

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

Special case No.....6/3 of 2021  
Date of Institution .....24.02.2021  
Date of Decision.....17.04.2021

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

**VERSUS**

1. Zahir Khan s/o Saleem Jan ; aged about 30 years r/o Tora Warhi Tehsil and District Hangu
2. Zareen Khan s/o Ayub Khan : aged about 35 years r/o Tribe Bar Qambar Khel Speen Dand District Khyber

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

**Represented by:**

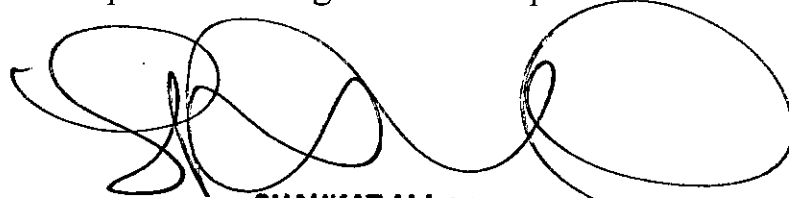
Mr. Amir Shah APP for State

Mr. Sana Ullah Khan Advocate counsel for accused

**CASE FIR NO. 1 DATED 01.01.2021 U/S 9-(D) KP CNSA OF POLICE  
STATION UPPER ORAKZAI**

**JUDGMENT**

The complainant Muhammad Naseem Khan SHO on 01-01-2021 received information during gusht that chars shall be smuggled from Daboori side and on that information the complainant along with Umar Zada AC, Abdul Wahab and SHahid Khan constables laid barricade at police post Takri-II Khadizai, that in the meanwhile two persons were coming from Daboori side on foot having plastic sacks on their shoulders, that when they reached to the place of occurrence they were stopped, that the one person disclosed his name Zahir Khan s/o Saleem Khan and from the sack in his possession five packets chars were recovered on search of the sack which were wrapped in a yellow plastic and on weightment each packet was 1000/1000 grams and total five thousand grams, that the empty sack was separately weighed which was 50 grams, that from each packet 10/10 grams were separated for FSL and sealed

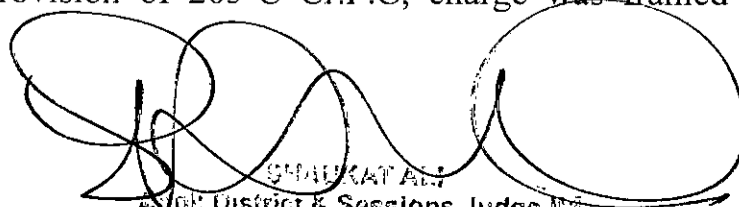


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into parcels No. 1 to 5 whereas the remaining chars were sealed into parcels No.6 to 10 as case property and the empty sack was sealed into parcel No.11, that the other person disclosed his name Zareen Khan s/o Ayub Khan and from the sack in his possession five packets chars were recovered on search of the sack which were wrapped in a yellow plastic and on weightment each packet was 1000/1000 grams and total five thousand grams, that the empty sack was separately weighed which was 50 grams, that from each packet 10/10 grams was separated for FSL and sealed into parcels No. 12 to 16 whereas the remaining chars were sealed into parcel No.17 to 21 as case property and the empty sack was sealed into parcel No.22. The chars were taken into possession by the complainant and the accused were arrested. The complainant drafted the Murasila and sent the same to the PS through constable Shahid Khan for registration of FIR against the accused on the basis of which case FIR Ex.PA was registered.

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 prosecution witnesses and accused u/s 161 Cr.PC. The IO also dispatched the samples sealed in parcel No. 1 to 5 and 12 to 16 to the FSL for chemical examiner 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 and the SHO submitted challan against the accused for trial.

