

In the court of Additional Sessions Judge-II/Judge Special Court,  
Orakzai at Baber Mela Hangu.

Special Case No.....04 of 2020  
Date of Institution.....09.09.2020  
Date of Decision.....21.01.2021

State through Khurshid Anwar ASHO Police Station Lower Orakzai  
.....(*Complainant*)

**VERSUS**

1. Nasrullah Khan s/o Khyal Khan; aged about 42/43 years r/o Feroz Khel Tappa Jeasal Khel Mir Bak District Lower Orakzai
2. Munawar Khen s/o Shathoth; aged about 22/23 years r/o Qamber Khel, Shahan Khel, Ajab Kaly Bara District Khyber

..... (*Accused Facing Trial*)

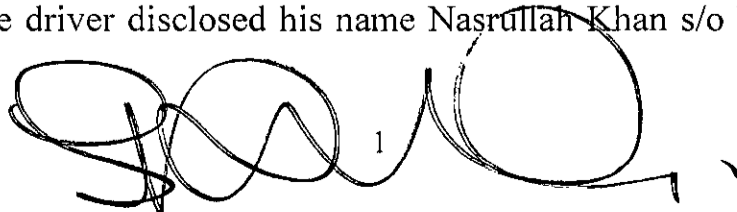
**Represented by:**

Mr. Javed Iqbal Anwar Learned Sr.PP for State  
Mr. Amir Shah Learned APP for State  
Mr. Yousaf Khalil Akbar Advocate and Mr. Sana Ullah Khan Advocate,  
counsels for accused Nasrullah Khan  
Mr. Sardar Ali Khan Advocate, counsel for accused Munawar Khan

**CASE FIR NO. 86 DATED 04.12.2019 U/S 9-(d) KP CNSA OF  
POLICE STATION LOWER ORAKZAI**

**JUDGMENT**

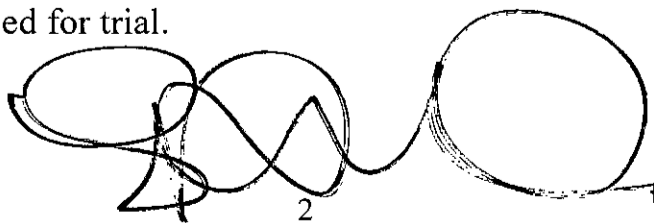
The prosecution story is that on 23-07-2020 the complainant along with police party were on gasht of the locality where the complainant received information about the smuggling of narcotics in a Motor Car GLI bearing Registration No. 4827 Lahore from Anjari to Bara District Khyber and on that information complainant along with other police constables laid barricade on the main road leading from Kalaya to Bara, that in the meanwhile the said Motor Car was coming which was signaled to stop and the driver stopped the Motor Car, that a young person was also seated in the front seat along with the driver and both were deboarded from the Motor Car, that the driver disclosed his name Nasrullah Khan s/o Khayal Khan



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R/o Feroz Khel Tappa Jesal Khel village Mir Bak District Orakzai and the other person disclosed his name Munawar Khan s/o Shahtoth, R/o Qoam Qmaber Khel Ajab Kaly District Khyber, that the Motor Car was searched and from the boot (Diggi) of the Motor Car one plastic sack white color was recovered containing 14 packets chars and on weightment each packet was 900/900 gram total 12600 grams chars, that the sack was separately weighed which was 112 grams. 10/10 grams was separated from each packet for the purpose of FSL analysis and sealed in parcels No.1 to 14 while rest of the chars and sack was sealed into separate parcels. Motor Car GLI along with ignition key, chars and plastic sack was taken into possession and the accused were arrested by issuing their card of arrest. Murasila was drafted and sent to PS for registration of the case through Anwar HC, on the basis of which instant FIR was registered against the accused. After the registration of the FIR, the case was handed over to the investigation staff for the purpose of investigation.

