

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

Special Case No.....07 of 2020
Date of Original Institution.....16.09.2020
Date of Present Institution... ..18.12.2020
Date of Decision..... ..03.02.2021

State through Ishtiaq Hassan SHO Police Station Lower Orakzai
.....(*Complainant*)

VERSUS

Dilawar Shah s/o Gul Haleem Shah; aged about 54 years r/o Ali Khel,
Tapa Sher Khel, Kagnai, Ghiljo District Upper Orakzai

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

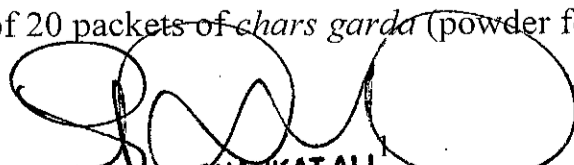
Represented by:

Mr. Javed Iqbal Anwar Learned Sr.PP for State.
Mr. Aurangzeb Khan Advocate, counsel for accused.

**CASE FIR NO. 36 DATED 10.10.2019 U/S 9-(d) KP CNSA OF
POLICE STATION LOWER ORAKZAI**

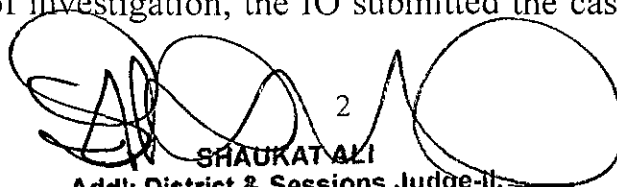
JUDGMENT

The story of the prosecution is that; on 10.10.2019 at about 1330 hours, the SHO Ishtiaq Hassan along with other police officials were busy in patrolling in the locality when an informer informed the SHO on mobile phone about smuggling of chars from Kagnayi Dabori through a tractor; that on receipt of information, the local police made barricade at the Shaho Khel check-post. At about 1330 hours the local police saw a tractor trolley proceeding from Dabori side which was signaled to stop. Upon the stoppage of tractor trolley, the same was searched and upon search, the police officials found a secret cavity beneath the trolley of the tractor. The wooden planks forming the secret cavity were removed by removing the screws with the help of screwdriver which lead to the recovery of 20 packets of *chars garda* (powder form). Upon weighment


SHAUKAT ALI
Addl: District Sessic
Orakzai at Hangu
Judge-II

through digital scale, each packet came out 1220 grams (total 24200 grams) of chars. The police officials separated 10/10 grams from each packet and packed and sealed the same into parcels No. 1 to 20 for chemical analysis, whereas remaining quantity of chars was packed and sealed in separate parcel bearing No. 21. The local police took into possession the recovered chars and tractor bearing No. LES-10/7514 along with trolley through recovery memo. The accused disclosed his name as Muhammad Hanif who was accordingly arrested by issuing card of arrest Ex. PW 5/1. Murasila Ex. PA/1 was drafted and sent to the PS which was converted into FIR Ex. PA.

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 and custody was granted. After the expiry of custody the accused was produced for recording his confessional statement before the Magistrate. The accused Muhammad Hanif recorded his confession before the Ilaqa Magistrate and in his confessional statement the accused facing trial was disclosed as owner of the tractor trolley and was charged for the commission of offence. 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

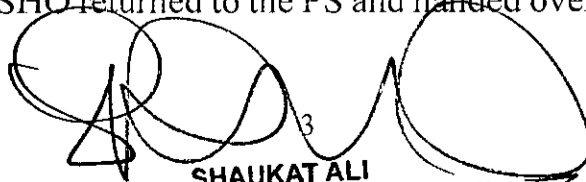

2
SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

for submission of complete challan who submitted challan against the accused Muhammad Hanif and accused facing trial u/s 512 Cr.PC. The accused Muhammad Hanif was acquitted after facing trial whereas the accused facing trial was declared as proclaimed offender and perpetual warrant of arrest was issued against him vide judgement Dated 20.06.2020 of Hon'ble Sessions Judge Orakzai. The accused Dilawar Shah was arrested on 02-07-2020 and was interrogated in the instant case and after completion of investigation supplementary challan was submitted against the accused.

