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

SPECIAL CASE NO. : 14/3 OF 2020
DATE OF INSTITUTION : 17.06.2020
DATE OF DECISION : 05.03.2021

STATE THROUGH MUHAMMAD SHAFIQ SHO, POLICE STATION,
LOWER ORAKZAI

.....(COMPLAINANT)

-VERSUS-

SHAHID ALI S/O QEEMAT KHAN, AGED ABOUT 37 YEARS,
TRIBE MANI KHEL, SUB-TRIBE AHMAD KHEL, LOWER
ORAKZAI.

..... (ACCUSED FACING TRIAL IN CUSTODY)

Present: Umar Niaz, District Public Prosecutor for state.
: Ishtiaq Ur Rehman Advocate for accused facing trial.

FIR No. 26 **Dated:** 10.04.2020 **U/S:** 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019

Police Station: Lower Orakzai Kalaya

JUDGEMENT
05.03.2021

The story of the prosecution as per contents of Murasila Ex. PA/1 converted into FIR Ex. PA are that; on 10.04.2020, complainant, Muhammad Shafiq SHO alongwith other police officials were on their routine patrolling when he received spy information about smuggling of chars from Kurez to Chapar Mishti through motorcar, and on this information, they laid barricade on Nanokey road. At about 1900 hours, a white colour motorcar bearing no. BC-9203/Peshawar came to spot



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from Kurez side which was signalled to stop and upon stoppage of the motorcar, the local police deboarded the driver of the motorcar who disclosed his name as Shahid Ali s/o Qeemat Ali. The police officials started search of the vehicle and upon search of the vehicle recovered 10 packets opium and 20 packets chars from secret cavities made in the rear seat of the motorcar. Each packet of opium and chars was weighed through digital scale on the spot which each packet came out to be 1100 grams (total 33,000 grams). The police officials separated 10/10 grams opium from each packet as well as 10/10 grams from each packet of chars and packed and sealed the same into parcels no. 1 to 10 (of opium) and 12 to 31 (of chars) for chemical analysis of FSL, whereas remaining quantity of opium was packed and sealed in separate parcel bearing no. 11 whereas remaining quantity of chars was packed and sealed in parcel no. 32. The accused was accordingly arrested by issuing his card of arrest Ex. PW 4/1. The local police took into possession the recovered opium and chars alongwith the vehicle in question through recovery memo Ex. PC. 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 examined. The gist of the evidence is as follow;

I. Aftab Hassan SI appeared before the court as PW-1 and deposed that he has taken the samples of recovered contrabands to the FSL for chemical analysis on 05.05.2020 and after submission of the same, he was given the receipt of the parcels which he handed over to the IO upon return.

II. Constable, Amir Nawaz in his statement as PW-2 stated to have taken the same contrabands to FSL on 13.04.2020 prior to Aftab Hassan SI but the laboratory was closed that day due to Covid-19, hence he returned back and handed over the parcels to the incharge investigation.

III. Libab Ali Moharrir deposed as PW-3 in respect of registration of FIR Ex. PA from the contents of Murasila besides deposed in

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respect of receipt of case property duly packed and sealed from the complainant which he thereafter kept in mal khana for safe custody whereas the motorcar was parked inside the PS. The witness further deposed in respect of recording of entry regarding the case property in register 19 as well as handing over of samples of the case property for FSL to the IO on 13.04.2020 and 05.05.2020.

IV. Complainant, Muhammad Shafiq and eyewitness constable Muhammad Shakil, in their evidence as PW-4 and PW-5 respectively, repeated the story of FIR. PW-5 further stated to have submitted complete challan against the accused.

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 where after statement of the accused was recorded U/S 342 Cr.P.C but the accused neither wished to be examined on oath nor produced evidence in defence. Accordingly,



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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 counsel for the defence mainly objected the late sending of samples to the FSL; no difference of writings between FIR, Murasila, card of arrest and recovery memo; the PW-1 and PW-2 who taken the samples and the Moharrir PW-3 never deposed in respect of availability of seal of MS on the parcels; proceedings of the case by an official of BPS-7 instead of SI; the ownership of motorcar not being determined in the name of accused; political involvement of the accused and recording of statement of Moharrir, Libab Ali PW-3 without administering oath. The counsel for the accused facing trial also produced copies of the evidence of case FIR 27, dated 10.04.2020, u/s 9 (d) CNSA of PS Lower Orakzai wherein one, Riaq Ali, the cousin of present accused has been charged for the recovery of 46200 grams chars and submitted that in a single day the accused facing trial and his cousin were charged for the recovery of huge quantity of narcotics which is politically motivated and the recovery is planted against them.

