

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

Special Case No.....08 of 2020
Date of Institution.....27.10.2020
Date of Decision.....08.02.2021

State through Naseem Khan SHO Police Station Upper Orakzai
.....(*Complainant*)

VERSUS

Diran Gul s/o Khan Akbar; aged about 62/63 years r/o Malak Din Khel,
Daulat Khel, Umar Khel, Bara Maidan District Khyber
..... (*Accused Facing Trial*)

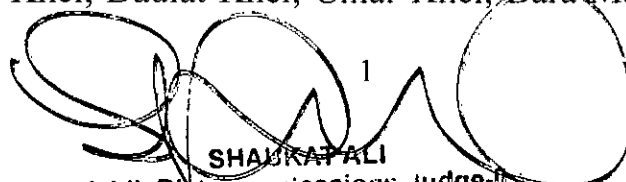
Represented by:

Mr. Javed Iqbal Anwar Learned Sr.PP for State,
Mr. Amir Shah Learned APP for the state,
Mr. Sana Ullah Khan Advocate, counsel for accused

**CASE FIR NO. 45 DATED 20.09.2020 U/S 9-(d) KP CNSA OF POLICE
STATION UPPER ORAKZAI**

JUDGMENT

The prosecution story is that on 20-09-2020 the complainant Naseem Khan SHO along with Arsal Khan SI, Dost Muhammad, Arbab Khan and Muhammad Raheel were present on Naka Bandi at Dabori check post-II, that in the meanwhile from Miadan side a person was coming having a plastic sack on his shoulder who was stopped on suspicion and the sack was searched, that on search of the sack 04 packets chars were recovered and on weightment each packet was 1020/1020 grams total 4080 grams chars, 10/10 grams was separated from each packet for the purpose of FSL analysis and sealed in parcels No.1 to 04 while rest of the chars were sealed into separate parcels No. 5 to 8 as case property and the sack was separately weighed which was 58 grams and sealed into parcel No. 09. The chars along with the sack was taken into possession and the accsued disclosed his name Diran Gul s/o Khan Akbar r/o Malak Din Khel, Daulat Khel, Umar Khel, Bara Maidan District Khyber


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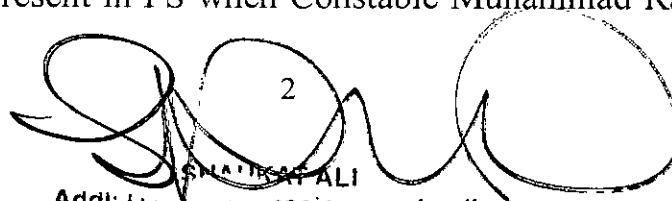
who was arrested, Murasila was drafted and sent to PS for registration of the case through Constable Muhammad Raheel, on the basis of which instant FIR was registered against the accused. After the registration of the FIR, the case was handed over to the investigation staff for the purpose of investigation.

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 recorded the statement of PWs of recovery memo u/ 161 Cr.PC and also interrogated the accused during investigation. The IO produced accused before the court for custody however application for custody was turndown. 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. 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.

On 27.10.2020, complete challan was received by this Court for the trial of accused. Accused Diran Gul was in custody was summoned through Zamima Bay, The accused Diran Gul was produced in custody before the Court on 03-11-2020 and after compliance of provision of 265-C Cr.P.C, charge was framed against the accused on 10.11.2020, to which the accused pleaded not guilty and claimed trial, therefore, the prosecution was allowed to produce its evidence in support of its case against the accused. During the trial of the case, the prosecution examined 04 PWs.

