEED ULLAH S/O FAZAL KHAN AGED ABOUT 47 YEARS RESIDENT OF TRIBE STORI KHEL, SUB TRIBE QAMBAR KHEL SUB TRIBE KHWAIDAD KHEL, YOUSAF KHEL, BAKYANA, BARA, DISTRICT KHYBER
..... (ACCUSED FACING TRIAL)

Present: Umar Niaz, District Public Prosecutor for state.
: Akbar Yousaf Khalil Advocate, for accused facing trial.

FIR No. 22 **Dated:** 01.08.2019 **U/S:** 9(c) CNSA
Police Station: Lower Orakzai

JUDGEMENT
08.10.2019

The story of the prosecution as per contents of Murasila Ex. PA/1 converted into FIR Ex. PA are that; on 01.08.2019 the local police received spy information pertaining to the smuggling of narcotics by some of the persons through motorcycle. Upon the receipt of said information, the local

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police laid a barricade at Said Khalil Baba police post. It was about 1630 hours when a motorcycle bearing registration no. MIK-2675 black colour came to the check post from Bezot side having boarded three persons. The SHO stopped the motorcycle and deboarded all the three persons from the motorcycle. The personal search of all the accused was conducted which led to the recovery of 2 packets Chars Gardah each from the trouser fold of each accused. The accused disclosed their names as above. Each packet of Chars Gardah was weighed at the spot which came out 1000grams each (6000grams/6kg in total). The SHO separated 10 grams each from each packet and sealed the same in to parcels no. 1 to 6 for chemical analysis to the FSL, whereas the remaining Chars Gardah 5940grams was sealed into parcel no. 7. The motorcycle of the accused was also taken into possession.

- The accused were arrested through card of arrest Ex. PW-3/1, recovery memo Ex. PC and Murasila Ex. PA/1 were drafted. Murasila was sent to the Police Station and accordingly FIR in question was registered against the accused facing trial.

- (2). Upon the receipt of case file, notices were issued to the accused facing trial as they were on bail and upon their appearance the proceedings were initiated and they were charge sheeted to which they pleaded not guilty and claimed

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trial and accordingly the witnesses were summoned who
deposed in the following manner.

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**Lubab Ali MHC Police Station Lower
Orakzai Kalaya as PW-1** deposed;

“that on receipt of Murasila, card of arrest and recovery memo from SHO Mujahid Khan through Constable Yousaf Khan, I incorporated the contents of Murasila in to FIR Ex. PA which is correct and correctly bears my signature. After registration of the case I handed over copy of FIR, Murasila, card of arrest and recovery memo to Shal Muhammad Khan SI for investigation. After arrival of SHO to the Police Station, he handed over to me case property i.e. Seven (7) parcels of Chars/Garda including parcel no. 1-6 of FSL and parcel no. 7 (remaining quantity of Chars/Garda). I handed over parcel no. 1-6 to the Incharge of Investigation Shal Muhammad Khan and kept parcel no. 7 in Maal Khana of the Police Station in safe custody. I have also parked the motorcycle of the accused at Police Station. My Statement was recorded by the IO U/S 161 Cr.P.C.”

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**Shal Muhammad Khan Investigating
Officer Police Station Lower Orakzai
Kalaya as PW-2 deposed;**

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“that on receipt of copy of FIR, card of arrest, Murasila and recovery memo I along with my investigation staff visited the spot and there on pointation of SHO Mujahid Khan I prepared site plan Ex. PB. I recorded statements of PW's of recovery memo and other PW's. After completion of investigation on spot I returned to Police Station and recorded statement of Muharrir, Lubab Ali. I then kept the accused in lockup of the Police Station. Thereafter, I interrogated the accused. Thereafter, I drafted an application for custody of accused and on the next day i.e. 02.08.2019 I produced the accused before the court of Judicial Magistrate vide my application Ex. PW-2/1 for obtaining their physical custody, as a result of which one day physical custody was granted. On the next day I again produce the accused for obtaining their further police custody vide my application Ex. PW-2/2 which was refused and accused were sent to Judicial

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Lockup. I recorded statements of accused. During course of investigation i.e. on 05.08.2019 I myself took the samples of Chars for chemical analysis to FSL Peshawar vide my application Ex. PW-2/3 and road permit certificate Ex. PW-2/4. After receiving the FSL report I placed the same on Judicial file which is Ex. PW-2/5 and is in positive. I have also placed on file the attested copy of register-19 regarding road permit certificate which is Ex. PW-2/6. After completion of investigation, I handed over the case file to SHO for onward submission of challan in court. All the documents prepared by me are correct and correctly bear my signatures.”

