

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

CNSA CASE NO. : 17/3 OF 2020
DATE OF INSTITUTION : 02.09.2020
DATE OF DECISION : 06.03.2021

STATE THROUGH SHAYAZ ASI, INCHARGE BOYA CHECK-POST,
KALAYA, LOWER ORAKZAI

.....(COMPLAINANT)

-VERSUS-

1. ABDUL WALI S/O HUSSAIN KHAN, AGED ABOUT 30 YEARS,
TRIBE MISHTI, VILLAGE INDRA LOWER ORKZAI
2. ARBAB HUSSAIN S/O GHULAM KHAN, AGED ABOUT 29 YEARS,
CASTE BANGASH, VILLAGE SHERKOT DISTRICT KOHAT


..... (ACCUSED FACING TRIAL ON BAIL)

Present: Umar Niaz, District Public Prosecutor for state.
: Abid Ali Advocate for accused facing trial.

FIR No. 67 **Dated:** 29.06.2020 **U/S:** 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019
Police Station: Kalaya Lower Orakzai

JUDGEMENT
06.03.2021

The story of the prosecution as per contents of Murasila Ex. PA/1 converted into FIR Ex. PA are that; on 29.06.2020, complainant, Shayaz ASI received spy information about smuggling of chars from Kurez side to Kohat. On receipt of information, the local police laid a barricade at the spot namely, Boya Algada. At about 10:20 am, the local police saw two persons coming on foot towards them, each of them having blue colour plastic shoppers in their hands who were stopped by the complainant, Shayaz ASI. The complainant searched the blue plastic shoper in the right hand of one of the accused and upon


ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

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 & 4 while the empty shoper was packed and sealed in separate parcel bearing no. 5. The accused disclosed his name as Abdul Wali s/o Hussain Khan. Similarly, the complainant also searched the blue plastic shoper in the right hand of the other accused and upon search, he 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. 6 & 7 for chemical analysis of FSL, whereas remaining quantity 1190 grams of chars was packed and sealed in separate parcels bearing no. 8 & 9 while the empty shoper was packed and sealed in separate parcel bearing no. 10. The accused disclosed his name as Arbab Hussain s/o Ghulam Khan. The local police took into possession the recovered chars through recovery memo Ex. PC. Both the accused were accordingly arrested by issuing their 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.



ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

(2). Upon the receipt of case file for the purpose of trial, notice was issued to the accused facing trial and upon their appearance, proceedings were initiated and they were charge sheeted to which they 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. Libab Ali Moharrir as PW-1 deposed in respect of registration of FIR Ex. PA from the contents of Murasila and handing over copy of Murasila, FIR, recovery memo and card of arrest to the incharge investigation 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 02.07.2020.
- II. Muhammad Shafiq SHO as PW-2 deposed in respect of submission of complete challan Ex. PW 2/1 in the instant case against the accused facing trial.
- III. Constable, Khan Wada appeared before the court as PW-3 and deposed that he has taken the samples of recovered chars to the FSL for chemical analysis on 02.07.2020 and after submission of the same, he was given the receipt of the parcels which he handed over to the IO upon return.



ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Meela

IV. Complainant, Shayaz Khan ASI and eyewitness, constable Said Ullah Jaan, in their evidence as PW-4 and PW-5 respectively, repeated the story of FIR.

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 including preparation of site plan Ex. PB, recoding statements of PWs, production of accused before the court, handing over samples of chars to constable Khan Wada for FSL Peshawar alongwith application Ex. PW 6/2 and road permit certificate Ex. PW 6/3, receipt of FSL report Ex. PK, placing on file letter of FSL regarding its closure Ex. PW 6/4 on account of Covid-19, copies of daily diary Ex. PW 6/5 and Ex. PW 6/6 regarding the departure and return of complainant and him from the PS to the spot on the day of occurrence and submission of case file upon completion of investigation to the SHO for submission of complete challan against the accused facing trial.

(3). Thereafter, prosecution closed their evidence whereafter statements of both the accused were 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.



ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Meia

(4). From the arguments and record available on file it reveals that 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.


(5). The recovery memo Ex. PC is showing that as many ten 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. The complainant, Shayaz was admittedly the incharge of the Boya check-post situated at a distance of 35/36 km from the PS where he was allegedly present with other witnesses upon receipt of information and allegedly conducted the remaining proceedings but however, it was not explained as to how the seal of M.S came to his possession as the same belong to SHO Muhammad Shafiq of PS Kalaya where the complainant never shown his presence before the occurrence. The daily diary pertaining to the departure of the complainant not produced to determine as to when and from what place he departed for the spot. The SHO Muhammad Shafiq as PW-2 in his evidence did not utter a single word regarding the handing over of his seal of



ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

M.S to the complainant, Shayaz. Thus, the proceeding of sealing and affixing the seal of M.S at the spot as alleged by the complainant failed to establish and it contradicts the very mode and manner of the occurrence besides it would denote that the proceedings of packing and sealing has not been conducted at the spot but in PS.

(6). The proceedings of the IO at the spot are also questionable as in his cross examination as PW-6 he deposed that he received copy of FIR, Murasila, card of arrest and recovery memo at about 16:30 hours. However, this stance was contradicted by the Moharrir PW-1, Libab Ali by deposing that immediately after scribing the FIR he handed over the same to the IO. The FIR has been registered at 12:20 pm. It was further deposed by him that one can reach from the PS to the spot in 1 hour and 40 minutes. The IO deposed that he reached the spot at about 17:00/17:15 hours. The perusal of daily diary Ex. PW 6/6 at serial no. 6 reveals that he proceeded for the spot at about 12:30 hours and by covering distance in 1 hour and 40 minutes, he was supposed to reach at the spot at about 02:10 pm but it is not the case as alleged by the IO. The IO deposed that he conducted proceedings at the spot after 05:00 pm where the accused, case property and witnesses were present. The complainant also deposed in his cross examination that they were kept on waiting at the spot till 05:00 pm with the accused. However, both theses statements of the IO and complainant are in contradiction with the daily diary Ex. PW 6/6 at serial no. 10 wherein the arrival time of the complainant and accused in the PS is recorded as 16:10


ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Meela

hours. When admittedly the accused, case property, complainant and witnesses were available in the PS at 16:10 hours, then how the IO conducted proceedings after 17:00/17:15 hours at the spot and how the complainant alleges his presence with accused and witnesses there till 17:00 hours. Meaning is clear that nothing was conducted at the spot by the IO or by the complainant and the whole proceedings have been carried out in the PS.

(7). It is worth mentioning that constable, Shehzad 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, Shehzad 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 prosecution. Thus, the very presence of the PWs and the mode and manner of the occurrence alleged at the relevant time is doubtful.

(8). It is also necessary to mention here that accused facing trial are neither previous convict nor involved in any such case in the past besides neither they have confessed their guilt nor any further recovery was affected at their pointation despite they being in police custody for some time. Also, no evidence was brought on record to prove their connection with the recovered contraband rather the evidence led by the prosecution is full of




ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Meila

doubts and contradictions which have denied the very presence of the witnesses and their proceedings at the spot at the relevant time. As per discussion above it is established that the evidence of the witnesses has contradicted the very mode and manner of the occurrence and thereby created serious dents and doubts in their version regarding the involvement of the accused facing trial in the commission of offence charged for.

(9). Accordingly, in the light of above, both the above-named accused are acquitted of the charges levelled against them through the FIR in question. Accused are on bail, their bail bonds stand cancelled and their 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.

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

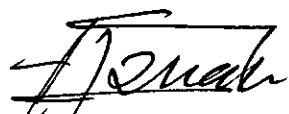
Announced
06.03.2021


ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

CERTIFICATE

Certified that this judgment consists of eight (08) pages. Each page has been read, corrected where-ever necessary and signed by me.

Dated: 06.03.2021


ASGHAR SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela