

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

SPECIAL CASE NO. : 16/3 OF 2020
DATE OF INSTITUTION : 03.07.2020
DATE OF DECISION : 22.12.2020

STATE THROUGH MOHSIN ALI SI, POLICE STATION,
LOWER ORAKZAI
.....(COMPLAINANT)

-VERSUS-


ABDUL MALIK S/O RASOOL KHAN, AGED ABOUT 22
YEARS, TRIBE ZAKHA KHEL ZAWA, SHEEN QAMAR
DISTRICT KHYBER.
..... (ACCUSED FACING TRIAL IN CUSTODY)

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

FIR No. 54 **Dated:** 01.06.2020 **U/S:** 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019
Police Station: Lower Orakzai

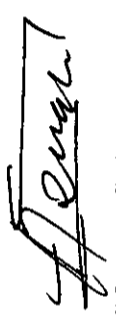
JUDGEMENT
22.12.2020

The story of the prosecution as per contents of Murasila Ex. PA/1 converted into FIR Ex. PA are that; on 01.06.2020, complainant, Mohsin Ali SI alongwith other police officials were present at Behramzai check-post when he received spy information about smuggling of chars. On this information, the police officials tightened the security. At about 10:30 am, the local police saw a person riding a motorcycle with high speed was coming


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towards them, who was signalled to stop. The person was deboarded from motorcycle who disclosed his name as Abdul Malik. One white colour plastic sack having red stripes was tied with back seat of the motorcycle. Upon search of the plastic sack, the police officials recovered 07 packets of chars, which packets were weighed through digital scale and each packet came out to be 1240 grams (total 8680 grams) of chars whereas the empty plastic sack came out 60 grams. The police officials separated 10/10 grams chars from each packet and packed and sealed the same into parcels no. 1 to 7 for chemical analysis of FSL, whereas remaining quantity of chars 8610 grams including the plastic sack 60 grams was packed and sealed in separate parcel bearing no. 8. The accused was accordingly arrested by issuing his card of arrest Ex. PW 3/1. The local police took into possession the recovered chars and the motorcycle without registration number through recovery memo Ex. PC. Murasila Ex. PA was drafted and sent to the PS which was converted into FIR Ex. PA. Hence, the case in hand.

(2). Upon the receipt of case file for the purpose of trial, notice was issued to the accused facing trial and upon his appearance, proceedings were initiated and he was charge sheeted to which he pleaded not guilty and claimed trial



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and accordingly the witnesses were summoned and examined. The gist of the evidence is as follow;

(3). Muhammad Shafiq SHO as PW-1 stated to have submitted complete challan Ex. PW 1/1 in the instant case against the accused facing trial. Ain Ullah Moharrir as PW-2 deposed that he has reduced the contents of Murasila Ex. PA/1 into FIR Ex. PA besides deposed that upon return of the SHO, he received from him the case property of the instant case and put the same for safe custody in mal-khana and entry Ex. PW 2/1 to this effect was recorded in register no. 19. This PW also deposed that on 12.06.2020, he handed over parcels no. 1 to 7 containing samples of chars to Shal Muhammad IO who onward transmitted the same to the constable Muhammad Zahid for FSL Peshawar but due to closure of FSL on account of Covid-19, the parcels were returned back. It was also deposed that on 02.07.2020 upon the opening of FSL Peshawar, he handed over the parcels again to the incharge investigation Shal Muhammad who transmitted the same to FSL Peshawar through constable Khan Wada. Complainant, Mohsin Ali SI as PW-3 and eyewitness, constable Ijad Ali as PW-4 in their evidence repeated the story of FIR. Constable Khan Wada as PW-5 stated to have taken the samples of chars for chemical analysis



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alongwith application addressed to the incharge FSL Ex. PW 6/5 and road permit certificate Ex. PW 6/5 to the FSL Peshawar. Lastly, Shal Muhammad SI was examined as PW-6 who deposed in respect of investigation carried out by him in the instant case.