Mujahid Khan SHO Police Station Lower Orakzai Kalaya as PW-3 deposed;

“that on the day of occurrence i.e. 01.08.2019, I received information that few persons will smuggle narcotics (Chars) from District Khyber through Said Khalil Road on motorcycle. On this information, I along with other Police Nafri of Police Station, Police Nafri of Said Khalil Baba check post under the

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supervision of SDPO, Mehboob Khan conducted Nakabandi at Said Khalil Baba check post. After some time one motorcycle came and I signalled the driver to stop, which was stopped and all the three persons were deboarded from the motorcycle for the purpose of their personal search. I firstly, conducted search of driver Syed Umar and recovered 2 packets of Chars Gardah which were wrapped in yellow colour shopper fastened with the Bada Shalwar beneath the Banyan. Similarly, I also conducted body search of the second person namely Hameed Ullah S/O Astra Khan and recovered 2 packets of Chars Gardah which were wrapped in yellow colour shopper fastened with the Bada Shalwar beneath the Banyan. Likewise, I also conducted body search of the third person namely Hameed Ullah S/O Fazal Khan and recovered 2 packets of Chars Gardah which were wrapped in yellow colour shopper fastened with the Bada Shalwar beneath the Banyan. Thereafter, I weight the contraband, resultantly each packet came out to be 1000 grams each and total quantity of

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Chars Gardah came out 6000 grams (6kg). I then separated 10 grams from each packet for FSL and packed and sealed the same in to separate parcels no. 1 to 6 while packed and sealed the remaining quantity of Chars Gardah i.e. 5940 grams in to parcel no. 7. I conducted the above proceedings in presence of the witnesses. I arrested the accused and took in to my possession the motorcycle. On the spot I prepared recovery memo Ex. PC, Card of arrest Ex. PW-3/1 and Murasila Ex. PA/1. Today the case property i.e. Chars Gardah produced before the court as Ex. P1 and the motorcycle bearing number MIK-2675 high speed black colour CD-70 is Ex. P2. After that I sent the Murasila, Card of arrest and recovery memo to Police Station through constable, Yousaf Ali for the registration of case. After registration of the FIR, Investigation Officer arrived at the spot and I pointed out the spot to him who prepared site plan already exhibited Ex. PB on my pointation. After some time, I came back to Police Station with my Police Nafri and handed over the case property i.e.

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parcels of Chars Gardah and motorcycle along with accused to the Muharrir of the PS for onward proceedings. After completion of investigation by IO, I submitted complete challan in the instant case which is Ex. PW-3/2. All the documents prepared by me are correct and correctly bear my signatures.”

Samiullah Head Constable/Incharge Police Post Said Khalil Baba as PW-4 deposed;

“that on the day of occurrence i.e. 01.08.2019, I was present with the SHO Mujahid Khan on Nakabandi at Said Khalil Baba check post then one motorcycle came which was signalled to stop by the SHO and three persons were deboarded from the motorcycle. The SHO in my presence conducted body search of the driver Syed Umar and recovered 2 packets of Chars Gardah which were wrapped in yellow colour shopper fastened with the Bada Shalwar beneath the Banyan. Similarly, the SHO also conducted body search of the second person namely Hameed Ullah S/O Astra Khan and recovered 2 packets of Chars Gardah which were

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wrapped in yellow colour shopper fastened with the Bada Shalwar beneath the Banyan. Likewise, the SHO also conducted body search of the third person namely Hameed Ullah S/O Fazal Khan and recovered 2 packets of Chars Gardah which were wrapped in yellow colour shopper fastened with the Bada Shalwar beneath the Banyan. Thereafter, the SHO weight the contraband through digital scale, resultantly each packet came out to be 1000 grams each and total quantity of Chars Gardah came out 6000 grams (6kg). The SHO then separated 10 grams from each packet for FSL and packed and sealed the same in to separate parcels no. 1 to 6 while packed and sealed the remaining quantity of Chars Gardah i.e. 5940 grams in to parcel no. 7. To this effect the SHO prepared recovery memo Ex. PC which is correct and correctly bears my signature. My statement was recorded by the IO U/S 161 Cr.P.C.”

- (3)- Thereafter, prosecution closed their evidence where after statement of all the three accused was recorded U/S 342 Cr.P.C but the accused neither wished to be examined on

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oath nor produced evidence in defence. Accordingly, arguments of the learned DPP for the state and counsel for the accused facing trial heard and case file perused.

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(4)- From the arguments and record available on file it reveals that the prosecution is duty bound to prove their case like the ring of a chain connected to each other thereby holding it to be one thereby surrounding the accused towards conviction. However, the missing or broking of any ring of the chain would amount to doubts and providing safe exits to the accused facing trial which would ultimately end the case of prosecution in acquittal.

(5)- In the present case, the complainant has mentioned in the initial report that prior to the occurrence, he received spy information regarding the smuggling of narcotics but yet no private person was associated either with the raiding party or with the recovery proceedings to make it a transparent case. The contents of Murasila when gone through in detail, it reveals that the raiding party was consist of the SDPO, complainant Mujahid Khan, Incharge Police post Said Khalil Baba namely Samiullah along with constables Abdul Malik, Yousaf Ali, Wahid Ali and Syed Hassan Raza. However, when the situation is confronted with the site plan Ex. PB then only the presence of complainant Mujahid Khan and Constable Abul Malik with incharge PP Said Khalil Baba

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namely Samiullah has been shown. It was not explained as to why the other witnesses neither shown in the site plan nor their statements were recorded by the IO besides, none of them were produced for evidence in the court. As such the very presence of the witnesses named in the initial report at the spot is doubtful.

