

116

In the name of almighty Allah who has unlimited jurisdiction over and beyond the universe.

BEFORE THE COURT OF
ADDITIONAL SESSIONS JUDGE/JUDGE SPECIAL COURT, ORAKZAI

Special Case No.13/3 of 2021

Date of institution: 02.07.2021

Date of decision: 10.07.2023

The State

...Versus...

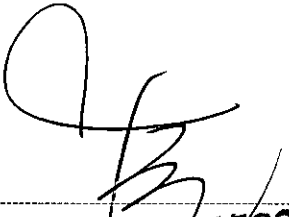
1. Saeed Khan s/o Samand Khan; aged about 38 year's resident of Qaum Bar Qamber Khel, Tappa Sheikmal Khel, Tehsil Bara and District Khyber.
2. Hahim Khan s/o Stori Gul; aged about 31 year's resident of Quam Stori Khel, Tappa Mula Khel, P.O Tazi Khel, Tehsil Lower and District Orakzai. (Accused facing trial)
3. Naseeb Khan son of Samand Shah Qaum Bar Qambar Khel, Distirct Khyber. (Absconding Accused)

**Case FIR No.33, Dated 09.03.2021 u/s 9-D of KP-CNSA, 2019
registered at Police Station Kalaya Orakzai.**

JUDGMENT

Accused placed at Serial No. 1 and 2 above faced trial before this Court in case FIR No.33 dated 09.03.2021 u/s 9-D of Khyber Pakhtunkhwa Control of Narcotics Substance Act, 2019, registered at Police Station Kalaya, Orakzai; whereas, the evidence against accused at Serial No. 3 has been procured for preservation on the score of being absconding.

2. Mr. Anwar Khan Sub Inspector being incharge of Giraj Police Post along with other police officials of Police Station Kalaya Orakzai, upon receiving spy

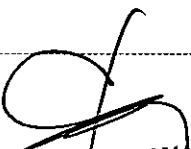

SAYED FAZAL WADOOD
Addl: District & Sessions Judge
Orakzai at Hangu

information about smugglings of drugs had established barricade. Motorcar bearing Registration No. 5397/LEC, black in color appeared and was stopped by the complainant for the purpose of checking. The Motorcar was driven by accused Saeed Khan. On search of the Motorcar, the complainant recovered 10 packets of chars, from secret cavity made beneath the front bumper of such Motorcar. On further search, the complainant also recovered 10 packets of chars, from secret cavity made beneath the rear bumper of said Motorcar. All the recovered 20 packets of chars were wrapped in yellow scotch tape; 19 packets of chars were having weight of 1200/1200 grams; while, 01 packet was having weight of 700 grams with total quantity of 23,500 grams chars. Accused was arrested on the spot. Murasila was drafted at the place of occurrence and sent to Police Station for bringing criminal law into motion which was given effect in the captioned FIR that culminated into present case. During the investigation, it has been revealed by the accused Saeed Khan arrested on the spot that it was one Naseeb Shah who has contacted him to drive the vehicle seized towards him and he had received such vehicle from one Hashim Khan. On such statement recorded under Section under Section 161 Cr.PC of the Code of Criminal Procedure, 1898, both the revealed persons have been implicated co-accused. One of them namely Hashim Khan was later on arrested; whereas, the other co-accused Naseeb Khan is still absconding.

3. On conclusion of the investigation, complete challan against the accused facing trial was presented. Accused Saeed was summoned through "Zamima Bay" being in custody and Hashim Khan on bail was summoned. On appearance, they were provided prescribed documents of case in line with Section 265-C of the Code of Criminal Procedure-1898. Charge against the accused was framed to which they pleaded not guilty and claimed trial. Similarly, trial in absentia has been commenced against absconding accused on examination of search witness.

4. Prosecution was afforded opportunity of leading evidence. In order to prove its case against the accused facing trial and to preserve evidence against absconding accused, prosecution produced and examined as many as seven (07) witnesses. Such evidence is sketched below for ease of reference in determination of guilt or innocence of accused:

5. Ain Ullah AMHC was examined as PW-1 who kept the case property in Malkhana of the PS for safe custody and made entries in the register No. 19, the extract of same is (Ex.PW-1/1). Malak Abdul Janan SI was examined as PW-2, who submitted the complete challan against accused namely Saeed Khan and challan under Section 512 Cr.PC (Ex.PW-2/1) against absconding accused namely Hashim Khan and Naseeb Khan and supplementary challan (Ex.PW-2/1) against accused Hashim Khan. Raees Khan SI, was examined as PW-3, who on receipt of Murasila, card of arrest and recovery memo, had registered the FIR


