

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

SPECIAL CASE NO. : 19/3 OF 2020
DATE OF INSTITUTION : 02.09.2020
DATE OF DECISION : 02.02.2021

STATE THROUGH AFTAB AHMAD ASI, POLICE STATION
KALAYA, LOWER ORAKZAI
.....(COMPLAINANT)

-VERSUS-


MIKAEEL KHAN S/O MAYOOB KHAN, AGED ABOUT 33
YEARS, CASTE STORI KHEL, TAPA LALBI KHEL, CHAMAN
JANA DISTRICT ORAKZAI.
..... (ACCUSED FACING TRIAL ON BAIL)

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

FIR No. 76 **Dated:** 06.07.2020 **U/S:** 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019
Police Station: Kalaya Lower Orakzai

JUDGEMENT
02.02.2021

The story of the prosecution as per contents of Murasila Ex. PA/1 converted into FIR Ex. PA are that; on 06.07.2020, Aftab Ahmad ASI received spy information about smuggling of chars from Anjari side to Kokodara. On receipt of information, the local police made a barricade at the spot namely, pukhta road Ghozdera. At about 10:20 am, the local police saw a person coming on foot towards them having one blue plastic shoper in his right hand who was stopped by the complainant, Aftab Ahmad ASI. The complainant searched the blue plastic shoper in the right hand of the accused and


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upon search, the local police found therein two packets of chars which were wrapped with yellow colour scotch tape. Upon weighment through digital scale, each packet came out 1200 grams (total 2400 grams) of chars whereas the empty plastic shoper came out 18 grams. The police officials separated 10/10 grams chars from each packet and packed and sealed the same into parcels no. 1 & 2 for chemical analysis of FSL, whereas remaining quantity 1190 grams of chars was packed and sealed in separate parcels bearing no. 3. The local police took into possession the recovered chars through recovery memo Ex. PC. Accused was accordingly arrested by issuing card of arrest Ex. PW 4/1. 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, proceedings were initiated and he was charge sheeted to which he pleaded not guilty and claimed trial and accordingly the witnesses were summoned and their evidence was recorded. The gist of their statements recorded in evidence is as;

I. Ain Ullah MHC deposed as PW-1 deposed in respect of registration of FIR Ex. PA from the contents of Murasila besides deposed in respect of receipt of case property duly packed and sealed.

from the complainant which he thereafter kept in mal-khana for safe custody. The witness further deposed in respect of recording of entry regarding the safe custody of case property in register 19 Ex. PW 1/1 as well as handing over of samples of the case property for FSL to the IO, Shal Muhammad on 13.07.2020. The witness also produced copies from the daily diary Ex. PW 1/2 wherein he has recorded the departure and return of the complainant from the PS.

- II. Constable, Khan Wada appeared before the court as PW-2 and deposed that he has taken the samples of recovered chars to the FSL for chemical analysis on 13.07.2020 and after submission of the same, he was given the receipt of the parcels which he handed over to the IO upon return.
- III. Muhammad Shafiq SHO as PW-3 deposed in respect of submission of complete challan Ex. PW 3/1 in the instant case against the accused facing trial.
- IV. Complainant, Aftab Ahmad ASI and eyewitness Ashraf Ali HC, in their evidence as PW-4 and PW-5 respectively, repeated the story of FIR.

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V. Lastly, investigating officer Shal Muhammad was examined as PW-6 who in his evidence deposed in respect of the investigation carried out by him in the instant case.