The gist of the prosecution evidence is as under:

PW-1 is the statement of Gul Asghar Muharrir/ASI who stated that "On 20-09-2020 I was present in PS when Constable Muhammad Raheel brought


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Murasila, card of arrest and recovery memo and handed over to me. I reduced the contents of Murasila into FIR Ex. PA which is correct and correctly bears my signature. After registration of the FIR I handed over copy of FIR, Murasila, card of arrest and recovery memo to the investigation officer for investigation. Later on when the SHO returned from the spot to the PS, he handed over parcels No. 1 to 9 duly packed and sealed having monogram of GJ and I kept the same in Maal Khana of PS in safe custody. The accused was also put behind the lock-up. I made entry of the case property in register No. 19 which is Ex.PW-1/1. I have also entered the departure and arrival of the SHO to the PS in Naqal Mad No. 3 and 12 DD on 20-09-2020 Ex.PW-1/2. On 22-09-2020 I handed over parcels No. 1 to 4 each containing 10 grams chars duly packed and sealed, to the IO who took the same to FSL for chemical analysis. My statement was recorded by the IO u/s 161 Cr.PC. Today I have seen the FIR and copies of Naqal Mad which are correct and correctly bears my signature.”

PW-2 is the statement of Muhammad Naseem SHO/SI who stated that “On 20-09-2020 I had laid barricade at Dobori check post. In the meanwhile from Maidan side a person was coming having a plastic sack on his shoulder who was stopped on suspicion. The sack was searched and 04 packets chars was recovered which is weighted on digital scale and on weighment each packet was 1020/1020 grams total 4080 grams. From each packet 10/10 grams were separated for FSL and sealed into separated parcels No. 1 to 4 whereas the remaining chars were sealed into parcels No. 5 to 8. The sack was separately weighted which was 58 grams and was sealed into parcel No. 9. I prepared recovery memo in the presence of marginal witness and also drafted the Murasila and prepared the card of arrest of the accused. The Murasila was sent to the PS through constable Raheem for registration of FIR. I called the

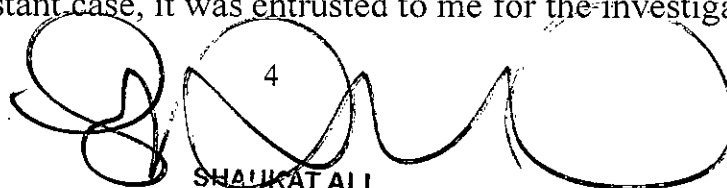
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investigation staff to the spot where I was waiting for them. The IO prepared the site plan at my instance and pointation. I affixed stamps of GJ on each parcel. When I returned to the PS I took all the parcels of chars with me and I handed over the same to the Muharrir of the PS and asked him to send the same to the FSL. The recovery memo is Ex.PW-1/1, Murasila is Ex.PA whereas card of arrest of accused is Ex.PW-1/2. The case property in parcels No. 5 to 8 and 9 are before the court which are Ex.P1 to P5. Today I have seen the above documents which are correctly bears my signature.”

PW-3 is the statement of Arsala Khan SI who stated that “on 20-09-2020 the complainant had laid barricade at Dabori check post. In the meanwhile from Maidan side a person was coming having a plastic sack on his shoulder who was stopped on suspicion. The sack was searched and 04 packets chars was recovered which was weighted on digital scale and on weighment each packet was 1020/1020 grams total 4080 grams. From each packet 10/10 grams were separated for FSL and sealed into separated parcels No. 1 to 4 whereas the remaining chars were sealed into parcels No. 5 to 8. The sack was separately weighted which was 58 grams and was sealed into parcel No. 9. The complainant prepared recovery memo in my presence as well as in the presence of marginal witness and also drafted the Murasila and prepared the card of arrest of the accused. The Murasila was sent to the PS through constable Raheem for registration of FIR. The recovery memo is already Ex.PW-1/1 whereas the case property is already Ex.P-1 to P-5. Today I have seen the above documents which are correctly bears my signature.”