SAYED FAZAL WADOOD
Addl: District & Sessions Judge
Orakzai at Hangu

Ex.PA. He handed over the FIR along with documents to Investigation staff for investigation. The star prosecution witness was complainant Anwar Khan SI, whose statement was recorded as PW-4. He confirmed the initial report Ex.PA to be true. Recovery of contraband vide recovery memo Ex.PW 4/2 was testified to be genuine. He arrested the accused and issued his card of arrest as Ex.PW-4/1. He drafted the Murasila Ex.PA/1. He produced case property parcel No. 21 to 40 as Ex.P-1 to P-20 along with the Motorcar P-21 and its Key Ex.P-22. One of the marginal witness to the recovery memo was Zia ul Haq HC, who was examined as PW-5. It was testified that the recovery was made from the secret cavities of Motorcar possessed by the accused and was documented vide recovery memo. This PW is the carrier of Murasila, card of arrest and recovery memo to the Police Station for further proceedings. Investigation Officer of the case was Shal Muhammad SI who entered into the witness box as PW-6. Preparation of site plan Ex: PB and examination of witnesses was confirmed by this witness. He took the Registration Copy of the seized car on recovery memo Ex.PW-6/1 and exhibited it as Ex.P-23. This PW exhibited application Ex.PW-6/2 which was submitted before the Court for obtaining physical custody. He also exhibited FSL Application Ex.PW-6/3; Road Permit Certificate Ex.PW-6/4; application before learned Area Judicial Magistrate for recording confessional statement of accused as Ex.PW-6/5; two applications regarding the vehicle as

Ex.PW-6/6 and 6/7; letter to Excise and Taxation Officer Lahore as Ex.PW-6/8; warrant under Section 204 Cr.PC Ex.PW-6/9; proclamation notices under Section 87 Cr.PC Ex.PW-6/10; FSL reports as Ex.PK and Ex.PK/1; copy of Naqalmad No. 10 as Ex.PW-6/11; card of arrest of accused Hashim Khan as Ex.PW-6/12; application before Judicial Magistrate for physical custody of accused Hashim Khan as Ex.PW-6/13; and, 04 photographs of recovered Motorcar as Ex.PW-6/14 to Ex.PW-6/17. Minhaz Hussain Sub Inspector was examined as PW-7, who produced record pertaining to dispatch of case property to the FSL for chemical analysis.

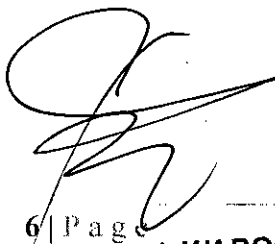
6. After the closure of prosecution evidence, statements of accused facing trial were recorded u/s 342 of the Code of Criminal Procedure, 1898. Accused neither opted examination on oath nor chosen production of defense evidence.

7. It was argued by learned APP that the recovery of narcotics is proved beyond doubt as is evident from the testimony of PW-4 and PW-5. That the recovery memo Ex.PW.4/2 has been proved to be correct and the testimony of the PWs has no contradiction on material particulars. That the offence is heinous in nature and there is nothing on record which could show any kind of *mala fide* on part of police in charging the accused facing trial. The direct evidence of primary source followed by circumstantial evidence entails conviction of accused; the Assistant Public Prosecutor concluded.

SAYED FAZAL WALOOD
Addl. District & Sessions Judge
Orakzai at Hangu

8. Learned defence counsel argued that no recovery has been made from direct possession of the accused and that the police have planted the recovery of narcotics against them with ulterior motive. That no independent witness came forward to support the prosecution case and that the testimony adduced by the prosecution is full of contradictions on material particulars. It was argued that as such very strong and consistent testimony would be required in order to prove the guilt, which is missing that gives birth to reasonable doubt; the benefit of which is to be extended in favor of accused.

9. The accused Saeed Khan was intercepted at barricade established in pursuance of spy information on 9th of March, 2021 at 9:00 hours and quantity of chars weighing 23500 grams was recovered from the secret cavities of the vehicle driven by accused Saeed Khan, in the presence of marginal witnesses namely HC Zia ul Haq and HC Khan Khel Vide Recovery memo (Ex. PW-4/2). The marginal witness Zia ul Haq (PW-5) was examined; whereas, Khan Khel being second marginal witness was abandoned. According to (PW-5), he was present with seizing officer on the eventful day. He stated that on search of the Motorcar, possessed by the accused, the complainant recovered 10 packets of chars from the secret cavity made beneath front bumper of the car and similarly also recovered 10 packets of chars from the secret cavity made beneath the rear bumper of the seized Motorcar.