The complete challan was received on 24-02-2021 for the trial of accused. The accused, being in custody was summoned through Zamima Bay, who were produced in custody before the court on 26-02-2021 and after compliance of provision of 265-C Cr.P.C, charge was framed against the

  
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Orakzai of Hanou

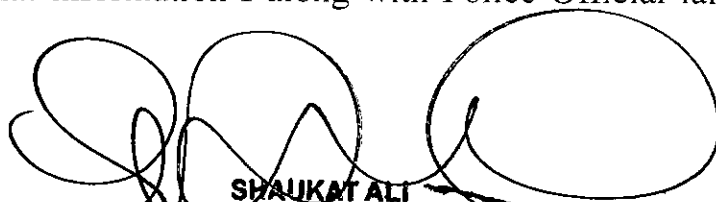
accused on 02.03.2021, to which the accused pleaded not guilty and claimed trial, therefore, the prosecution was allowed to produce its evidence. During the trial of the case, the prosecution examined 05 PWs.

The gist of the prosecution evidence is as under:

**PW-1** is the statement of Libab Ali HC who stated that "I was posted as Muharrir PS lower during the days of occurrence. 01.01.2021 at 7: 30 hours I received Murasila, recovery memo and card of arrest through Constable Muhammad Shahid in the PS. I correctly incorporated the contents of Murasila in FIR Ex.PA. Today I have seen the FIR which correctly bears my signature. When the complainant came to the PS from the spot he handed over to me the samples for FSL and case property along with accused. on 01.01.2021 I handed over the sample for FSI to the IO of the case and the remaining case property was kept in the Mall kana of PS after incorporating the same in register No.19 of the PS. I put the accused in the lockup of the PS. The IO recorded my statement u/s 161 Cr.P.C on the same day."

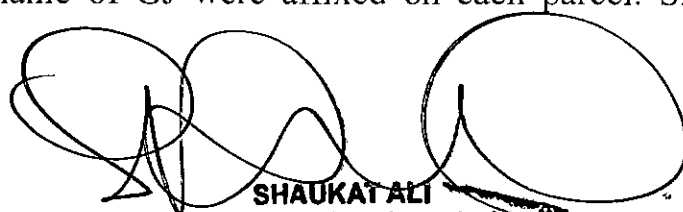
**PW-2** is the statement of Abdul Malik ASI who stated that "on 01.01.2021 the IO handed over me parcel No.1 to 5 and 12 to 16 for FSL along with road certificate Ex.PW-2/1 and application Ex.PW-2/2 for FSL. I took the said parcels to the FSL and deposited the same in FSL Peshawar against a receipt. On return I handed over the receipt to the Muharrir in the PS. My statement was recorded by the IO u/s 161 Cr.PC."

**PW-3** is the statement of Naseem Khan SI/complainant who stated that "during the days of occurrence I was SHO PS upper Orakzai. Stated that 01.01.2021 I was on gusht when I received spy information that chars shall be smuggled. On that information I along with Police Official laid barricade at

  
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Khadizai area near PP Takri-2. From Dabori side the accused Zareen and Zahir were proceeding who were stopped on suspicion by me. The accused had sacks on their shoulders which was searched and on search of the sacks it contains chars five packets each sack. Each packet was 1000/1000 grams in each sack and total 5000/5000 grams in each sack. From each packet 10/10 grams were separated for FSL and sealed into parcel No.1 to 5 and 12 to 16. The sack was also weigh which was 50 grams each which were separately sealed and the remaining case property was also separately sealed. I prepared recovery memo Ex.PW-3/1 and also drafted the Murasila Ex.PA/1 and prepared card of arrest as Ex.PW-3/2. I sent the Murasila through Shahid Khan Constable to the PS for registration of FIR. When the IO came to the spot he prepared the site plan on my instance and pointation. On completion of investigation I submitted complete challan Ex. PW-3/3 against the accused for trial. Today I have seen the above documents which are correct and correctly bears my signature”