The case was investigated and in the course of investigation, the investigation officer prepared the site plan Ex.PB at the instance of complainant. The IO interrogated the accused during investigation and produced accused before the court for custody. The IO also sent the samples separated for FSL to the FSL Peshawar for chemical examiner's report and received report of FSL Ex.PZ in affirmative, which was placed on file. The I.O, during investigation, recorded the statements of PWs and accused u/s 161 Cr.P.C. After completion of investigation, the IO submitted the case file to the SHO for submission of complete challan who submitted challan against the accused for trial.



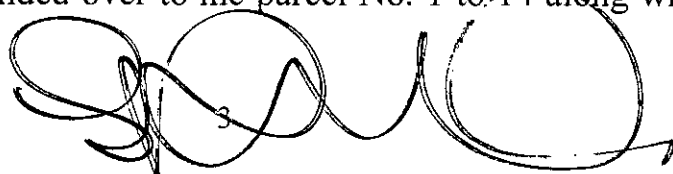
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On 09.09.2020, complete challan was received by this Court for the trial of accused. Accused Nasrullah who was in custody was summoned through Zamima Bay whereas the accused Munawar Khan who was on bail was also summoned. The accused Nasrullah was produced in custody and accused Munawar on bail appeared before the Court on 11-09-2020 and after compliance of provision of 265-C Cr.P.C, charge was framed against the accused on 19.09.2020, to which the accused pleaded not guilty and claimed trial, therefore, the prosecution was allowed to produce its evidence. During the trial of the case, the prosecution examined 06 PWs and on 06.01.2021, the prosecution closed its evidence;

The gist of the prosecution evidence is as under:

**PW-1** is the statement of Libab Ali Muharrir who stated that "During the days of occurrence I was posted as AMHC at PS Lower Orakzai. On the receipt of Murasila from Khurshid Anwar ASHO through Anwar HC I correctly incorporated the contents of Murasila into FIR. I also received the card of arrest of both the accused along with recovery memo. When the complainant ASHO Khurshid Anwar returned to the PS he handed over to me the case property along with the motor vehicle. The case property chars was entered in register NO. 19 and was kept in the Maal Khana of the PS whereas the motor vehicle was parked in PS. I handed over the samples prepared for the FSL to Aftab Hassan SI for FSL. My statement was recorded u/s 161 CR.PC by the IO. Today I have seen the FIR which is Ex.PA which is correct and correctly bears my signature."

**PW-2** is the statement of Khan Wada Constable who stated that "On 29-07-2020 the IO handed over to me parcel No. 1 to 14 along with road

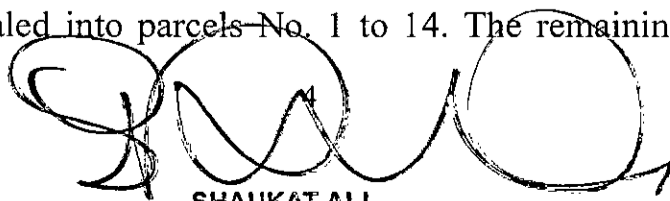


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certificate and the vehicle for FSL report. I handed over the samples and motor vehicle to the incharge FSL and on the road certificate receipt was handed over to me as a token of receiving the samples and moto vehicle. On return to the PS I handed over the receipt to the IO Aftab Hassan. The IO recorded my statement u/s 161 Cr.PC”

**PW-3** is the statement of Muhammad Shafiq Khan SHO who stated that “On completion of investigation against the accused facing trial the case file was submitted to me by the IO for submission of challan. I submitted complete challan against accused facing trial which is Ex.PW-3/1 which correctly bears my signature.”