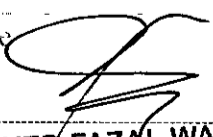


10. With respect to proceedings conducted by the Investigation Officer on the spot, the stance of the prosecution as per Murasila Ex. PA/1, FIR Ex. PA and Recovery Memo Ex. PW-4/2 is; that after drafting of Murasila, recovery memo and card of arrest of the accused by the complainant, the same were handed over to PW-5 HC Zia ul Haq who took the same to the Police Station and handed over to Raees Khan ASHO PW-3, who registered FIR Ex. PA on the basis of such Murasila. He handed over FIR, Murasila, card of arrest and recovery memo to the IO Shal Muhammad SI PW-6. The said PW proceeded to the spot where he prepared site plan Ex. PB on the pointation of the complainant and recorded the statements of witnesses u/s 161 of the Code of Criminal Procedure, 1898. In order to prove its stance, the prosecution has produced HC Zia ul Haq as PW-5, Shal Muhammad Investigation Officers as PW-6, Raees Khan SI as PW-3 and Ain Ullah Muharrir as PW-1. All the witnesses narrated the aforementioned story and the sequence of different events in their statements. HC Zia ul Haq as PW-5 in his statement has confirmed that he left the spot and reached the PS and handed over Murasila, card of arrest and recovery memo to Raees Khan SI, who was examined as PW-3 confirming that the Murasila, card of arrest and recovery memo were handed over to him and he has drafted the FIR Ex.PA. Similarly, Shal Muhammad OI as PW-6 has established that the case was handed over to him for investigation; where after, he left the PS and reached the spot. That the

case property was shown to him on the spot by the seizing officer in sealed condition. He has also established that the site plan Ex. PB was prepared on the spot and the statements of marginal witnesses were also recorded by him on the spot. The witnesses are also unanimous on the points of arrival of the IO on the spot, his departure and return to PS and the time of arrival of the complainant party to the Police Station. The statements of all the witnesses are consistent regarding proceedings conducted by the IO on the spot; their statements could not have been shattered in cross examinations and the prosecution has proved its stance regarding proceedings conducted on the spot in the mode and manner as alleged by it; that too, without any material contradiction.

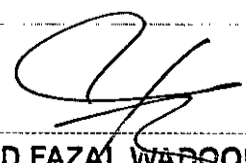
11. Chain of custody of the recovered material plays pivotal role in the cases of narcotics. The departure and arrival of the Police Party, transportation of the recovered material to Police Station, its entry in the relevant register, custody at Police Station, transportation to FSL and other material questions are prime points for determination in accordance with the evidence.

12. The case of the prosecution regarding the chain of the custody of the representative samples, their transmission to the FSL within the prescribed period of time and following full protocols of the tests applied in the FSL, is; that after seizure of the contrabands by the complainant containing 20 packets, 10 grams from each of the packet have been separated and sealed by him on the


SAYED FAZAL WADOOD
 Addl: District & Sessions Judge
 Orakzai at Hangu

spot by affixing of three monograms of 'MS' on each of the parcels. The complainant, after his arrival in the PS, has handed over the representative samples to PW-1 Ain Ullah, who has made entry of the case property in Register No. 19 and has kept the samples in safe custody. On 10.03.2021, the Incharge investigation collected the samples from Moharrir and handed over the same to Minhaz Hussain SI, PW-7 for transmission to FSL, who has transmitted the same against a Road Permit Certificate Ex.PW-6/4 and deposited the same in FSL against proper receipt, which on return has been handed over by him to the IO. On getting back of FSL reports Ex.PK and Ex.PK/1 being positive, the same have been placed on file by the IO. The prosecution, in order to prove its stance, has examined the complainant as PW-4, Muharrir Ain Ullah as PW-1, Shal Muhammad Investigation Officers of the case as PW-6 and Head Constable Zia ul Haq as PW-5. All the above mentioned witnesses have narrated the aforementioned story in their statements. Nothing contradictory could be extracted from the witnesses in their cross examinations.

13. As far as objection of not associating private witnesses is concerned, the police witnesses are also believed to be good witnesses as private witnesses unless some mala fide is shown on behalf of police witness. Similarly, Section 103 of Criminal Procedure Code, 1898 has specifically been excluded in the cases under the Khyber Pakhtunkhwa CNSA Act, 2019 vide Section 231 of the



ibid Act; therefore, the failure of the seizing officer or the investigating officer to associate any private witness with the occurrence does not adversely affect the case of prosecution. As per Daily Dairy, the complainant was accompanied by head constable Zia ul Haq who had already been examined in the Court.