(5). However, when the situation is confronted with the record and evidence available on the case file, then it

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reveals that accused facing trial is directly and by name charged for the recovery of huge quantity of narcotics in the promptly lodged report. The single accused is charged has ousted the chances of substitution or wrong implication. The recovery was affected from the rear seat of the motorcar bearing registration no. BC9203/Peshawar which was being driven and in the sole control and possession of the accused facing trial. The substance recovered proved opium and chars vide report of the FSL Ex. PK. The complainant, Muhammad Shafiq SHO PW-4 and eyewitness, constable Muhammad Shakil PW-5 in their evidence stood firm regarding the mode and manner of the occurrence and despite lengthy cross examination, nothing favourable to the accused could be extracted from their mouths. There exists surprising homogeneity in between the statements of the ocular account and no contradictions whatsoever exist between their statements either to deny their presence at the spot or the mode and manner of the occurrence as alleged by them. The prosecution proved the safe custody of the case property from the spot to the PS and thereafter its dispatch to the FSL by producing the Moharrir, Libab Ali PW-3 who not only produced extract from register 19 in respect of safe custody of the case property but also deposed in respect of



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the handing over of samples to the IO for its onward submission to the FSL. The SI Aftab Hassan PW-1 deposed in respect of receipt of samples of the case property and its safe dispatch to the FSL Peshawar for chemical analysis. The Investigating Officer, Shal Muhammad SI PW-6 besides other proceedings has placed on file the copies of the daily diary Ex. PW 6/9 and Ex. PW 6/10 in respect of departure and arrival of the SHO and other police officials from the PS to the spot on the day of occurrence confirming thereby their presence at the spot on the very day and time of occurrence. The main portion of the evidence regarding scaling, packing and sealing, arrest of the accused facing trial with the motorcar at the spot was not subjected to cross examination, hence would be deemed admitted on the part of defence. As such, without hesitation it could be concluded that the accused facing trial proved to be guilty and has committed the offense as alleged by the prosecution.

- (6). As for as the objections of the defence are concerned, the same are taken one by one. Firstly, it was objected that the alleged recovery was affected on 10.04.2020 whereas the samples for chemical analysis were received at the FSL Peshawar on 05.05.2020 as such there is unexplained delay of 25 days which is fatal for the



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case of prosecution. As per rule 4 (2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001, samples may be dispatched for analysis at the earliest, but not later than seventy-two hours of the seizure. In this regard when the evidence of the prosecution is consulted, it transpired that initially the samples were sent within 72 hours on 13.04.2020 through constable, Ameer Nawaz PW-2 but as per his deposition the FSL Peshawar was closed due to Covid-19 besides the IO, Shal Muhammad PW-6 in his cross examination deposed in respect of placing on file a letter of the FSL Peshawar bearing no. 815-30/FSL dated 22.06.2020 regarding its closure on account of Covid-19 but neither the said letter was objected nor termed fabricated or false by the defence. The prosecution was abled to prove that they have transmitted the samples of recovered contraband safely to the FSL Peshawar through the SI Aftab Hassan PW-1 on 05.05.2020 after when the FSL Peshawar got opened again after the pandemic Covid-19 and the delay has thus been sufficiently explained and it would not vitiate the proceedings as such. Also, no question or suggestion was put to the witnesses who taken the samples to the FSL that either they have tempered with the same or were having any ill-will or enmity towards the accused facing trial.



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(7). With regard to the similar writings of FIR, Murasila, card of arrest and recovery memo, no proof was provided by the defence nor they have extracted anything favourable to them from the mouths of the witnesses in this regard. Moreover, with regard to non-deposition by the PW-1 to PW-3 of availability of seal of MS on the parcels, the questions were supposed to have been put in the cross examination of the witnesses which was not done, hence objections at the time arguments are immaterial. As for as the proceedings being conducted by an official of BPS-7 is concerned, in this regard it has to be noted that u/s 28 and 2 (e) of the KP CNSA Act, 2019 provides that an official not below the rank of SI has got the power of seizure and arrest. But their lordships held in a case reported in 2009 SCMR page 291 titled "State VS Abdali Shah" as well as in an unreported case of Criminal Misc. BA no. 1540-P/2020 titled "Ismail VS State" decided by Peshawar High Court, Peshawar on 29.06.2020, that non-compliance of section 28 of the KP CNSA Act, 2019 would not vitiate the proceedings. Also, it has to be noted that District Orakzai being newly merged is having no regular SI deputed for official duties and mostly low scale employees have been authorised to deal with the cases, which employees have conducted the



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instant case without being properly trained for the purpose. The defence could not prove the malafidy, ulterior motive, ill-will or any other reason of the ocular account or other police officials of the instant case for nomination of accused facing trial for the occurrence.

