

(84)

STATE VS SHER BAHADAR

**FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber
Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez**

IN THE COURT OF SHAUKAT AHMAD KHAN
SESSIONS JUDGE/JUDGE SPECIAL COURT, ORAKZAI
(AT BABER MELA)

SPECIAL CASE NO. : 13/3 OF 2023
DATE OF ORIGINAL INSTITUTION : 14.06.2022
DATE OF TRANSFER-IN : 15.03.2023
DATE OF DECISION : 12.07.2023

STATE THROUGH AFTAB HUSSAIN ASHO, POLICE STATION KUREZ

.....(COMPLAINANT)

-VERSUS-

SHER BAHADAR S/O MUHAMMAD KHAN, AGED ABOUT 49 YEARS, R/O
MERAZAI KALAYA, DISTRICT ORAKZAI

..... (ACCUSED FACING TRIAL)

Present: Umar Niaz, District Public Prosecutor for State.

: Abid Ali Advocate, the counsel for accused facing trial.

FIR No. 32 **Dated:** 01.12.2021 **U/S:** 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019 and 512 CrPC
Police Station: Kurez

JUDGEMENT

12.07.2023

The above-named accused faced trial for the offence u/s 9 (d) of the Khyber Pakhtunkhwa CNSA, 2019 vide FIR No. 32, dated 01.12.2021 of Police Station Kurez.

- (2). The case of the prosecution as per contents of Murasila based FIR is; that on 01.12.2021, the complainant Aftab Hussain ASHO along with constables Asmeed Ali, Naswar Ali and Faheem during routine patrolling acting on information regarding smuggling of narcotics via motorcar bearing Registration No. LX 1794 of black colour from Feroz Khel, laid a picket near Ghozdera check-post, where at about 1000 hours the above-mentioned motorcar driving by absconding accused Gul Bahadar on seeing the police party, abandoned the motorcar and made his escape good from the

Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela
17/07/23

(65)

STATE VS SHER BAHADAR

**FIR No. 32 | Dated: 01.12.2021 | U/S: 9(d) of the Khyber
Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez**

spot. However, a was found seated in the motorcar who was deboarded but nothing incriminating was recovered from his personal possession. The search of the motorcar led the complainant to the recovery of 05 packets of chars wrapped with yellow colour scotch tape, each weighing 1200 grams, making a total of 6000 grams, from beneath the rear seat of the motorcar. The complainant separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 5 whereas the remaining quantity of chars weighing 5950 grams were sealed in parcel no. 6 by placing/affixing monograms on all the parcels. The accused was accordingly arrested by issuing his card of arrest. The complainant took into possession the recovered chars and the motorcar bearing Registration No. LX 1794 vide recovery memo. Murasila was drafted and sent to Police Station through constable Faheem which was converted into FIR by Ain Ullah MM.

- (3). After registration of FIR, it was handed over to Investigating Officer Hassan Jan for investigation. Accordingly, after receipt of FIR, he reached the spot, prepared site plan on the pointation of the complainant and recorded the statements of PWs u/s 161 Cr.P.C. On 07.12.2021, the IO sent the samples of chars for chemical analysis to FSL vide his application through constable Rameez Ul Hassan and road permit certificate, the result whereof was received and placed on file by him. After completion of


Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela
12/07/23

STATE VS SHER BAHADAR


FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

investigation, he handed over the case file to SHO who submitted complete challan against the accused facing trial.

(4). Upon receipt of case file for the purpose of trial, the accused on bail was summoned, copies of the record were provided to him in line with section 265-C CrPC and formal charge was framed against him to which he pleaded not guilty and claimed trial. Accordingly, the witnesses were summoned and examined. The gist of the evidence is as follow;

I. Ain Ullah MM appeared in the witness box as PW-1. He has incorporated the contents of Murasila Ex. PA/1 into FIR Ex. PA. He has received the case property from the complainant duly packed and sealed which he had kept in mal khana in safe custody besides parked the motorcar in vicinity of the police station. The witness further deposed that he has recorded entry of the case property in Register No. 19 Ex. PW 1/1 and he has handed over the motorcar and samples of the case property to the Investigating Officer for sending the same to FSL on 06.12.2021 and 07.12.2021 respectively.


II. Constable Rameez Ul Hassan is PW-2. He has taken the samples of chars in parcels no. 1 to 5 to the FSL for chemical analysis on 07.12.2021 and after submission of the same, he has handed over the receipt of the parcels to the IO.


Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela
12/07/23

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

- III. Constable Faheem Hassan, the Murasila carrier, is PW-3 who has taken the Murasila along with other documents to police station for registration of FIR.
- IV. Aftab Hassan SI is the complainant of the case. He as PW-4 repeated the same story as narrated in the FIR.
- V. Constable Asmeed Ali is PW-5. He besides being eyewitness of occurrence is marginal witness of recovery memo Ex. PC as well vide which the complainant has taken into possession the recovered chars and the motorcar. He also reiterated the contents of FIR in his statement
- VI. Lastly, Investigating Officer Hassan Jan was examined as PW-6 who in his evidence deposed in respect of the investigation carried out by him in the instant case. He has prepared the site plan Ex. PB on the pointation of the complainant, recorded the statements of witnesses on the spot, produced the accused before the court of Judicial Magistrate vide his applications Ex. PW 6/1 and Ex. PW 6/2, sent the vehicle to the FSL and the result thereof was placed on file by him as Ex. PK, sent the representative samples to FSL along with application addressed to the incharge FSL Ex. PW 2/1 and road permit certificate Ex. PW 2/2 and result of the same Ex. PK/1 was placed on file by him, submitted applications Ex.


Shaukat Ahmad Khan
 District & Sessions Judge,
 Orakzai at Baber Mela

12/07/23

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

PW 6/3 and Ex. PW 6/4 for obtaining warrant 204 CrPC and notices of proclamation u/s 87 CrPC against the absconding accused Gul Bahadar, record the statement of search witness Khalid Ali, placed on file copy of Register No. 19 Ex. PW 1/1 and submitted the case file to SHO for its onward submission.

(5). Prosecution closed its evidence whereafter the statement of accused was recorded u/s 342 Cr.P.C but the accused neither wished to be examined on oath nor opted to produce any evidence in defence. Accordingly, arguments of learned DPP for State and learned counsel for accused facing trial heard and case file perused.

(6). Learned DPP for State submitted that the accused facing trial is directly nominated in the FIR, huge quantity of chars has been recovered from possession of the accused facing trial, the recovered chars are sealed and sampled on the spot by the complainant, the IO has conducted investigation on the spot, the samples for chemical analysis, though have not been transmitted to the FSL within the prescribed period but the same have been found positive for chars vide report of FSL Ex. PK/1. The complainant, the witnesses of the recovery, the official transmitted the samples to the FSL and the IO have been produced by the prosecution as witnesses, whom have fully supported the case of the prosecution and their statements have been lengthy cross examined but nothing contradictory

Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Meta

17/07/23

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

could be extracted from the mouth of any of the witness of the prosecution and that the prosecution has proved its case beyond shadow of any doubt.

(7). Learned counsel for the defence argued that though the accused facing trial is directly nominated in the FIR, the alleged chars have been shown recovered from his possession and the report of FSL support the case of prosecution; however, the accused facing trial is falsely implicated in the instant case and nothing has been recovered from his possession. He argued that the prosecution has failed to prove the mode and manner of recovery and the mode and manner of investigation allegedly conducted by the IO on the spot, as detailed by the prosecution on the case file. That the representative samples have been sent to FSL with a delay of about 07 days. He concluded that there are various dents in the case of prosecution leading to its failure to bring home the charge against the accused facing trial.