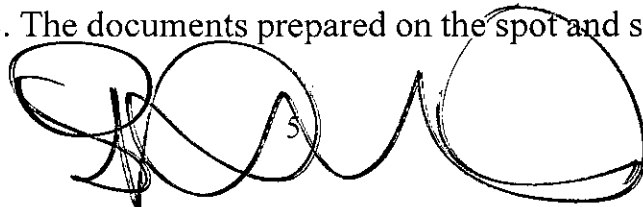
**PW-4** is the statement of Khurshid Khan ASHO who stated that “On 23-07-2020 I along with Ayaz, Saif Ullah, Anwar and other police officials were on gasht. I received spy information that chars shall be smuggled to District Khyber in vehicle bearing registration No. 4827 GLI silver color. We laid barricade at main road Khwaja Hizar where after some time the motorcar bearing registration No. 4827 reached there. Two persons were present in the motorcar among whom one was driving the motorcar while the other was on the front seat alongside the driver. The motorcar was stopped and both the persons were deboarded from the motorcar. The driver of the motorcar disclosed his name Nasrullah Khan and the person sitting on the front seat disclosed his name Munawar Khan. The motorcar was searched and on search from the Diggy one sack was recovered and on search of the sack it was containing chars 14 packets. The chars was weighted on digital scale and on weighment each packet was 900/900 grams total 12600 grams. From each packet 10/10 grams were separated for FSL and sealed into parcels No. 1 to 14. The remaining chars were



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sealed in separate parcels No. 15 to 28 as case property. The sack was separately weighed which was 112 grams and was sealed in parcel No. 29. I prepared recovery memo Ex.PW-4/1, Murasila Ex.PA and card of arrest Ex.PW-4/2. The Murasila was handed over to Anwar Constable for sending the same to the PS for registration of FIR. After registration of the FIR the IO came to the spot and prepared the site plan at my instance and pointation and also recorded the statement of witnesses. We thereafter returned to the PS. Today the case property in parcels No. 15 to 29 are before the court which are Ex.P-1 to P-15. The motorcar is Ex.P-16. Today I have seen the Murasila and the recovery memo which are correct and correctly bear my signature.”

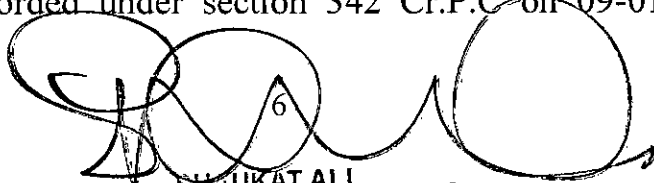
**PW-5** is the statement of Muhammad Ayaz Constable who stated that “On 23-07-2020 I was present along with ASHO Khurshid Khan on gasht and during gasht the complainant laid barricade at Khwja Hizar. In the meanwhile a silver color motorcar bearing registration 4827 reached there. Two persons; one driver and a passenger was present in the vehicle. The complainant opened the diggy of vehicle and chars were taken from the diggy which were in a white plastic sack wrapped in a yellow scotch tape. It was 14 packets chars each packet containing 900 grams chars after weighment on digital scale and total 12600 grams. 10/10 grams were separated for FSL and sealed into parcels No. 1 to 14 whereas the remaining were sealed into parcels No. 15 to 28 and the sack was sealed into parcel No. 29. The IO then came to the spot who recorded our statements. The complainant then prepared 03 papers and those papers were sent to the PS and Murasila was taken by Anwar HC. Thereafter I and complainant returned to the PS. The documents prepared on the spot and signed by me.”



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**PW-6** is the statement of Aftab Hassan SI/IO who stated that "After registration of the present case I was entrusted with the investigation of the instant case. On the same day after receiving the relevant documents in the PS I visited the spot and prepared the site plan Ex.PB. I recorded the statements of recovery witnesses on the spot. When I returned to the PS I recorded the statement of Libab Ali AMHC and HC Anwar. I curserly interrogated the accused. On 24-07-2020 I produced the accused vide my application Ex. PW-6/1 before the Illaqa Magistrate for seeking custody. One day custody was granted. I interrogated the accused during custody and on the expiry of custody I again produced the accused vide my application Ex.PW-6/2 for further custody which was declined. I recorded the statement of accused u/s 161 Cr.PC and sent the accused to jail. The jail receipt is Ex.PW-6/3. I drafted application for FSL Ex.PW-6/4 and took the parcels to the FSL myself along with Constable Khan Wada vide road certificate Ex.PW-6/5. I received the report of FSL Ex,PZ which is placed on file. I took the vehicle to the FSL for report and received the report Ex.PZ/1. I issued letters to Excise and taxation Lahore for verification which are ExpW-6/6 and PW-6/7. I annexed the copy of relevant page in register No. 19 which is Ex.PW-6/8 in respect of case property. I also placed on file the copy of DD regarding the arrival and departure of complainant from the PS which are Ex.PW-6/9 and PW-6/10. After completion of my investigation I handed over the case file to the SHO for onward submission. Today I have seen the all the relevant documents which are correct and correctly bears my signature."

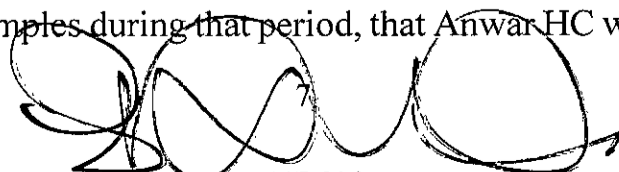
After the prosecution closed its evidence, the statements of both the accused were recorded under section 342 Cr.P.C on 09-01-2021. The

  
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accused denied the allegations of the prosecution but they refused to be examined on oath or to produce defense, therefore case was adjourned for final arguments.

Learned APP for the State argued that the accused was arrested red handed along with chars recovered from the motor car wherein both the accused were boarded, that the samples were taken from each packet that were in safe custody of the police, which was sent to the FSL and the FSL report is in positive which supports the version of prosecution, that the case property was produced before the Court, which was exhibited, that there are no major contradiction in the statement of prosecution witnesses who supported the recovery of contrabands, that no personal enmity or ill will of the police shown by the accused, that the accused could not produce any defense evidence, that the statement of witness to the recovery memo is in line with the statement of complainant, that sending the samples to the FSL beyond 72 hours is not fatal to the prosecution case in the rules to the that affect are directory in nature. The learned APP argued that the prosecution has proved the case against the accused beyond any shadow of doubt and submitted that the accused may be convicted.

On the other hand, learned counsels for the accused opposed the arguments of learned APP for the state and contended that the prosecution witnesses are not consistent in their statements and there are major contradictions on material points in the statements of prosecution witnesses, which create doubts in the case of prosecution the benefit of which may be extended to the accused, that the samples were sent to the FSL with unexplained delay and the prosecution could not prove the safe custody of the samples during that period, that Anwar HC was not produced

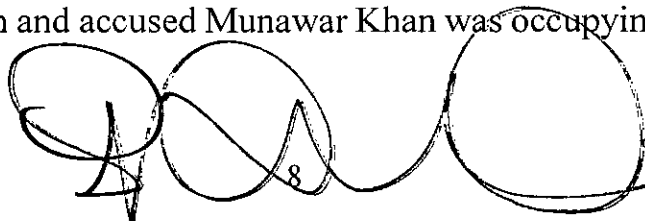


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before the court as prosecution witness who took the Murasila to the PS, therefore the chain of occurrence not established, that the alleged contrabands was not recovered from the personal possession of accused nor on the pointation of accused, that the registration book and ignition key of the vehicle not taken into possession to show the connection of the vehicle with the accused, that despite spy information no private witnesses were associated to the recovery proceedings which makes the recovery of contrabands highly doubtful, that the CDR of the accused not placed on file to show the contact of the accused inter se in their contact with the drug paddlers, that the alleged contraband is planted against the accused as there is no previous history of involvement of accused in such like cases, that the case of prosecution is full of doubts, the benefit of which may be extended to the accused. Learned counsel for the accused refer and relied on 2020 YLR 311, 2018 SCMR 772, 2020 SCMR 687, 2020 PCr LJ 1410, 2018 MLD 1210, 2020 YLR 2618, 2019 YLR 1282, 2020 SCMR 196, 2020 YLR 2524, 2020 PCr LJ Note 72, 2020 MLD 448, 2020 PCr LJ 202, PLD 2020 Supreme Court 132, 2018 YLR 1067, 2020 PCr.LJ 88, PLD 2019 Balochistan 96 and 2011 YLR 134.