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- (6)- The evidence when further scanned, it reveals that the complainant, Mujahid Khan SHO as PW-3 as well as the Investigating Officer, Shal Muhammad Khan as PW-2 admitted in their cross examinations that the documents i.e. Murasila, recovery memo, card of arrest along with site plan, application of the IO to the incharge FSL, road permit certificate etc have been scribed by one, Ilyas ASI. It was not explained as to when the witnesses were present at the spot and were competent enough to carry out the legal proceedings, why the above-mentioned documents were prepared by the Ilyas ASI. Also, the said Ilyas ASI was neither produced in evidence nor his statement was recorded by the IO to determine his presence at the spot as well as scribing of the said documents by his own hand writing. The name of the Ilyas ASI is neither mentioned in the Murasila nor in the recovery memo nor any point is attributed to him in the site plan besides, it was not explained as to whether he was the member of the raiding party or came to the spot with

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the IO. This fact would denote that either the complainant and IO were not present at the spot at the relevant time or have not deposed in the mode and manner as alleged by the prosecution.

(7)- With regard to the case property, the contents of Murasila is showing that 6 parcels were prepared and sealed for FSL whereas the remaining case property was packed and sealed in a separate parcel. But however, it is not mentioned in the Murasila that the seal was containing the name or abbreviation of the complainant. Also, when the recovery memo is confronted with the Murasila then it provides that seal with the abbreviation MK is affixed on the parcels and is mentioned in the recovery memo. The complainant as PW-3 admitted in his evidence that the recovery memo was prepared prior to them drafting of Murasila but however, if it was the case, the abbreviation MK might have been mentioned in the contents of Murasila as well. The FSL report Ex. PW-2/5 is showing that they received the parcels having seals with abbreviation of MK. So, it is doubtful to determine that the recovered Chars is same as sent to the FSL. Moreover, in the contents of Murasila it is mentioned that the Chars was wrapped in a Banyan whereas in the recovery memo as well as in the statements of the ocular account it is mentioned that the Chars were wrapped in

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yellow colour plastic shopper. This create a doubt regarding the version of the prosecution pertaining to the preparation of the recovery memo and Murasila at the spot as well as recovery and sending of one and same Chars to the FSL. Also, it is necessary to mention here that U/S 27 (1)(b) of the Control of Narcotics Substances, ACT 1997, the production of case property soon after the occurrence before the court was necessary. However, the IO Shal Muhammad Khan PW-2 in his cross examination admitted that at the time obtaining police custody he has not produced the case property before the court concerned. So, had any recovery of contraband as alleged was effected and was available in packed and sealed parcels, the same might have been produced before the court while obtaining the Police custody of the accused facing trial. Furthermore, the record reveals that the alleged recovery was effected on 01.08.2019 whereas samples were received in the FSL on 05.08.2019 i.e. on the 5th day of the occurrence. The Rule 4 (2) of the CONTROL OF NARCOTIC SUBSTANCES (GOVERNMENT ANALYSIS) RULE, 2001 provides that the samples be dispatched to the FSL not later than 72 hours of the seizure. In the instant case the sending of sample with delay of 5 days was not explained by the IO. Thus the late sending of samples to the FSL is fatal for the case of the prosecution and doubts is thus erecting

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rounds the story crop up by the prosecution regarding the case property, samples of case property, its packing and sealing at the spot as well as doubt is apparent as to whether the recovered Chars and the one sent to the FSL are one and the same or otherwise. Moreover, with regard to the motorcycle no investigation at all was carried out to determine its connectivity with either of the accused facing trial.

(8)- A part from the above, it is necessary to mention here that accused facing trial are neither previous convict nor involved in any such case in the past besides neither they have confessed their guilt nor any further recovery was effected at their pointation despite they being in police custody for one day. Also, no evidence was brought on record to prove their connection with the recovered contraband 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 and manner in which the occurrence was alleged to have had been committed. Thus, it can be held safely that the prosecution failed to maintain their chain of story from the recovery to the evidence against

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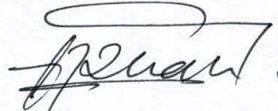
the accused facing trial in the intact form and rather a number of dents and doubts as pointed out above have broken the chain of the prosecution thereby providing safe exits to the accused facing trial towards acquittal.

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(9)- Accordingly, in the light of above, all the three above named accused are acquitted of the charges levelled against them through the FIR in question. Accused are on bail, their sureties stand discharged from the liabilities of the bail bonds. The Chars be destroyed after the expiry of period provided for appeal/revision in accordance with law. The motorcycle be returned by the SHO to its lawful owner upon production of original documents and attested copy of this judgement but after the expiry of period provided for appeal/revision.

(10). File be consigned to Sessions Record Room after its necessary completion and compilation.

Announced
08.10.2019



ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

08/10/19

CERTIFICATE

Certified that this judgment consists of fifteen (15) pages. Each page has been read, corrected where-ever necessary and signed by me.

Dated: 08.10.2019.



ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

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