**PW-4** is the statement of Umar Zada constable who stated that “01.01.2021 I was along with SHO and other police Nafri on gusht, when SHO received spy information that chars shall be smuggled. On that information we laid barricade at Khadizai area near PP Takri-2. From Dabori side the accused Zareen and Zahir were proceeding who were stopped on suspicion by SHO. The accused had sacks on their shoulders which was searched and on search of the sacks it contains chars five packets each sack. Each packet was 1000/1000 grams in each sack and total 5000/5000 grams in each sack. From each packet 10/10 grams were separated for FSL and sealed into parcel No.1 to 5 and 12 to 16. The sack was also weigh which was 50 grams each which were separately sealed and the remaining case property was also separately sealed. The monogram in the name of GJ were affixed on each parcel. SHO prepared

  
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recovery memo already Ex.PW-3/1. I along with the other marginal witness Abdul Wahab signed the recovery memo on the spot. The SHO drafted the Murasila already Ex.PA/1 and prepared card of arrest as already Ex.PW-3/2. The SHO sent the Murasila through Shahid Khan Constable to the PS for registration of FIR. When the IO came to the spot he prepared the site plan on the instance and pointation of the complainant. My statement was recorded u/s 161 Cr.PC Today I have seen the recovery memo which is correct and correctly bears my signature.”

**PW-5** is the statement of Malik Abdul Janan SI/IO who stated that “during the days of occurrence I was Incharge Investigation PS upper Orakzai. The Murasila, card of arrest of accused and copy of FIR was handed over to me by constable Shahid for investigation in the PS and I proceeded to the spot for spot inspection. During spot inspection I prepared site plan Ex.PB at the instance of complainant. I checked the parcels on the spot in the presence of complainant packed and sealed by the complainant. I recorded the statement of witnesses to the recovery memo on the spot. I thereafter returned to the PS where the accused were in lockup of the PS were handed over to me. I recorded the statement of Muharrir of the PS and constable Shahid Ali in the PS. On the same day on 01-01-2021 I produced accused Zahir Khan and Zareen Khan before the Magistrate for custody vide my application Ex.PW-5/1. The custody was refused and the accused was sent to Judicial Lockup. I recorded statement of accused u/s 161 Cr.PC. I sent parcel No.1 to 5 and 12 to 16 to the FSL through Abdul Malik ASI vide application already Ex.PW-2/2 for chemical report and received the FSL report Ex.PZ. I placed on file daily diary Ex.PW-5/2 and 5/3 regarding the arrival and departure of complainant from the PS. I placed on file the attested copy of relevant page of the register-19 Ex.PW-5/4.

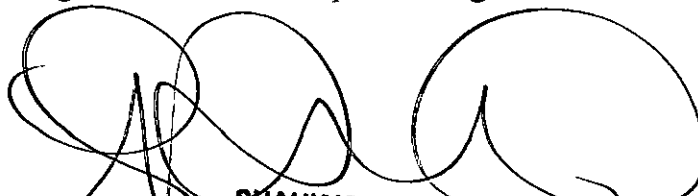
  
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After completion of investigation I submitted the case file to the SHO for submission of complete challan. Today the case property in parcel No. 6 to 10 and 17 to 21 is before the court which are Ex.P-1 to P-10. Similarly parcel No.11 and 22 in which the sacks were sealed are also before the court which are Ex.P-11 and P-12 respectively. Today I have seen the above exhibited documents which are correct and correctly bears my signatures.”

On 07.04.2021 after the prosecution closed its evidence, the statements of the accused was recorded under section 342 Cr.P.C on 09-04-2021. The accused denied the allegation 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 personal possession of accused from the sack carrying by the accused on their shoulders, that the samples sealed in parcels were 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 PWs are consistent in their statements who supported the recovery of chars from the accused, 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.

