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

Special Case No.....06 of 2020
Date of Institution.....13.10.2020
Date of Decision.....09.02.2021

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

VERSUS

Nasrullah Khan s/o Yaqoob Khan; aged about 27 years r/o Shalobar, Qamber
Khel, Village Kanday Seena District Khyber..... (*Accused Facing Trial*)

Represented by:

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

**CASE FIR NO. 33 DATED: 18-08-2020 U/S 9(D) KP CNSA PS UPPER
ORAKZAI**

JUDGMENT

The prosecution story is that on 18.08.2020 the complainant Naseem Khan SHO was on gusht and received spy information that chars shall be smuggled by a Motorcycle. After that information the complainant put barricade at Sombog where in the meanwhile a person was coming on Motorcycle. The complainant signal him to stop who stop the Motorcycle and the Motorcycle was searched as a result of which from the side cover chars weighing 1050 grams were recovered which was wrapped in white shopper. 10 gram were separated for FSL and sealed into parcel No.1 while the remaining 1040 gram separately sealed in parcel No.2. The complainant prepared recovery memo Ex.PW 3/1, Murasila Ex.PA and card of arrest Ex.PW 3/2 of accused. 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


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case was handed over to the investigation staff for the purpose of investigation.

During the course of investigation the IO visited the spot and 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 13.10.2020, complete challan was received by this Court for the trial of accused. Accused Nasrullah was on bail was summoned. The accused Nasrullah appeared before the Court on 16-10-2020 and after compliance of provision of 265-C Cr.P.C, charge was framed against the accused on 20.10.2020, 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 05 PWs.

The gist of the prosecution evidence is as under:

PW-1 is the statement of Malak Janan SI who stated that "Muharrir of PS handed over to me one parcel containing 10 grams chars along with application and road certificate for FSL Peshawar. I took the sample to the FSL and handed over the same to the official of laboratory against a receipt


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which is Ex.PW-1/1. I returned to the PS on the same day on 24-08-2020 and the IO recorded my statement in the PS on the same day”

PW-2 is the statement of Abdul Manan Madad Muharrir who stated that “On 18-08-2020 I was present in the PS and was working as Madad Muharrir of the PS. Abdul Basit constable brought Murasila along with recovery memo and card of arrest and handed over the same to me. I chalked out case FIR Ex.PA on the basis of Murasila and correctly incorporated the contents of Murasila into FIR. After the registration of FIR I handed over the copy of FIR along with Murasila, recovery memo and card of arrest to the IO for investigation. I handed over samples to Nawaz Sharif SI/OII. The SHO/complainant handed over to me the remaining case property along with motorcycle in the PS. I parked the motorcycle in the PS whereas deposited the case property in the Maal Khana and in this respect entry was made in the register No. 19. My statement was recorded u/s 161 Cr.PC. Today I have seen the FIR which correctly bears my signature”

PW-3 is the statement of Muhammad Naseem Khan SHO who stated that “On 18-08-2020 I was on gusht when during gusht I received spy information that chars shall be smuggled by a Motorcycle. After that information I put barricade at Sombo where in the mean while a person was coming on Mortor Cycle. I signal him to stop who stop the Motorcycle and the Motorcycle was searched as a result of which from the side cover chars weighing 1050 grams where recovered which was wrapped in white shopper. I separated 10 gram for FSL and sealed into parcel while the remaining 1040 gram separately sealed. I prepared recovery memo Ex.PW 3/1, Murasila Ex.PA and card of arrest Ex.PW 3/2 of accused. I sent the Murasila to PS for the registration of FIR. The IO prepared the site plan on my instance and

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pointation. Today I have seen the above documents which are correct and correctly bears my signature.”

PW-4 is the statement of Muhammad Zubair Constable who stated that “on 18-08-2020 I along with SHO was on gusht. At sombog which is a chowk we laid Nakabandi. The SHO had received information that chars shall be smuggled through a Motorcycle. After that information in the mean while a person was coming on Motorcycle. The SHO signal him to stop who stop the Motorcycle and the Motorcycle was searched as a result of which from the side cover chars weighing 1050 grams where recovered which was wrapped in white shopper. The chars was weighed with digital scale by the complainant. The complainant separated 10 gram for FSL and sealed into parcel while the remaining 1040 gram separately sealed. The complainant then inform the PS and IO came to spot who prepared the site plan. We took the accused to the PS. The complainant prepared recovery memo I signed the same.”

PW-5 is the statement of Nawaz Sharif SI who stated that “on 18-08-2020 at 13:50 hours the investigation was handed over to me. The Muharrir handed over to me Murasila, card of arrest, recovery memo and copy of FIR for investigation and thereafter I proceeded to the spot for spot inspection. During spot inspection I prepared site plan Ex.PB in the instance of complainant. After spot proceedings I returned to the PS where I recorded the statement of witnesses to the recovery memo. The accused Nasrullah was handed over to me in the PS and I produced him for custody vide my application Ex.PW-5/1 before the Magistrate. The custody was refused and the accused was sent to judicial lock-up. On 21-08-2020 the Muharrir handed over to me sealed sample in parcel No. 1 which I dispatched to the FSL vide

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MAGISTRATE
Distt: District & Sessions
District & Sessions
Judge-II

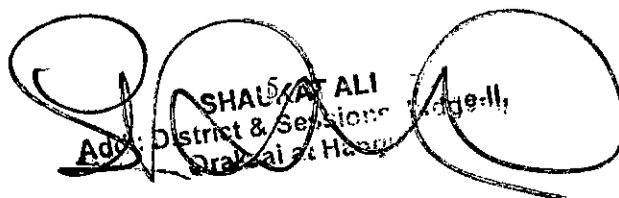
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my application is Ex,PW-5/2 through Malak Abdul Janan SI and received the FSL report Ex.PZ. I sent letter Ex.PW-5/3 for verification of motorcycle. I also placed on file the mad No.09 Ex.PW-5/4 and mad No. 25 Ex.PW-5/5. I recorded statement of PWs and on completion of investigation I submitted the case file to the SHO for complete challan. Today I have seen the above documents which are correct and correctly bears my signature.”