Arguments of learned APP for the State and learned counsels for the accused already heard and available record perused.

The prosecution case briefly stated is that chars weighing 12600 grams in fourteen packets wrapped in yellow scotch tape, each packet weighing 900 grams was found and recovered in a sack from the Diggi of Motor Car GLI bearing Registration No. 4827 Lahore being driven by accused Nasrullah and accused Munawar Khan was occupying front seat of the vehicle.

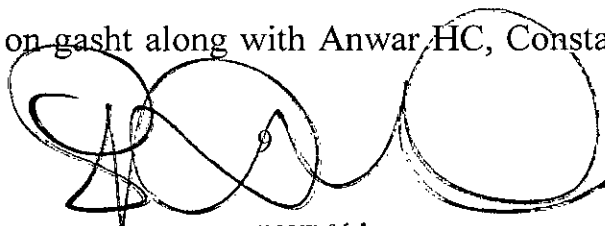


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In the case of prosecution against the accused Khurshid Khan ASHO/complainant (PW-04) and Muhammad Ayaz Constable (PW-05); the witness to the recovery memo Ex.PW-4/1 are the material witnesses of prosecution. The complainant stated in his evidence that he sealed the chars in parcels. The samples were sealed into parcels No. 1 to 14 and the remaining chars were sealed into parcel No. 15 to 28 as case property. The complainant stated in his cross examination that it is correct that the parcels are prepared and sewed with the help of sewing machine and further stated that cloth sewing machine is not available with them in their vehicle. Muhammad Ayaz (PW-05) also stated in his cross examination that the parcels were prepared through sewing machine and further stated that he does not know that how the parcels were prepared by the complainant through sewing machine. Muhammad Ayaz (PW-05) who is the marginal witness to recovery memo Ex.PW-4/1 is not aware of the preparation of parcels on the spot by the complainant and the statement of complainant shows that when the sewing machine was not available with him in the vehicle and the parcels were prepared with the help of sewing machine then it is established that the parcels were not prepared on the spot which makes the recovery of contraband from the vehicle in the mode and manner highly doubtful.

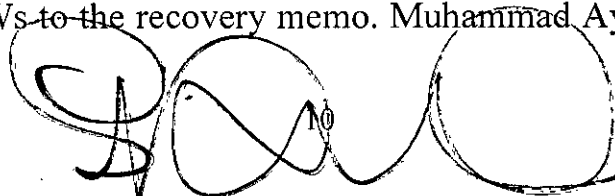
The complainant in his cross examination deposed that they go on gasht in official vehicle. The site plan Ex.PB also shows official vehicle pick-up. Aftab Hassan SI/IO (PW-06) negates the complainant and the site plan prepared by him by stating that there was a private vehicle with ASHO Khurshid Khan on the spot. The complainant mentioned in the Murasila Ex.PA that he was on gasht along with Anwar HC, Constable Saif Ullah



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and Muhammad Ayaz whereas in his cross examination the complainant stated that Shah Wali and Zahid were also present with him during gasht. In the site plan only 03 police officials are shown with the complainant and Shah Wali and Zahid are not shown in the site plan nor their statements were recorded by the IO. PW-05 also negated the complainant and stated in his cross examination that they were 04 police officials on spot namely ASHO Khurshid Khan, Anwar HC, Saif Ullah Constable and he himself. Furthermore the complainant stated in his cross examination that all the police officials who accompanied him was on gahst with him from the PS. The complainant was belied by Muhammad Ayaz PW-05 who stated that he came from home and went to the check post and the complainant was on his way when he joined him. PW-05 further stated that he along with Constable Saif Ullah and Anwar HC present in the check post accompanied the complainant. The contradiction in the statement of prosecution witnesses created serious doubts regarding the fact that the complainant was on gasht on the day of occurrence, the arrest of the accused and recovery of alleged contraband and such statement could not be believed for the conviction of accused.