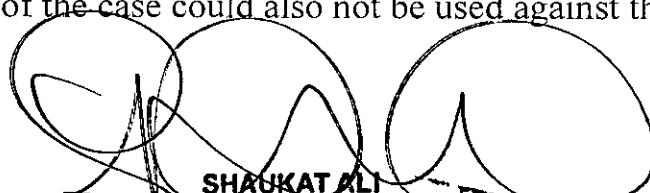
On the other hand, learned counsel for accused opposed the arguments of learned APP for the state and argued that there are major contradiction in the statement of prosecution witnesses who do not support the allegation of prosecution, that constable Shahid who took the Murasila to the PS was not produced as prosecution witness, therefore the chain of occurrence has not been established, that the alleged contraband is planted against the accused as there

  
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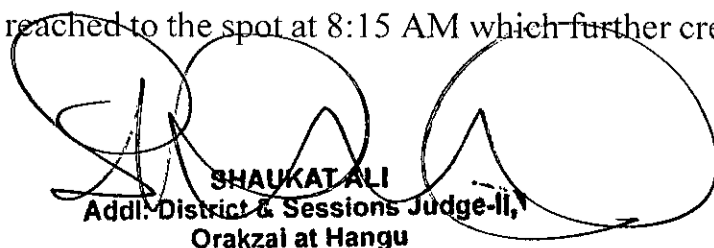
is no previous history of involvement of accused in such like cases, that the case of prosecution is full of doubts, the benefit of which shall be extended to the accused. Learned counsel for accused referred and relied on 2020 YLR 311 (Peshawar).

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

The prosecution case in brief is that on 01-01-2021 at 6:30 AM the accused facing trial were arrested by the complainant (PW-3) during Naka Bandi at Police Post Takri-II Khadizai and chars weighing five thousands grams were recovered from the sack carrying by each accused. The glaring point in the case of prosecution is that the time of occurrence is 6:30 hours and the time of report is 07:00 hours. Abul Malik ASI (PW-2) who took the parcels to the FSL on 01-01-2021 vide road certificate Ex.PW-2/1 along with application Ex.PW-2/2 on the same day stated in his cross examination that he left the PS for FSL at 07:00 AM which is the time of report and at that time the parcels of samples were yet not received in the PS. The samples were handed over to the Muharrir by the complainant when the complainant came to the PS from the spot at 9:40 AM after arrest of the accused and spot proceedings with the IO as stated by the complainant in his cross examination. The samples were handed over to the IO after 9:40 AM and at 07:00 AM the parcels of samples were not available with the IO, therefore it may be safely held that the samples took by Abdul malik ASI on 01-01-2021 at 07:00 AM were not those samples prepared by the complainant, therefore it creates dents in the case of prosecution which makes the recovery of contraband from the possession of the accused at the alleged time of occurrence highly doubtful and the FSL report in the circumstances of the case could also not be used against the accused.

  
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There are also material contradiction in the statement of prosecution witnesses. The complainant in his Murasila mentioned that the chars were wrapped in a yellow plastic but during his statement in the course of cross examination the complainant stated that the chars were put in a white plastic in each packet. The complainant further stated in his cross examination that he cut the samples from each packet with the help of knife however Umar Zada constable (PW-4) stated that the samples were taken with the help of hands from each packet and thus negated the complainant. The complainant further stated in his cross examination that the opening of both the sacks were not tied and self-stated that it was in open condition held by the accused with their hands on their shoulders, however Umar Zada constable (PW-4) stated that that the opening of sacks were tied with a piece of cloth. The complainant stated that he weight the packets along with plastics in which the chars were wrapped. PW Umar Zada also negated the complainant on this fact and stated that the chars were weight after removing the yellow plastic from the packets. Furthermore the complainant stated that when constable Shahid took the Murasila to the PS he did not return to the spot after taking the Murasila whereas the IO who reached to the spot at 8:15 AM in his cross examination stated that when he reached to the spot there the complainant along with Head constable Umar Zada, Abdul Wahab and Shahid constable were present, the IO negated the statement of complainant that constable Shahid took the Murasila to the PS. If constable Shahid had taken the Murasila to the PS and did not return then his presence on the spot at the time when the IO came to the spot shows that the occurrence has not taken place in the mode and manner narrated by the complainant. The complainant stated that the IO reached to the spot at 8:00 AM and PW Umar Zada stated that the IO reached to the spot at 7:50 AM whereas the IO stated that he reached to the spot at 8:15 AM which further create doubts