On 25.01.2021 after the prosecution closed its evidence, the statements of the accused was recorded under section 342 Cr.P.C on 27-01-2021. 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 chars was recovered from the motorcycle driven by the accused who was signal to stop by the complainant and was arrested on the spot, that the samples were taken from the recovered chars which was sent to the FSL and the FSL report is in positive which supports the version of prosecution, that the case property chars was produced before the Court, which was exhibited, that the prosecution witness made consistence statement which connect the accused with the commission of offence, 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.

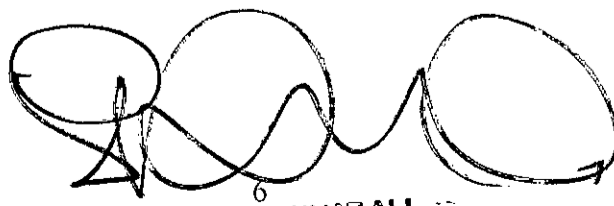
On the other hand, learned counsels for the accused vehemently opposed the arguments of learned APP for the state and contended that the accused was allegedly arrested on spy information but no private witnesses


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were associated to the recovery proceedings, that constable Abdul Basit who took the Murasila to the PS was not produced as prosecution witness which creates doubt in the prosecution case, that 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 alleged contrabands was not recovered from the personal possession of accused, 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 MLD 1210, 2020 MLD 448 and 2011 YLR 134.

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

The complainant (PW-03) allegedly arrested the accused after receiving spy information at Sombog where the accused who was riding on the motorcycle was stopped and chars 1050 grams was recovered from the side cover of the motorcycle which was taken into possession vide recovery memo Ex.PW-3/1, however the recovery memo, 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 laid after receiving spy information. 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;



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“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 stated that he drafted the Murasila Ex.PA and sent the Murasila to the PS through Constable Abdul Basit for registration for FIR. Abdul Manan *Madad Muharrir* (PW-02) stated that Abdul Basit constable brought Murasila along with recovery memo and card of arrest and handed over the same to him and he chalked out the case FIR Ex.PA on the basis of Murasila, but the prosecution has not produced constable Abdul Basit as a prosecution witness in support of version of the prosecution, 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.

It is the case of the prosecution that on 18-08-2020 the complainant along with other police official during gasht received information about the smuggling of narcotics. The complainant stated in his cross examination that he left the PS for gasht at 9:00 a.m. The DD No. 09 Dated 18-08-2020 Ex.PW-5/4 shows that the complainant left the PS for gasht at 11:00 hours in official vehicle which contradict the statement of complainant that he left the PS at 9:00 a.m. for gasht and makes it doubtful that the complainant was on gasht at the time of occurrence. Furthermore the complainant stated that he drafted the Murasila and sent the same through Constable Abdul-Basit who after

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taking the Murasila to the PS did not return to the spot. Muhammad Zubair Constable (PW-04) also stated in his cross examination that constable Abdul Basit went to the PS in suzuki who did not return however this statement of complainant and Muhammad Zubair constable was negated by Nawaz Sharif SI/IO (PW-05) who stated in his cross examination that when he reached to the spot the complainant along with Raheel, Zubair and Abdul Basit constables were present on the spot and he has shown constable Abdul Basit in the site plan Ex. PB who himself pointed out to him his point on the spot. Beside the complainant stated in his cross examination that he called the IO for spot inspection who reached to the at 1:30 p.m. on motor cycle however the complainant was again belied by the IO who stated in his cross examination that he reached to the spot at about 3:00 p.m. The complainant stated that the IO came to the spot who was accompanied by one constable on motorcycle whereas Muhammad Zubair constable stated in his cross examination that the IO came to the spot in a Van Dabba who was accompanied by two constables, therefore the spot proceedings and the very mode and manner of the occurrence is doubtful and makes the presence of complainant on the spot at the time of occurrence and along with the IO not believable. Such statement of the prosecution witnesses which is not confidence inspiring could not be make bases for the conviction of accused nor the same connect the accused with the commission of offence.

The complainant alleged that chars *Garda* was recovered from the possession of accused and during his cross examination the complainant stated that chars *Garda* is in powder form which may consumed if the same is thrown in the air. The samples in parcel No. 1 sent to the FSL is also that of chars *Garda* while the FSL report Ex.PZ shows the physical appearance of

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chars as brown solid which do not support the recovery of contraband from the possession of accused.

The prosecution could not connect the accused with the alleged contraband by producing cogent and confidence inspiring evidence. There are material contradictions in the statement of prosecution witnesses which cloud not be believe for the conviction of accused. The accused would be entitle to even a single doubt in the case of prosecution whereas in the case against the accused there are many doubts the benefit of which shall be extended to the accused 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 Nasrullah 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
09th February, 2021



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

CERTIFICATE

Certified that this judgment consists of -09- 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