The complainant stated that after registration of the FIR the IO came to the spot and prepared the site plan on his instance and pointation and thereafter returned to the PS. In his cross examination the complainant stated that the IO reached to the spot at 17:30 hours and remained on the spot for about two hours. The IO in his cross examination stated that he reached to the spot at 17:30 hours and consumed one hour and 15 mints on the spot proceedings during which he prepared site plan and recorded the statement of PWs to the recovery memo. Muhammad Ayaz (PW-05) who

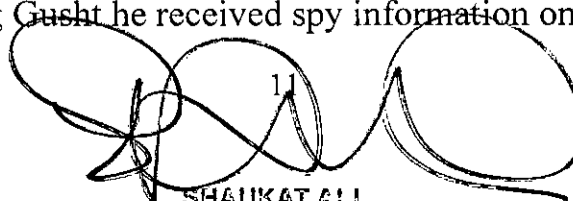


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is witness to the recovery memo Ex.PW-4/1 stated in his cross examination that he along with the complainant came to the PS and reached to the PS at 17:00 hours which negates the presence of complainant and witnesses of recovery memo on the spot with the IO, preparation of site plan at the instance of complainant and recording of statements of the witnesses to the recovery memo at 17:30 hours by the IO and makes the proceedings on the spot by the IO and investigation in the mode and manner not believable.

Muhammad Ayaz (PW-05) who is the material witness of prosecution being witness to the recovery memo Ex.PW-4/1, his statement is worth perusal who stated in his examination in chief that parcels were prepared and then the IO came to the spot and recorded their statement and further stated that the complainant then prepared 03 papers and those papers were sent to the PS whereas Murasila was taken by Anwar HC to the PS. if the Murasila was sent after the arrival of the IO to the spot then the time of occurrence is 14:20 hours mentioned in the Murasila Ex.PA could not be believed as the IO had reached to the spot at 17:30 hours which negates the time of occurrence. PW-05 further stated during cross examination that he signed only one document but does not remember the name of that document and he does not know that on which paper his signature was obtained, which put serious doubts in the case of prosecution and makes the statement of prosecution witnesses unworthy of any credit. Such statement of the prosecution witness is neither worth reliable nor the same can be made bases for the conviction of accused.

The complainant as per contents of Murasila was on gusht of the locality along with Anwar HC, constables Saif Ullah Khan and Mohammad Ayaz when during Gusht he received spy information on his mobile phone

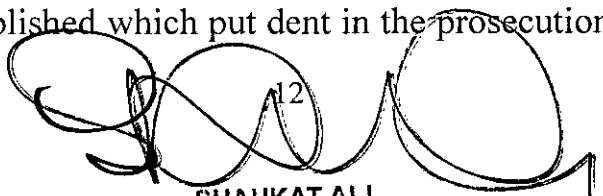


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regarding the smuggling of narcotics in the Motor Car GLI 4827 Lahore. The complainant laid barricade on the Main Road leading from Kalaya to Bara where the said Motor Car was intercepted and stopped for the purpose of search and on search the alleged contraband was recovered which was taken into possession vide recovery memo, however the recovery memo, available on file Ex: PW-4/1, would transpire that both the witnesses to the recovery memo are police officials and no private witnesses were associated to the recover proceedings despite the fact that the barricade was on main road leading from Kalaya to Bara. When the search was conducted after receiving spy information then in such circumstances the complainant was required to associate private witnesses to the recovery proceedings. The august Peshawar High Court in case titled "Bakhti Jang Vs State" reported in 2011 YLR 134 held that;

"The recovery of contraband was doubtful for the reason that the recovery was not made in the presence of public witnesses- though the application of section 103 Cr.P.C. is excluded through section 25 of the Control of Narcotics Substances Act, 1997 but the association of public witnesses was necessary when the proceedings were conducted on prior information".