(8). In the light of arguments advanced by learned DPP for the State, arguments of learned counsel for the defence and the available record, following are the points for determination of charge against the accused facing trial:

Shaukat Amirad Khan
District & Sessions Judge
Orakzai at Baber Mela
12/12/21

- (i). Whether the occurrence has taken place in the mode and manner as alleged by the prosecution?
- (ii). Whether the investigation has been carried out in the mode and manner as alleged by the prosecution?

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

(iii). Whether the case of prosecution is substantiated through report of FSL?

(9). The case of prosecution, as per contents of Murasila Ex. PA/1, court statements of Aftab Hassan SI as PW-4 and constable Asmeed Ali as PW-5 is, that the complainant Aftab Hassan ASHO/PW-4 along with constables Asmeed Ali, Naswar Ali and Faheem during routine patrolling acting on information regarding smuggling of narcotics via motorcar bearing Registration No. LX 1794 of black colour from Feroz Khel, laid a picket near Ghozdera check-post, where at about 1000 hours the above-mentioned motorcar driving by absconding accused Gul Bahadar on seeing the police party, abandoned the motorcar and made his escape good from the spot. However, a person was found seated in the motorcar who was deboarded but nothing incriminating was recovered from his personal possession. The search of the motorcar led the complainant to the recovery of 05 packets of chars wrapped with yellow colour scotch tape, each weighing 1200 grams, making a total of 6000 grams, from beneath the rear seat of the motorcar. The complainant/PW-4 on the spot has separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 5 whereas the remaining quantity of chars weighing 5950 grams were sealed in parcel no. 6, placing/affixing monograms on all the parcels. The accused disclosing his name as **Sher Bahadar** s/o Muhammad Khan, was arrested on the spot by issuing his card

Shaukat Ahmad Khan
 District & Sessions Judge,
 Orakzai at Baber Mela

17/01/23

(71)

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber
Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

of arrest Ex. PW 4/1. The Murasila Ex. PA/1 has been transmitted by constable Faheem/PW-3 to police station where, after registration of FIR by Ain Ullah MM/PW-1, it has been handed over to Hassan Jan SI/PW-6, the IO of the case. The IO has visited the spot and conducted investigation by making a site plan Ex. PB on the pointation of Aftab Hassan ASHO/PW-4 and recorded the statements of marginal witnesses.

The prosecution in order to prove its case in the mode and manner as alleged, has examined Aftab Hassan ASHO, the complainant of the case, as PW-4 who has reiterated the contents of Murasila Ex. PA/1, constable Asmeed Ali, the eyewitness witness of the occurrence and marginal witness of recovery memo Ex. PC as PW-5 who has repeated the same story as narrated in the FIR and constable Faheem as PW-3 who has stated to have taken the documents to the police station for registration of FIR and handed over the documents to Ain Ullah MM/PW-1 who has registered the FIR. In order to prove the mode and manner of investigation allegedly conducted on the spot, prosecution has examined Investigating Officer Hassan Jan SI as PW-6 who, after receiving of the copy of FIR and other documents, has proceeded to the spot, made the site plan Ex. PB and recorded the statement of witnesses u/s 161 CrPC.

Shaukat Ahmad Khari
District & Sessions Judge,
Orakzai at Baber Meia
17/07/23

It is evident from record that as per contents of Murasila Ex. PA/1, the complainant/PW-4 was accompanied

(72)