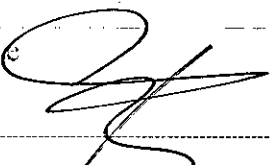
14. In view of what is discussed above, it is held that the statements of the complainant and the eyewitness are consistent regarding the date, time and place of occurrence as well as the mode and manner of the recovery. The scientific evidence in shape of FSL reports and other circumstantial evidence available on file is that of sufficient degree of cogency; therefore, the commission of offence is proved by the prosecution beyond reasonable doubt. Moreover, the witnesses of prosecution are unanimous regarding all material facts; therefore, the minor contradictions between the statement of PWs, cannot be taken to defeat the case of prosecution and in no way create reasonable doubts to shatter the case.

15. It can safely be concluded that the prosecution has proved case beyond reasonable doubt, establishing the chain of the custody of the representative samples; that too, within the prescribed period of time, from the spot till these are received in the FSL. Similarly, as per report of FSL, the representative samples no. 1 to 20 were found positive for chars after following full protocols of the tests applied. Hence, the case of the prosecution is substantiated by the report of FSL.

16. In circumstances, it is held that the prosecution has successfully proved its case against the accused facing trial without any shadow of reasonable doubt.

Consequently, the accused facing trial, Saeed Khan is held guilty for having in his possession 23500 grams of chars. He is convicted u/s 9 (d) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 and accordingly sentenced to suffer rigorous imprisonment for life and also to pay fine of Rs. 500,000/- (five lac). In case of default of the payment of fine, the accused shall further suffer simple imprisonment for six (06) months; nevertheless, the amount shall be made recoverable as arrear of land revenue prescribed in the provision of the West Pakistan Land Revenue Act, 1967. The benefit of Section 382-B of Code of Criminal Procedure, 1898 is, extended to accused. The case property i.e., chars be destroyed after the expiry of period provided for appeal/revision while the Motorcar is confiscated to State for being used in smuggling of chars with secret cavities and therefore be shifted to Provincial Warehouse for auction in accordance with law, if not required in any other case.

17. As far as co-accused facing trial namely Hashim Khan is concerned, he has been charged on the basis of statement recorded of co-accused under Section 161 of the Code of Criminal Procedure, 1898. There is no evidence collected against such accused and mere statement of co-accused; that too, recorded by Police, is no ground for basing judicial determination of guilt of such accused.


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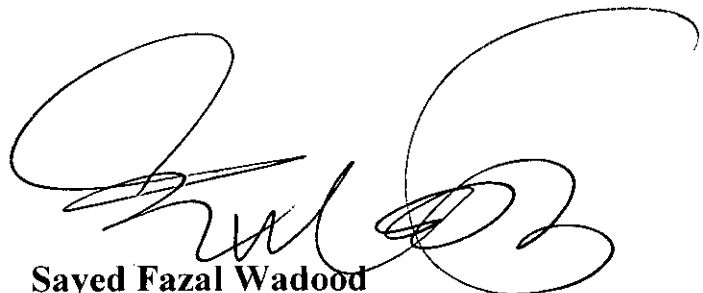
Resultantly, he being neither arrested on spot nor linked with recovery of Narcotics is acquitted from the charges levelled against him. His sureties are absorbed from the liability of bonds.

18. Absconding accused namely Naseeb Khan son of Samand Shah being proclaimed offender be entered in register concerned and perpetual warrant of arrest be issued against him.

19. Copy of this Judgement is delivered to the accused convicted today for free and his thumb impression to this effect has been obtained at the margin of the order sheet; besides, the copy of Judgement shall also be issued to the District Public Prosecutor, free of cost, in line with Section-373 of the Code of Criminal Procedure, 1898. Case file be consigned to District Record Room, Orakzai, after completion within specified time.

ANNOUNCED

10.07.2023

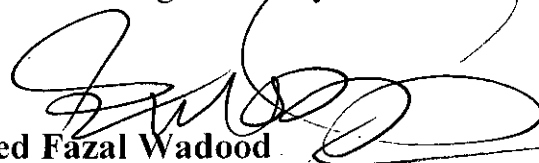


Sayed Fazal Wadood

Additional Sessions Judge/Judge Special
Court Orakzai

CERTIFICATE:

Certified that this Judgment is consisting upon twelve (12) pages; each page has been read over and signed by me after making necessary corrections therein.



Sayed Fazal Wadood

Additional Sessions Judge/Judge Special
Court Orakzai