The complainant (PW-04) stated that he prepared recovery memo Ex.PW-4/1 card of arrest of accused Ex.PW-4/2 and drafted Murasila Ex.PA and then the Murasila was handed over to Anwar HC for transmitting the same to the PS for the registration of the FIR but said Anwar HC has not been produced by the prosecution as prosecution witness, therefore the very chain of the occurrence starting from the spot has not been established which put dent in the prosecution case. Reliance

  
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is placed on the Judgement of Peshawar High Court in case titled Javed and two others Vs The State reported in 2020 YLR 311.

The accused Nasrullah was shown as the driver of the Motor vehicle whereas the accused Munawar was occupying the front seat. The case was investigated but during the investigation of the case, the link of the accused could not established with the vehicle. Neither the ignition key of the vehicle nor its registration book or any other documents was taken into possession vide any recovery memo from the accused at the time of their arrest nor produced before the court to show that the accused were either the owner or driver of the vehicle. The alleged contraband was not recovered from the personal possession of the accused or on the pointation of the accused from the vehicle nor the same were recovered from the secret cavity of the vehicle designed for the smuggling of narcotics. The prosecution failed to prove that accused Nasrullah was the driver or owner of the vehicle. Furthermore there is no previous record of involvement of accused in such like case. There are major contradictions in the statement of prosecution witnesses which make the arrest of the accused in the mode and manner narrated by the complainant in the Murasila and recovery of contraband highly doubtful. In case of doubt in the prosecution case the accused shall be entitle to the benefits of such doubt, not as a matter of grace or concession but is a matter of right and the benefit of doubt shall be extent to the accused.

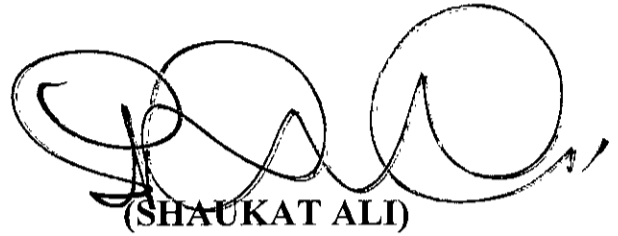
The prosecution failed to bring home the guilt of the accused beyond any reasonable shadow of doubt therefore; both the accused facing trial are acquitted in the instant case from the charges leveled against them by extending them the benefit of doubt. The accused Nasrullah is in custody,

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he be released forthwith if not required in any other case whereas accused Munawar is on bail, his sureties are discharged from the liability of bail bonds. The case property be kept intact till the expiry of period of appeal/revision and where after the same be dealt with in accordance with law.

File be consigned to the District Record Room Orakzai after necessary completion and compilation.

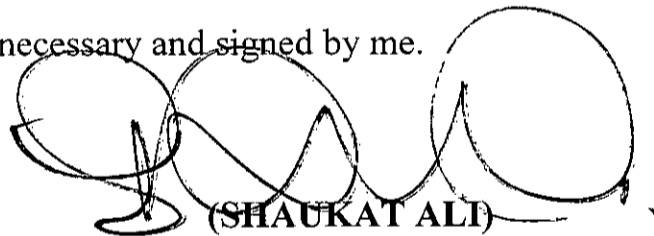
**Announced**  
21<sup>st</sup> January, 2021



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**CERTIFICATE**

Certified that this judgment consists of -14- pages. Each page has been read, corrected wherever, necessary and signed by me.



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