PW-4 is the statement of Muhammad Ishaq SI/IO who stated that “During the relevant days I was posted in the investigation staff as IO. After registration of the instant case, it was entrusted to me for the investigation. On



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the same day I visited the spot and prepared the site plan on the pointation of the complainant Ex.PB. I recorded the statements of PWs of the recovery memo u/s 161 Cr.PC. on my return to the PS I curserly interrogated the accused and on 21-09-2020 vide my application Ex.PW-4/1. I produced the accused before the Illaqa Magistrate for obtaining 05 days police custody. My application was turndown. I recorded the statement of accused u/s 161 Cr.PC. I drafted an application for FSL Ex.PW-4/2 and I took the parcels to the FSL vide road certificate Ex.PW-4/3 and also received the FSL report which is Ex.PZ. I also placed on file the DD already Ex.PW-1/2 and also copy of register No. 19 which is already Ex.PW-1/1. I also recorded the statement of the PWs u/s 161 Cr.PC and after completion of investigation I handed over the case file to the SHO for onward submission. Today I have seen the above documents which are correct and correctly bears my signature.”

On 08.01.2021 after the prosecution closed its evidence, the statements of the accused was recorded under section 342 Cr.P.C on 19-01-2021. The accused denied the allegations of the prosecution but 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 contraband was recovered from the personal possession of accused arrested on the spot, that the contraband was weighed on the spot and 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 the prosecution witnesses recorded consistence statements and there are no major contradiction in the statement of prosecution witnesses who supported the

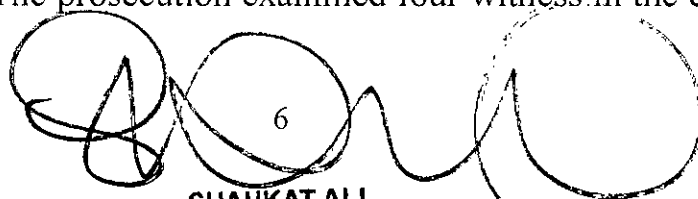
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recovery of contrabands from the possession of accused, that no personal enmity or ill will of the police shown by the accused, that the accused could not produce any defense evidence, The learned APP argued that the prosecution has proved the case against the accused beyond any shadow of doubt and submitted that the accused may be convicted.

On the contrary, learned counsel for the accused opposed the arguments of learned APP for the state and argued 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 Muhammad Raheel Constable was not produced before the court as prosecution witness who took the Murasila to the PS, therefore the chain of occurrence not established, that the complainant has not mentioned in the Murasila the type of chars that it was chars pukhta or chars garda, 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, 2020 PCr LJ Note 72, 2016 MLD 920, 2018 MLD 1210, 2020 YLR 2524 and 2020 MLD 448.

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

The accused Diran is charged for the recovery of 04 packets chars from his possession weighing 4080 grams which was as per prosecution story the accused facing trial was carrying on his shoulder in a sack on *naka bandi* at Dabori check post. The prosecution examined four witness in the case against



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the accused facing trial and the material witnesses of the prosecution case against the accused is the statement of complainant Muhammad Nasim Khan SHO (PW-02) and statement of the Arsala Khan SI who is witness of the recovery memo Ex.PW-1/1.

The complainant mentioned in the Murasila Ex.PA that the accused was arrested and chars weighed 4080 grams containing in 04 packets were recovered. From each packet 10/10 grams were separated for FSL and sealed into parcels whereas the remaining chars were sealed into separate parcels as case property, that the accused was arrested and the complainant drafted the Murasila which was handed over to Constable Muhammad Raheel for dispatching the same to the PS for registration of FIR. The complainant also stated in his statement as PW-02 that he sent the Murasila to the PS through constable Raheel for registration of FIR. Gul Asghar Muharrir PW-01 stated that constable Raheel brought Murasila, card of arrest and recovery memo and handed over to him which he reduced into FIR. The complainant (PW-02) stated in his cross examination that constable Raheel took the Murasila in a passenger vehicle (flying coach) passing from the place of occurrence whereas PW-03 stated in his cross examination that constable Raheel took the Murasila to the PS in official vehicle of SHO. The prosecution has not produced constable Muhammad Raheel as prosecution witness to support the prosecution version, therefore the very chain of the occurrence starting from the spot has not been established which makes the prosecution case doubtful. Reliance 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 complainant in the Murasila Ex.PA mentioned that chars was recovered from the possession of accused and it is not specified in the Murasila

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as well as in the recovery memo that whether the alleged chars was chars *Garda* or chars *Pukhta*. The type of chars has not been mentioned by the complainant which also makes the recovery form the possession of accused doubtful. Reliance placed on 2016 MLD 920 (Peshawar).