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

(5). From the arguments and record available on file it reveals that the alleged recovery of contraband was affected on 01.06.2020 whereas as per report of the FSL Ex. PK, the samples of chars were received in the FSL Peshawar on 02.07.2020 i.e. after 32 days of the recovery. With regard to the delay of 32 days, the IO Shal Muhammad as PW-6 deposed that the FSL Peshawar was closed on account of Covid-19, hence the delay occurred in sending the samples to the FSL Peshawar. However, no notification regarding the closure of FSL Peshawar on account of Covid-19 was produced. The investigating officer also deposed that initially it was on 12.06.2020 when for the first time he



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handed over the samples of chars to constable Muhammad Zahid for FSL Peshawar but he came back on the same day as the laboratory was closed, and to this effect, he recorded his entry in the daily diary Ex. PW 6/2. However, neither 161 Cr.P.C statement of the said constable was recorded by the IO nor he was produced for evidence besides the report of FSL Ex. PK as well as the application addressed to the FSL Ex. PW 6/5 is showing the name of constable Khan Wada as the taker of the samples to the FSL. It shows that till 02.07.2020 even no application addressing the FSL was drafted otherwise it might have been produced containing the name of constable Muhammad Zahid but it is not produced. The evidence of constable Muhammad Zahid was the best evidence withheld by the prosecution. So, adverse inference under Article 129 of Qanoon e Shahadat Order, 1984 would be drawn that had such witness was produced, his evidence would have gone against the version of his producer. However, if, for the time being, we presume that the IO sent the samples to FSL for the first time on 12.06.2020, then a question would arise as to why the delay of 12 days occurred, no plausible explanation was furnished to this effect. The samples as per rules are to be sent not later than 72 hours



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of its recovery which was not done in the instant case. Moreover, the evidence of the prosecution is silent with regard to the fact that if the samples were handed over to the constable Muhammad Zahid on 12.06.2020 and the parcels were returned back on the same day then till its final dispatch on 02.07.2020 where the same were lying and whether the same were in proper custody and without the interference of anybody. The evidence of the Moharrir of PW-2 to this effect is absolutely silent, thereby creating doubts regarding the safe custody of the case property. 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. Moreover, the local Police in the recovery memo Ex. PC as well as in 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 the complainant, Mohsin Ali as PW-3 in his cross examination deposed that chars in powder form was recovered and he separated the 10 grams from each packet through knife which is beyond the understandings of a prudent mind as if it was in powder form, there was no need to cut the same through



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knife. As such not only the form of chars recovered is doubtful but also 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 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 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.

- (6). The perusal of record further reveals that the recovery memo Ex. PC is showing that as many 08 parcels were prepared at the spot which were sealed with seal having abbreviation of M.S. However, the seal of M.S is not mentioned in the Murasila Ex. PA/1 to determine that the recovered contraband was sealed and Murasila was prepared at the spot or otherwise. Moreover, constable Marjan Ali through whom allegedly the Murasila was sent for registration of FIR was also not produced to determine and support the version of the complainant and eyewitness. The complainant PW-3 and eyewitness as PW-4 are in



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contradiction with regard to the sack containing chars being tied with plastic rope or otherwise. The ownership of the recovered motorcycle was also not determined to be of the accused facing trial. The evidence of the ocular account is more or less contains dishonest improvements as the 161 Cr.P.C of the eyewitness PW-4 is silent with regard to stoppage of motorcycle and conducting of search by the complainant, the scaling of chars through digital scale and affixing of monogram of M.S on the parcels but in the statement before the court he alleged the said things in affirmative. Thus, the very presence of the PWs and the mode and manner of the occurrence alleged at the relevant time is doubtful.



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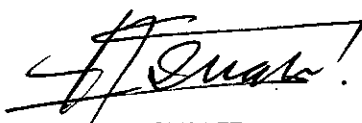
(7). It is also necessary to mention here that accused facing trial is neither previous convict nor involved in any such case in the past besides neither he has confessed his guilt nor any further recovery was affected at their pointation despite he being in police custody for some time. Also, no evidence was brought on record to prove his 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 deposited in the mode and manner in which the occurrence was alleged to have had been committed.

(8). 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 Chars be destroyed while the recovered motorcycle being unregistered having no owner at the moment stand confiscated to the state which shall be handed over to the Custom Authorities for further proceedings but after the expiry of period provided for appeal/revision in accordance with law.

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

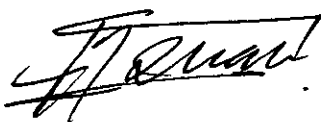
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CERTIFICATE

Certified that this judgment consists of nine (09) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 22.12.2020.


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