On 16.09.2020, supplementary challan was received for the trial of accused. Accused Dilawar Shah who was on bail was also summoned. The accused on bail appeared before the Court on 26-09-2020 and after compliance of provision of 265-C Cr.P.C, charge was framed against the accused on 05.10.2020, 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 08 PWs;

The gist of the prosecution evidence is as under:

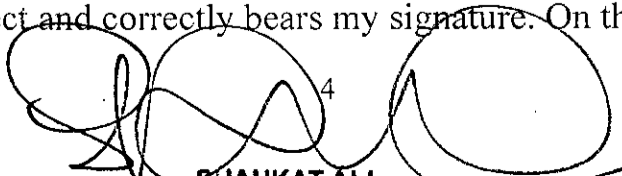
PW-1 is the statement of Libab Ali Additional Muharrir who stated that "During the days of occurrence of the instant case, I was posted as Additional Moharrir in PS Upper Orakzai. On 10-10-20219 Constable Khan Wada brought a murasila to the PS which was sent by Ishtiaq Hassan SHO. I reduced the contents of the Murasila into FIR register as FIR no. 36. The copy of FIR is Ex. PA-1. Thereafter, I handed over the original Murasila and a copy of FIR to IO. Later on, that day Ishtiaq Hassan SHO returned to the PS and handed over 21 parcels to me


SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

and brought a tractor to PS. I placed the parcels in the maalkhana, and the tractor was parked in PS.”

PW-2 is the statement of Muhammad Shafiq, SI/SHO who stated that “During the relevant days of submission of challan in the present case I was serving as SHO of PS Lower Orakzai. On completion of investigation case file was submitted by IO. I drafted complete supplementary challan against accused Dilawar Shah and file the same in the office of DPP, Orakzai on 17-07-2020.”

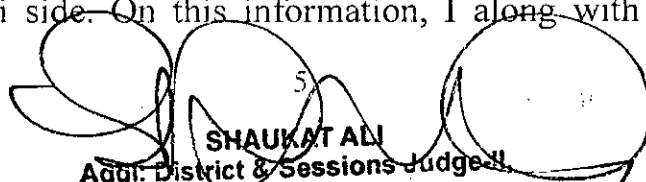
PW-3 is the statement of Kaleem Ullah SI who stated that “On 10.10.2019, I along with Ishtiaq Hassan SHO and other police nafri were present on naka bandi at Shaho Khel check-post at about 1330 hrs. One tractor along with trolley from Dabori side came which was signaled to stop by the SHO and the driver of the tractor stopped the tractor. SHO started search of the tractor and trolley. During search, SHO found one secret cavity beneath the trolley which was opened through screw driver and there were contraband chars in the secret cavity. The SHO on the spot weighed the packet of chars separately, each packet stood 1220 grams and the total 20 packets of chars weighed 24400 grams. The weight was carried out through digital scale. The SHO separated 10 grams from each packet for FSL and packed and sealed them into parcel no, 1 to 20 while the remaining quantity of chars 24200 grams were packed and sealed in separate packet no. 21. Accused disclosed his name as Muhammad Hanif who was arrested by the SHO. The SHO taken into possession the above-mentioned contraband chars along with tractor bearing No. LES-10/7514 Punjab and prepared the recovery memo which is correct and correctly bears my signature. On the spot, the SHO


SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

boarded the accused in his vehicle and also kept the case property i.e. chars in his vehicle. Murasila was drafted which was handed over to Constable Khan Wada who took the same to PS for registration of the case. The investigation officer came to the spot for investigation and the IO recorded my statement u/s 161 Cr.P.C”

PW-4 is the statement of Ameer Nawaz Constable who stated that “During the days of occurrence I was posted in investigation branch District Orakzai. On 14.10.2019, in-charge investigation Shal Muhammad Khan SI handed over to me 20 parcels duly sealed containing 10 grams chars in each parcel along with application addressed to the in-charge FSL and road permit certificate (raseed rahdari) and I took the same to the FSL Peshawar. I handed over the above-mentioned parcels along with application and road permit certificate to the official of FSL who received the same and returned to me road permit certificate duly signed and I handed over the road permit certificate to the in-charge investigation at PS on my returned to the PS. My statement was recorded by the IO u/s 161 Cr.P.C. The road permit certificate is Ex. PW 4/1”

PW-5 is the statement of Ishtiaq Hassan SI/Complainant who stated that “During the days of occurrence, I was posted as SHO of PS Lower Orakzai Kalaya. On 10.10.2019, I along with other police officials including Hakim Ali Shah ASI, Constable Fazal Hamid, Constable Khan Wada and other police *nafri* were on routine patrol in the area. During patrol, I received information through my cellular phone that narcotics (chars) will be smuggled today through tractor from Kagnayi Dabori side. On this information, I along with other police