(3). Thereafter, prosecution closed their evidence whereafter statement of the accused was recorded U/S 342 Cr.P.C but the accused neither wished to be examined on oath nor produced any evidence in defence. 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 the alleged recovery of contraband was affected on 06.07.2020 whereas as per report of the FSL Ex. PK, the samples of chars were received in the FSL Peshawar on 13.07.2020 i.e., after 7 days of the occurrence. The IO Shal Muhammad PW-6 in his evidence deposed that the relevant section of FSL Laboratory was closed due to Covid-19 which caused delay in sending the samples to the FSL Peshawar. In support of his statement, the IO produced a letter Ex. PW 6/3 addressed to the Additional Inspector General Police KPK by the Director FSL Peshawar informing him regarding the negative test of some of their officials and thereby opening some of sections of FSL Peshawar. However, this letter has by no means providing the automatic proof of the closure of FSL Peshawar from 06.07.2020 to 13.07.2020 i.e., the dates

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between the recovery and dispatch of samples to the FSL Peshawar. However, by the same one thing is clear that the samples were neither sent soon after its recovery nor within 72 hours to the FSL and there is delay of 07 days, which delay has not been properly explained. 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.

- (5). 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 as such 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. Thus, the report of the FSL is inconclusive and unreliable.

- (6). The recovery memo Ex. PC is showing that as many four parcels were prepared at the spot which were sealed with three seals each 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. Moreover, with regard to sealing of the samples at the spot, the Moharrir of the PS, Ain



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Ullah PW-1 in his evidence did not utter a single word that he received the samples in sealed condition and the similar statement was also found missing in his 161 Cr.P.C statement recorded before the IO. The complainant, Aftab Ahmad ASI as PW-4 as well as the eyewitness, Ashraf Ali as PW-5 both admitted in evidence that neither in their statements recorded before the IO u/s 161 Cr.P.C nor in their examination in chief recorded in court they have mentioned the three number of seals affixed on the samples prepared at the spot. The said ocular account in their cross examination admitted to have had recovered the CNIC and mobile phone of the accused facing trial but neither the same was taken through any recovery memo nor the Moharrir deposed anything about it in his evidence and no reason was furnished as to why this piece of evidence was withheld without any solid reasons. Moreover, the very bare perusal of Murasila, recovery memo allegedly prepared by the complainant and that of site plan prepared by the IO would reveal that the same are almost in one and same handwriting. Thus, it is questionable and has created a doubt regarding the proceedings conducted at the spot as well as the preparation of documents on the spot as alleged. The proceedings of the IO at the spot are also questionable when in his cross examination he deposed that 161 Cr.P.C statements of the witnesses have been recorded upon his dictation by the



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constable Amir Nawaz. Because when the daily diary Ex. PW 1/2 as gone through, it reveals that the IO Shal Muhammad at serial no. 8 of the daily diary has recorded his departure from the PS to the spot in the instant case on 06.07.2020 but the presence of said constable Amir Nawaz is not recorded in the said daily diary. The constable Amir Nawaz was neither examined by the IO u/s 161 Cr.P.C nor was produced in court to elucidate the real facts. Here a question would arise, that if the IO was present at the spot and conducted the proceedings as alleged by him then it was not explained as to what were the reasons by not recording the statements of the witnesses by his own handwriting. Thus, it creates a doubt regarding the availability of the IO at the spot and his proceedings allegedly conducted there on the day of occurrence. Most importantly, constable, Ijtehad Ali who has been assigned the role of taking Murasila from the spot has not been produced for evidence as such the very chain of the prosecution case from spot to the PS regarding the recovery and safe custody of chars of the instant case has been broken. The evidence of constable, Ijtehad Ali was of utmost importance and by withholding the said piece of evidence, the adverse inference under article 129 of the Qanon e Shahadat Order, 1984 would be drawn against the prosecution that had such witness was produced, his evidence would have gone against the version of the




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prosecution. Thus, the very presence of the PWs and the mode and manner of the occurrence alleged at the relevant time is doubtful.

(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 not confessed his guilt nor any further recovery was affected at his 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 deposed 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 on bail, his bail bonds stand cancelled and his sureties stand discharged from the liabilities of bail bonds. The Chars be destroyed after the expiry of period provided for appeal/revision in accordance with law whereas the personal belongings of the accused


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facing trial i.e., his CNIC and mobile phone be returned to him immediately, if not returned earlier.

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

Announced
02.02.2021



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CERTIFICATE

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

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