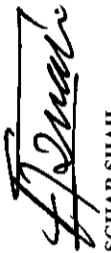
(8). No doubt the ownership of the motorcar was not proved in the name of accused facing trial and it proved to be in the name of one, Amjad Ali besides the FSL with regard to the same is clear as per report Ex. PK/1 as well as by the report of MRA Peshawar Ex. PW 6/6, but however till date neither Amjad Ali nor any other person came forward to claim the ownership of the motorcar in question besides it is a common routine in our country that people usually do not keep the vehicles in their name and rather keep its possession on open transfer letter. The motorcar in question was in sole possession of the accused facing trial at the time of occurrence and was used for the commission of offence and the portion of examination in chief of the complainant, Muhammad Shafiq PW-4 wherein it was alleged that the accused facing trial owned the recovered contraband and vehicle was never subjected to cross examination, hence would be deemed admitted on the part of accused facing trial.



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(9). The defence pointed out that at the time of recoding evidence of Moharrir, Libab Ali PW-3, he was not given oath. This matter for the first time came into the notice of the court when the defence put the same in the cross examination of the witness. But it has to be noted that while recoding his examination in chief the counsel for the defence was present and kept mum and put no objection by that time, hence his objection in the cross examination is of no legal effect besides when the same was brought in the notice of the court, the witness was given oath at the same time. Thus, the same would by no means vitiate the proceedings as the section 5 (a) of the Oaths Act, 1873 provides that statements of the witnesses shall be made on oath and the word shall is directory and not mandatory. Their lordships held in a case reported in **P L D 1978 Lahore 498** titled "Municipal Committee, Jhang Versus Muhammad Ramzan" in citation which is reproduced below for ready reference;

(c) Interpretation of statutes - Directory and mandatory provisions. Where a provision is expressed in a negative and prohibitory language, it is considered to be absolute and the one expressed in an affirmative language: may be considered as directory. Where a provision is absolute having an obligatory force, it carries an implied



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nullification for its disobedience, but where it is merely directory, its non-compliance may not be fatal unless the complaining party is able to show that the non-compliance has worked to its prejudice. Moreover, section 13 of the Oaths Act, 1873 provides;

“13. Proceeding and evidence not invalidated by omission of oath or irregularity. — No omission to take any oath or make any affirmation, no substitution of any one for any other of them and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence, whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.”

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Thus, in the absence of any prejudice on behalf of witnesses' mere omission of oath in examination in chief, which oath was administered in the cross examination has not invalidated or vitiated the evidence deposed by the PW-3.

(10). The defence in the cross examination of the complainant put the last suggestion that the contraband

was recovered from a godown owned and occupied by an unknown person besides in the cross examination of the investigating officer, it was claimed that the accused has been implicated in the case on political basis and the same was reply of the accused to question no. 1 in his statement recorded u/s 342 of the Cr.P.C. However, even after shifting the burden to themselves regarding the recovery of contraband from a godown owned and occupied by an unknown person as well as involvement of the accused for political purposes neither the accused produced any evidence in defence nor took oath in support besides could not explain a single line as to how he was politically victimized and implicated and by whom and that where is the alleged godown situated and who was that unknown person/owner of the godown. Thus, the burden shifted by the accused to himself was not discharged.

- (11). As for as the last objection of the defence regarding case FIR 27, dated 10.04.2020, u/s 9 (d) CNSA of PS Lower Orakzai wherein one, Riaz Ali, the cousin of present accused has been charged is concerned, in this regard no doubt the attested copies of the same have been produced by the defence, but however, it was not explained as to what kind of relevancy the same is having with the present case and what are the malafidy of the



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prosecution in the instant case and how the same would effect the present case. As such, the same is irrelevant and of no benefit to the accused facing trial.

(12). The story deposed by the ocular account in the absence of any malafidy etc. on their part is thus confidence inspiring, trustworthy and reliable. There exist no contradictions in between the statements of the ocular account or the formal witnesses and all the witnesses deposed in line with the story reported in the first information report.

(13). The detailed discussion of the case would lead to the conclusion that the prosecution has successfully martialled their troops towards conclusion of trial in their favour and proved its case against the accused facing trial without any shadow of doubts. Therefore, the accused facing trial, Shahid Ali s/o Qeemat Khan is convicted and sentenced u/s 9 (d) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 for having in his possession 11,000 grams opium and 22,000 grams chars (total 33,000 grams) to suffer rigorous imprisonment for life and also to pay fine of Rs. 500,000/- (five lac). In case of default, the accused shall further suffer simple imprisonment for 6 months. The benefit of section 382-B Cr.P.C is however extended in his favour.




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The case property i.e., opium and chars be destroyed while the motorcar in question stand confiscated to the state being used in the commission of offence but after the expiry of period provided for appeal/revision. Copy of the judgement delivered to the accused today free of cost and his thumb impression to this effect obtained at the margin of the order sheet besides the copy of judgement also be issued to the District Public Prosecutor u/s 373 of the Cr.P.C free of cost.

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


Announced
05.03.2021


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CERTIFICATE

Certified that this judgment consists of fifteen (15) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 05.03.2021.


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