5
SHAUKAT ALI
Addl. District & Sessions Judge-II
Orakzai at Hangu

officials conducted *Naka Bandi* at Shaho Khel check-post. At about 1330 hours, one tractor along with trolley came from Dabori side and I signaled the driver of tractor to stop which was accordingly stopped. I along with police officials started search of the tractor. During search of the trolley of the tractor, I found one secret cavity beneath the trolley of the tractor which was opened by me through screw driver and I found and recovered 20 packets of chars from the secret cavity. I weighed the packets of chars with digital scale, resultantly each packet stood 1220 grams and the total quantity of chars came out 24400 grams. On the spot, I separated 10 grams of chars from each packet for FSL and packed and sealed them into separate parcels from 1 to 20 while packed and sealed the remaining quantity of chars weighing 24200 grams in parcel no. 21. I affixed monogram of MK on all the parcels mentioned above. I also took into possession the tractor Messi Ferguson bearing no. LES-107514 Punjab along with trolley and contraband chars. The driver of the tractor disclosed his name as Muhammad Hanif s/o Khushal Khan, r/o Ali Khel sub-tribe Sher Khel Ghiljo District Orakzai, who was arrested by me accordingly. The above-mentioned proceeding was carried out in presence of the police official present there. To this effect, I prepared recovery memo Ex. PC/1 in presence of marginal witnesses and Murasila Ex. PA/2. Today the case property i.e. tractor produced before the court along with trolley and parcel no. 21 containing 24200 grams chars. The tractor is Ex. P1 while the trolley with secret cavity is Ex. P2 and parcel no. 21 is Ex. P3. Thereafter, I handed over the Murasila to Constable Khan Wada who took the same to the PS for registration of the case. After registration of the case, the IO came to the spot and I pointed out the spot to him and the IO prepared site plan on my pointation. Case

6
SHAUKAT ALI
Addl. District & Sessions Judge-II,
Orakzai at Hangu

property along with accused were shown to the IO on the spot. After some time, I returned to PS and handed over the case property to the Muharrir of the PS. My departure from the PS and return to the PS has been duly entered by the Muharrir of the PS in daily dairy on 10.10.2019 (original seen and returned). The copy of the daily dairy is Ex. PW 5/1. The tractor was parked in the courtyard of the PS. On 25.10.2019. Today I have seen all the documents which are prepared by me are correct and correctly bear my signatures”

PW-6 is the statement of Abdul Latif DFC who stated that “During relevant days I was posted as DFC PS Upper Orakzai. As the accused Dilawar Shah S/O Gul Khani Shah was avoiding his lawful arrest. Warrant U/S 204 of Cr.P.C against the said accused Dilawar Shah S/O Gul Khani Shah R/O Ali Khel Kagnai Upper Orakzai was entrusted to me. I went to the house of the accused for execution of warrant 204 Cr.P.C but the accused was not present at his home. Therefore, I returned the warrant 204 Cr.P.C unexecuted along with my report overleaf warrant. Warrant 204 Cr.P.C is Ex. PW-6/1 while my report along with statements of elders of the locality is Ex. PW-6/2 which is correct and correctly bears my signatures”

PW-7 is the statement of Shal Muhammad SI/IO who stated that “On receipt of copy of FIR and Murasila, I visited the spot along with my police nafri and there on the spot I prepared site plan Ex. PB on the pointation of SHO. The SHO have shown me the case property and accused on the spot and thereafter, I recorded statements of marginal witnesses of the recovery memo Kaleem Ullah SI and Sher Muhammad HC. Thereafter, the SHO returned to the PS and after completion of proceedings on spot, I along with police nafri returned back to the PS. In

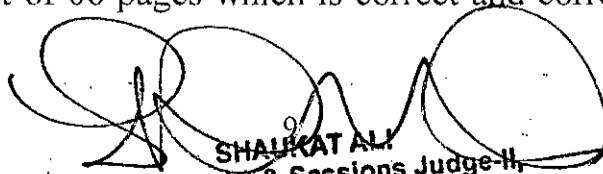
7
SHAIKAT ALI
Adm. District & Sessions Judge-II,
Orakzai at Hangu

the PS, I recorded statements of Muharrir Libab Ali and Constable Khan Wada u/s 161 Cr.P.C. Accused was formally handed over to me for onward investigation who was behind the lock-up. On 11.10.2019, I produced accused before the court of Judicial Magistrate vide my application Ex. PW 7/1 for obtaining his five days physical custody, as a result of which three days police custody was granted. During course of investigation, accused confessed his guilt to me and I recorded his statement u/s 161 Cr.P.C. On 14.10.2019, I handed over parcels no. 1 to 20, each containing 10 grams of chars garda along with road permit certificate already Ex. PW 2/1 and application addressed to the in-charge FSL Ex. PW 7/2, who took the same to the FSL. On the same day, I produced accused Muhammad Hanif before the court of Judicial Magistrate vide my application Ex. PW 7/3 for recording his confessional statement. Accused confessed his guilt before the court and was sent to Judicial lock-up. I recorded statement of Constable Amir Nawaz and received the FSL report on 04.11.2019. The FSL report is Ex. PZ which is placed on file. I annexed attested copy of register no. 19 Ex.PW-7/7 on the case file. Thereafter, I handed over the case to the SHO for submission for interim challan. As the accused Dilawar Shah s/o Gul Khani Shah tribe Ali Khel, Kagnaye Upper Orakzai was avoiding his lawful arrest, therefore I initiated absconding proceedings by submitting application u/s warrant 204 Cr.P.C, Ex. PW 7/4, against him and thereafter submitted application for issuance of proclamation notice u/s 87 Cr.P.C which is Ex.PW-7/5. During course of investigation, I have approached to my high-ups for verification of tractor in this respect addressed to the Excise and Taxation Officer Lahore is placed on file which is Ex. PW 7/6. After completion of investigation, I handed over

8
SHAUKAT ALI
Add: District & Sessions Judge-II,
Orakzai at Hangu

the case file to the SHO for submission of challan. All the documents prepared by me are correct and correctly bear my signatures. After the arrest of the accused Dilawar Shah the investigation was also entrusted to me. I produced the accused before the Illaqa Magistrate for obtaining 05 days custody vide my application Ex.PW-7/8 which was turndown the accused was sent to Judicial lock-up. I recorded the statement of accused u/s 161 Cr.PC. I also obtained the report from excise and taxation department Lahore regarding ownership of the tractor which is placed on file as Ex.PW-7/9. Today I have seen the above documents which are correct and correctly bears my signature.”

PW-8 is the statement of Muhammad Intiaz Judicial Magistrate who stated that “On 14.10.2019, accused Muhammad Hanif s/o Khushal Khan was produced by In-charge investigation SI Shal Muhammad Khan before me for recording his confessional statement u/s 164/364 Cr.P.C. Handcuffs of the accused were removed. All the codal formalities complied with and sufficient time was given to accused. Accused was ready to confess his guilt before me without any duress or coercion. Thereafter, the true confessional statement of the accused was recorded with his free will which was thumb impressed by him. After recording the confessional statement, original statement was handed over to IO while photo copy of the same was retained within the court in safe custody. Then after accused was handed over to Naib Court namely Mr. Izaz Ahmad and DFC Mr. Muhammad Khurshid to take him to the judicial lock-up/ sub-jail Orakzai at Baber Mela, Hangu which is at the walking distance from the Court. Today I have seen the confessional statement consist of 06 pages which is correct and correctly signed by


SHAIKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

39

me. The questionnaire consists of 03 pages Ex. PW 8/1, confessional statement of accused Ex. PW 8/2 while certificate is Ex. PW 8/3.”

On 20-01-2021 after the prosecution closed its evidence, the statements of accused was recorded under section 342 Cr.P.C on 22-01-2021. The accused denied the allegations of the prosecution but he refused to be examined on oath or to produce defense, therefore case was adjourned for final arguments.

Arguments of learned Sr.PP for the State and learned counsel for the accused already heard and available record perused.

Admittedly the accused Dilawar Shah was neither present on the spot at the time of arrest of acquitted accused Muhammad Hanif nor any recovery has been effected from his possession. The accused facing trial Dilawar Shah is charged in the confessional statement Ex.PW-8/1 of acquitted accused Muhammad Hanif recorded on 14-10-2019, wherein the accused facing trial had been stated as owner of the tractor trolley. The confessional statement of Muhammad Hanif was also not believed against him during his trial. The confessional statement shows that the acquitted accused had not admitted the commission of offence and stated himself to be innocent. The confessional of accused Muhammad Hanif was recorded after the accused remained in police custody for three days. If the accused was willing to record his confession, he would have recorded it on the first day when he was produced for the custody by the IO before the Illaqa Magistrate. Furthermore when the accused Muhammad Hanif was arrested he was inquired on the spot by the complainant who disclosed his name to the complainant but did not

10
SHAUKAT ALI
Addl: District Sessions Judge-II,

40

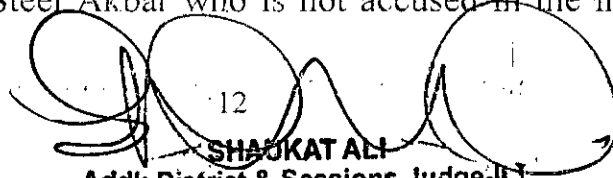
mention the name of the accused facing trial at that time but later on in the confessional statement accused Dilawar Shah was disclosed as the owner of the tractor trolley and was charged in the instant case, therefore such confessional statement of accused Muhammad Hanif could not be used against the accused facing trial to connect him with the commission of offence.