The prosecution case is that the complainant along with Arsala Khan SI, constable Dost Muhammad, Arman Khan and Muhammad Reheel were present on *naka bandi* at Dabori check post-II when in the meanwhile a person was coming from Miadan side having a plastic sack on his shoulder who was stopped on suspicion and on search of the sack four packets chars were recovered. The complainant stated that he separated samples for FSL and further stated in his cross examination that he separated samples through knife whereas PW-03 contradicted the statement of complainant and stated that the samples were separated with the help of scissor. The complainant during his cross examination stated that he left the PS at morning time at 8:00 a.m. and was accompanied from the PS by Arsala Khan SI, Dost Muhammad, Arman Khan, Raheel Khan, Rasool Rehman and Yousaf constables. The IO placed on file the DD Ex.PW-1/2 which shows that the complainant left the PS along with Constable Muhammad Raheel, Arman Khan and Muhammad Shafiq at 8:20 a.m. where constable Dost Muhammad Rasool Rehman and Yousaf are nowhere mentioned to have accompanied the complainant and the time for departure is also not 8:00 a.m. which negates the statement of complainant. The complainant is further negated by Arsala Khan SI (PW-03) who stated in his cross examination that he was already present at Dabroi check post and further stated that he had not left the PS along with SHO for gasht as the SHO was accompanied by Constable Raheel and his driver when he reached to Dabori check post. Arsala Khan further stated that he was accompanied by Dost

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Muhammad during his duty on the check post and the complainant came to the check post and asked him that he is laiding a barricade, hence the version of the complainant that he was on gasht is not supported from the material available on file. The statement of prosecution witnesses and the contents of DD Ex.PW-1/2 belied the version of the complainant regarding his gasht and mode and manner of recovery of alleged contraband from the possession of accused, therefore the recovery of contraband could not be believed.

The time of occurrence is recorded as 9:40 a.m. and the time of report is 10:00 a.m. whereas the time of registration of FIR is 11:10 a.m. The Muharrir (PW-01) stated that after registration of FIR he handed over the copy of FIR, Murasila, card of arrest and recovery memo to the IO for investigation and it is also the statement of Muhammad Ishaq SI/IO (PW-04) that after registration of FIR it was entrusted to him for investigation and thereafter he visited the spot and prepared site plan Ex,PB on the pointation of complainant. The IO during his cross examination stated that he left the PS for the spot at 9:00 a.m. and when he reached to the spot the SHO was present on the spot. The complainant also stated in his cross examination that he called the IO to the spot on mobile phone who reached to the spot at about 11:00 a.m. and the distance between the place of occurrence and the PS might be 17/18 KM. The statement of the IO that he left the PS for spot at 9:00 a.m. and statement of the complainant that the IO reached to the spot at 11:00 a.m. is not supported from the contents of FIR Ex.PA which shows the time of registration of FIR 11:10 a.m. which belied both the IO and complainant, makes the presence of complainant on the spot and arrest of the accused in the mode and manner highly doubtful.

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

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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 extended to the accused.

The prosecution could not prove the case against the accused beyond any reasonable shadow of doubt therefore; the accused facing trial is acquitted in the instant case from the charges leveled against him by extending him the benefit of doubt. The accused Diran Gul 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
08th February, 2021


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CERTIFICATE

Certified that this judgment consists of -10- 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