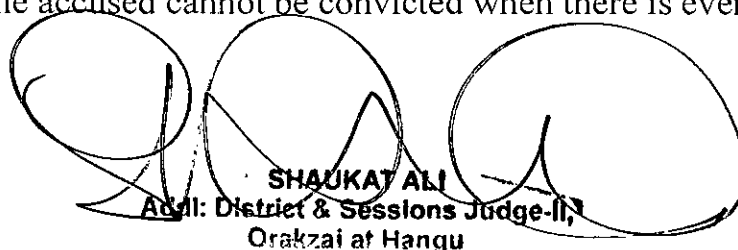
  
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about the recovery of contraband and mode and manner of offence narrated by the complainant. Furthermore the IO stated in his cross examination that Muharrir Libab Ali handed over to him the parcels for FSL at about 8:15 AM whereas the IO was on the spot at 8:15 AM which is at a distance of 9/10 KM from the PS as the IO stated that he reached to the spot at about 8:15 AM. When the IO was on the spot for spot proceeding at 8:15 AM then how he received the parcels at 8:15 AM in the PS from the Muharrir at morning time. The contradiction in the statement of prosecution witnesses created doubts in the case of prosecution therefore their statements could not be believe for the conviction of accused.

The complainant after drafting the Murasila and sent the same Murasila to the PS through constable Shahid however the prosecution did not produce constable Shahid as prosecution witness and abandoned him being unnecessary on 25-03-2021, therefore the chain of the prosecution case starting from the spot has not been established. The complainant along with the Murasila also handed over to him the card of arrest and recovery memo which was received by Libab Ali HC (PW-1) and lodged FIR against the accused, therefore the statement of Shahid Khan as prosecution witness was necessary and due to his non-examination the prosecution case became doubtful, the benefit of which shall be extended to the accused. Reliance is placed on 2020 YLR 311 (Peshawar).

The evidence produced by the prosecution is not reliable and confidence inspiring and do not connect the accused with the commission of offence. There are many doubts in the case of prosecution which makes the story of prosecution untrustworthy and not reliable. This is the universal principle of Criminal Law that the accused cannot be convicted when there is even a single

  
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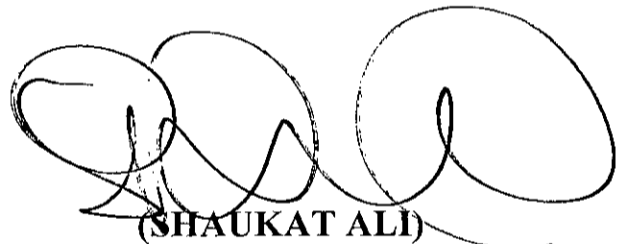
doubt in the prosecution case regarding the guilt of the accused and in case of doubt the accused shall be entitle to the benefits of such doubt not as a matter of grace or concession but as a matter of right.

As sequel to the above discussion, the prosecution could not prove the case against the accused beyond any reasonable shadow of doubt therefore; the accused are acquitted in the instant case from the charges leveled against them by extending them the benefit of doubt. The accused are in custody, they be released forthwith if not required in any other case.

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.

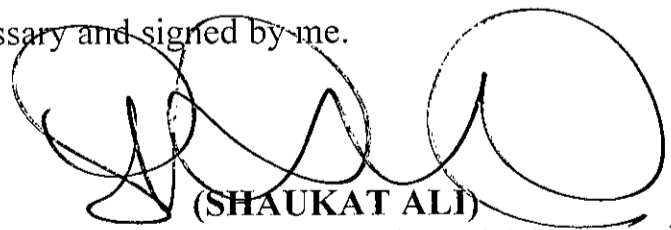
**Announced**  
17-04-2021



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

**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