The confessional statement Ex.PW-8/1 wherein the accused facing trial is charged to be the owner of the tractor trolley is not supported by the statement of the prosecution witnesses. The only allegation against the accused is that the accused facing trial is the owner of the tractor trolley and the accused facing trial asked accused Muhammad Hanif to take the tractor trolley to Hangu for taking crush stones from Hangu where from which the alleged chars was recovered, however neither the accused Muhammad Hanif at the time of his arrest on the spot disclosed accused facing trial as the owner of the tractor trolley nor any documents of ownership were recovered to substantiate the ownership of the accused facing trial. During the whole investigation no such material was brought on record to show that the accused facing trial is the owner of tractor trolley. When the accused was charged in the confessional statement then the IO was required to place on record during investigation confidence inspiring evidence in support of the allegation against the accused facing trial in confessional statement Ex.PW-8/1, however the allegation against accused facing trial could not substantiate on the available record and evidence produced by the prosecution. Ishtiaq Hassan SI complainant (PW-05) stated in his cross examination that he had not recovered any documents from the tractor

11
SHAIKAT ALI
Addl. District & Sessions Judge-II,
Gangra, Hangu

trolley at the time of search to prove that the tractor trolley is the ownership of accused Dilawar Shah. The complainant further stated that there is no previous record of involvement of accused facing trial in such like cases. Kaleem Ullah SI (PW-03) who is witness to the recovery memo Ex.PC/1 stated in his cross examination that no document of ownership or any other document was recovered from the tractor trolley to show that the tractor trolley is the ownership of accused Dilawar Shah. The IO could not investigate the case to dig out that the accused facing trial is the owner of the tractor trolley or the same was handed over to accused Muhammad Hanif by the accused facing trial. No incriminating material has been placed on file to connect the accused with the commission of offence. The IO recorded his statement as PW-07 and during the course of his cross examination the IO has also admitted that he has not placed on file any document to show the tractor trolley is the ownership of accused Dilawar Shah and further stated that no witness from the locality came forward to record statement regarding the involvement of accused facing trial in such like cases and there is no record of previous involvement of accused facing trial in such like cases.

It is not sufficient that the accused facing trial is charged in the confessional statement to be the owner of the tractor trolley from which the alleged contrabands was recovered but such allegation should have been proved by the producing cogent and confidence inspiring oral and documentary evidence to support the allegation in the confessional statement which is lacking in the case of prosecution against the accused facing trial. The tractor trolley has been returned to the original owner Tajmeel Khan S/o Steel Akbar who is not accused in the instant case

12

SHAUKAT ALI
Addl: District & Sessions Judge-II,
Orakzai at Hangu

after he produced the bargain receipt and the original registration of the tractor which further negates the allegation of prosecution against the accused facing trial.

The prosecution could not place on record that either the accused facing trial is the owner of tractor trolley or that the accused facing trial remained involved in such like cases of narcotics, therefore could not prove the case against the accused Dilawar Shah, hence the accused facing trial Dilawar Shah is acquitted from the charges leveled against him. The accused is on bail, his sureties are discharged from the liability of bail bonds. The case property be dealt with in accordance with law.

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

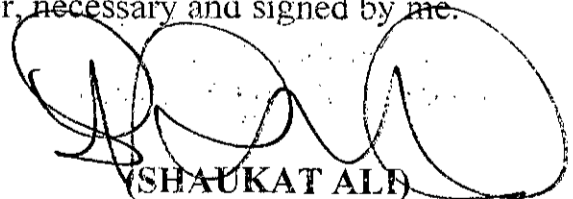
Announced
03rd February, 2021



(SHAUKAT ALI)
Addl; Sessions Judge-II/JSC,
Orakzai at Baber Mela, Hangu

CERTIFICATE

Certified that this judgment consists of -13- pages. Each page has been read, corrected wherever necessary and signed by me.



(SHAUKAT ALI)
Addl; Sessions Judge-II/JSC,
Orakzai at Baber Mela, Hangu