STATE VS SHER BAHADAR

**FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber
Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez**

by constable Asmid Ali/PW-5, Inswar Ali and Faheem Hassan/PW-3 along with other police officials during the routine patrolling. The complainant/PW-4 has received secret information regarding smuggling of huge quantity of chars during patrolling. The time of occurrence is shown as 10:00 hours while the time of report is mentioned as 10:35 hours. The complainant/PW-4 when cross examined on this point he stated that he received information in police station and later on corrected his statement by saying that at that time he was on gasht at about 08:00 pm, but when asked about the time of leaving the police station he stated that he proceeded from the police station at about 08:20 pm which again does not coincide with his corrected statement. The marginal witness to the recovery memo, who is eyewitness of the occurrence as well i.e., constable Asmid Ali when cross examined on this point as PW-5 he told a different story i.e., that the complainant/PW-4 received information at Zera check post. Similarly, PW-3/Faheem Hassan who was also alleged to be present with the complainant on the spot and he has transmitted the documents from the spot to the police station, also stated that the complainant received information at about 08:00 am, that he left the police station at 08:00 after receiving the information and that from the police station they directly went to the spot and laid a barricade at Ghozdara. All the three witnesses are not unanimous on the point that whether the complainant had received information at police station or during patrolling.


Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela
17/07/21

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

Similarly, as per contents of Murasila Ex. PA/1, the complainant was accompanied by constable Asmid Ali/PW-5, Inswar Ali and constable Faheem Hassan/PW-3 and other police officials but the names of other police officials are neither mentioned in the Murasila nor they have been shown in the site plan Ex. PB. The complainant as PW-4 when cross examined on this point, he also failed to tell the names of other police officials and stated that;

"I was accompanied by police officials namely Asmid Ali, Inswar Ali, Faheem Hassan and driver along with other police nafri".


PW-3/Faheem Hassan denied the presence of other police officials in his cross examination and stated that;

"The SHO Aftab Hassan, Asmid Ali, Inswar Ali, the driver of the police mobile and I left the police station".

This PW has also excluded the presence of the driver of the police vehicle. PW-5/Asmid Ali has excluded even the presence of PW-3/Faheem Hassan, who has allegedly taken the documents from the spot to the police station. He has stated that;

"We were accompanied by driver Zar Khan and constable Inswar Ali with the SHO".

Above all, no daily diary regarding departure of the complainant party from police station has either been produced or annexed with the record which creates further doubt regarding the presence of complainant party on the spot.


Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela
17/07/23

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

The witnesses of the prosecution are also not unanimous on the mode and manner of the escape of the absconding accused and arrest of the present accused facing trial i.e., as per contents of Murasila Ex. PA/1, the motorcar number LX/1794 when stopped, was found driving by Gul Bahadar s/o unknown resident of District Khyber, who on seeing the police party, stopped the motorcar and ran away, he was chased but made his escape good while a person was found seated in the motorcar who was made came down and his person was searched. When the prosecution witnesses were cross examined on this point that who out of the police party chased the absconding accused and who arrested the accused facing trial?, the complainant/PW-4 in his cross examination stated that;

“We chased the absconding accused for some distance but in vain and then returned to the spot. One police constable namely, Faheem remained on the spot with the vehicle while rest of the police party went behind the absconding accused. This fact is not mentioned specifically in my report. Accused facing trial was present in front seat of the vehicle and we saw him on our return”.

Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela

17/07/23

When this question was put to constable Asmeed Ali, the eyewitness as PW-5, he told a different story and even himself contradicted his statement;

“The complainant along with constable Inswar Ali and other police nafri chased the absconding accused while I

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019, and 512 CrPC | Police Station: Kurez

remained on the spot with the vehicle. I cannot tell that as to after how much time the complainant along with constable Inswar Ali and other police official chasing the absconding accused, returned to the spot. The constable Inswar Ali and Zar Khan chased the absconding accused while the complainant deboarded the accused facing trial from the vehicle".

There are contradictions between the statements of PWs regarding arrival of the IO and the time consumed by them on the spot i.e., according to the cross examination of complainant/PW-4, the IO arrived at the spot at about 12:30 pm, that he(complainant) remained with the IO for about 30 minutes and that he (complainant) along with police nafri left the spot at about 01:00 pm. But according to the cross examination of IO/PW-6, he reached the spot at 12:55 pm and the SHO remained with him on the spot for about half an hour. In these circumstances, if the IO has reached the spot at 12:55 pm and the complainant had left the spot at 01:00 pm it means that he has remained with the IO for about 05 minutes which create serious doubt regarding making of investigation by the IO on the spot to the fact that as to how the IO was able to prepare the site plan and record the statements of the PWs within about 05 minutes only.

Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai, Baber Mela
12/07/23

The most important aspect of the instant case is, that admittedly the recovery has not been effected from personal possession of the accused facing trial rather from beneath the

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

rear seat of the vehicle which is neither owned by him nor he was driving the said vehicle. He has allegedly been found seated in the front seat of motorcar. The main accused who has absconded is the resident of village of District Khyber while the accused facing trial is the resident of District Orakzai. In these circumstances, the prosecution was under immense obligation to prove the connection of accused facing trial with the contrabands allegedly recovered from beneath the rear seat of the motorcar but not an iota of evidence has been brought on record in this respect.

With respect to transmission of the case property from the spot to the Police Station and sending of the representative samples to the FSL, the case of prosecution is, that after sampling and sealing of case property in parcels on the spot, these were brought by the complainant/PW-4 to the Police Station and handed over the same to Ain Ullah MM/PW-1, who deposited the same in Mal khana while parked the motorcar in vicinity of police station. The representative samples were handed over by Moharrir of the Police Station to the IO on 07.12.2021 who transmitted the same to FSL through constable Rameez Ul Hassan/PW-2 vide road permit certificate. In order to prove its case, the prosecution produced Ain Ullah MM as PW-1, constable Rameez Ul Hassan as PW-3 and Hassan Jan Oll as PW-6. PW-1, though in his examination in chief has stated that he had received case property from the complainant, made entry of the same in

Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela
17/07/23

STATE VS SHER BAHADAR

FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez

register no. 19, handed over parcels no. 1 to 5 to the IO and a copy of the same as Ex. PW 1/1 has been placed on file but the original register no. 19 has not been produced before the court. Moreover, the occurrence has taken place on 01.12.2021 while as per report of the FSL Ex. PK/1, the representative samples have been transmitted to FSL on 07.12.2021 with a delay of 06-days which has not been explained.

Hence, in view of what is discussed above, though the representative samples, as per report of FSL Ex. PK/1, have been found as chars but keeping in view the failure of the prosecution to prove the safe custody of the case property, it is held that the report of FSL cannot be relied for recording conviction.

(10). In the light of aforementioned discussion, it is held that the prosecution has failed to prove the presence of complainant party on the spot, the mode and manner of recovery, the mode and manner of the transmission of case property from spot to police station, the mode and manner of the investigation carried out by the IO on the spot and transmission of representative samples to FSL. All these facts lead to the failure of prosecution to prove the case against the accused beyond shadow of doubt. Therefore, the accused namely, **Sher Bahadar** is acquitted of the charge levelled against him by extending him the benefit of doubt. Accused is on bail. His bail bonds stand cancelled and his sureties are discharged of the liabilities of bail bonds.

Shaukat Ahmad Khan
District & Sessions Judge,
Orakzai at Baber Mela
17/12/23

78


STATE VS SHER BAHADAR

**FIR No. 32 | Dated: 01.12.2021 | U/S: 9 (d) of the Khyber
Pakhtunkhwa CNSA 2019 and 512 CrPC | Police Station: Kurez**

So far, the case against absconding accused Gul Bahadar s/o unknown resident of District Khyber is concerned, as per statement of search witness, he has wilfully absconded and there is no probability of his arrest in near future. There is prima facie case against the absconding accused; therefore, he is declared proclaimed offender u/s 512 CrPC. Perpetual warrant of arrest be issued against him. The case property be kept intact till arrest of the absconding accused and final disposal of the case. Consign.

Pronounced
12.07.2023





SHAUKAT AHMAD KHAN
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

CERTIFICATE

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

Dated: 12.07.2023


SHAUKAT AHMAD KHAN
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela