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STATE VS ABDUL WALI
FIR No. 09 | Dated: 28.01.2023 | U/S: 9 (d) of the Khyber
Pakhtunkhwa CNSA 2019 | Police Station: Kalaya

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

SPECIAL CASE NO. : 6/3 OF 2023
DATE OF INSTITUTION : 08.03.2023
DATE OF DECISION : 23.08.2023

STATE THROUGH SHAL MUHAMMAD SHO, POLICE STATION
KALAYA

.....(COMPLAINANT)

-VERSUS-

ABDUL WALI S/O NAZEER KHAN, AGED ABOUT 21 YEARS, R/O
ZAKHA KHEL, DISTRICT KHYBER

..... (ACCUSED FACING TRIAL)

Present: Umar Niaz, District Public Prosecutor for State.
: Sana Ullah Advocate, the counsel for accused facing trial.

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Pakhtunkhwa Control of Narcotic Substances Act, 2019
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JUDGEMENT
23.08.2023

The above-named accused faced trial for the offence
u/s 9 (d) of the Khyber Pakhtunkhwa CNSA, 2019 vide FIR
No. 09, dated 28.01.2023 of Police Station Kalaya.

- (2). The case of the prosecution as per contents of Murasila
based FIR is; that on 28.01.2023, the complainant Shal
Muhammad SHO along with Taj Gul HC and constable
Muhammad Rasool in official vehicle driving by Abid Gul
during routine patrolling laid a picket on the spot where at
about 1500 hours a motorcycle on way from Feroz Khel Bazar
towards the picket was stopped for the purpose of checking.
The driver of the motorcycle was made come down from
motorcycle who disclosed his name as Abdul Wali s/o Nazeer
Khan but nothing incriminating was recovered from his


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personal search. Upon search of a plastic shopper of yellow colour placed on oil tank of the motorcycle, 2000 grams of chars were recovered. The complainant separated 10 grams of chars from the total quantity for chemical analysis through FSL, sealed the same into parcel no. 1 whereas the remaining quantity of chars weighing 1990 grams along with the plastic shopper were sealed in parcel no. 2 by placing/affixing monograms of 'SH' on all the parcels. The complainant took into possession the recovered chars and the motorcycle having Chassis No. EA176797 and Engine No. 7994602 vide recovery memo. The accused was arrested on the spot by issuing his card of arrest. Murasila was drafted and was sent to Police Station through Taj Gul HC which was converted into FIR by Muhammad Jameel MHC.

- (3). After registration of FIR, it was handed over to Muhammad Hanif OII 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 29.01.2023, the IO sent the sample of chars for chemical analysis to FSL through constable Khalil Rehman, the result whereof was received and placed on file by him. After completion of investigation, he handed over the case file to SHO who submitted complete challan against the accused facing trial.


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(4). Upon receipt of case file for the purpose of trial, the accused 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. Constable Muhammad Khalil is PW-1. He has taken the sample of chars in parcel no. 1 to the FSL for chemical analysis on 29.01.2023 and after submission of the same, he has handed over the receipt of the parcels to the IO.

II. Muhammad Jameel MHC is PW-2. 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 motorcycle 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 2/1 and he has handed over the sample of the case property to the IO for sending the same to FSL on 29.01.2023.

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Shal Muhammad SHO appeared in the witness box as PW-3 who is the complainant of the case. He repeated the same story as narrated in the FIR. He has

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submitted complete challan Ex. PW 3/2 against the
accused facing trial in the instant case.

- IV. Taj Gul HC is PW-4. 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 charrs and the motorcycle.
He also reiterated the contents of FIR in his statement.
- V. Lastly, Investigating Officer Muhammad Hanif was
examined as PW-5 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, drafted
application Ex. PW 5/1 for verification of the
motorcycle, sent the representative sample to FSL
along with application addressed to the incharge FSL
Ex. PW 5/2 and road permit certificate Ex. PW 5/3
and result of the same Ex. PK was placed on file by
him, produced the accused before the court of Judicial
Magistrate vide his applications Ex. PW 5/4 and Ex.
PW 5/5, recorded the statements of witnesses u/s 161
CrPC, placed on file copy of Register No. 19 Ex. PW
2/1, copies of daily diaries Ex. PW 2/2 and submitted
the case file to SHO for its onward submission.

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(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 sample for chemical analysis have been transmitted to the FSL within the prescribed period and the same has been found positive for chars vide report of FSL Ex. PK. The complainant, the witnesses of the recovery, the official transmitted the sample 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 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.

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;

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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. 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:

- (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?
- (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 Shal Muhammad SHO as PW-3 and Taj Gul HC as PW-4 is, that the complainant Shal Muhammad SHO/PW-3 along with Taj Gul HC/PW-4 and constable Muhammad Rasool in official vehicle driving by Abid Gul during routine patrolling laid a picket on the spot where at about 1500 hours a motorcycle on way from Feroz

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Khel Bazar towards the picket was stopped for the purpose of checking. The driver of the motorcycle was made come down from motorcycle who disclosed his name as **Abdul Wali** s/o Nazeer Khan but nothing incriminating was recovered from his personal search. Upon search of a plastic shopper of yellow colour placed on oil tank of the motorcycle, 2000 grams of chars were recovered. The complainant/PW-3 on the spot has separated 10 grams of chars from the total quantity for chemical analysis through FSL, sealed the same into parcel no. 1 whereas the remaining quantity of chars weighing 1990 grams along with the plastic shopper were sealed in parcel no. 2, placing/affixing monograms of 'SH' on all the parcels. The accused has been arrested on the spot by issuing his card of arrest Ex. PW 3/1. The Murasila Ex. PA/1 has been transmitted by Taj Gul HC/PW-4 to police station where, after registration of FIR by Muhammad Jameel MHC/PW-2, it has been handed over to Muhammad Hanif OII/PW-5, 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 complainant Shal Muhammad SHO/PW-3 and recorded the statements of marginal witnesses.

The prosecution in order to prove its case in the mode and manner as alleged, has examined Shal Muhammad SHO, the complainant of the case, as PW-3 who has reiterated the contents of Murasila Ex. PA/1 and Taj Gul HC, the eyewitness witness of the occurrence and marginal witness of recovery


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memo Ex. PC as PW-4 who besides repeating the same story as narrated in the FIR, has stated to have taken the documents to the police station and handed over the same to Muhammad Jameel MHC/PW-2 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 Muhammad Hanif OII as PW-5 who has made the site plan Ex. PB, recorded the statement of witnesses u/s 161 CrPC, produced the accused before the court of Judicial Magistrate and sent the representative sample to the FSL.

As per contents of Murasila Ex. PA/1, the complainant Shal Muhammad SHO/PW-3 was accompanied by PW-4/HC Taj Gul, constable Muhammad Rasool and driver Abid Gul; however, as per contents of daily diary no. 3 of 28.01.2023 regarding departure of Shal Muhammad SHO/PW-3 from police station besides the above-named police officials, constable Amir Ullah has also accompanied him during patrolling. Similarly, as per court statement of Shal Muhammad SHO/PW-3 and HC Taj Gul/PW-4, constable Amir Ullah was also present with the complainant party at the time of occurrence but the matter has not been explained by Shal Muhammad SHO/PW-3 to the fact that as to why the name of constable Amir Ullah has not been mentioned in the Murasila. On the other hand, the said constable Amir Ullah has also not been shown present in the site plan Ex. PB.


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Second, as per contents of Murasila Ex. PA/1 coupled with site plan Ex. PB, the occurrence has taken place just opposite Utman Khel check-post where the complainant party has allegedly laid a barricade. As per cross examination of complainant/PW-3, Laiq Badshah was incharge of the police check-post Utman Khel while constable Yousaf and HC Jahanzeb were also posted at the said check-post. Similarly, as per cross examination of the complainant/PW-3, the said officials were present at the check-post and he has met them over there. In these circumstances the incharge and the other police officials posted at check-post, could be the natural witnesses of occurrence but none of them has been associated as witnesses of the occurrence even their statements have not been recorded to testify as to the factum of presence of the complainant party on the spot having laid a barricade over there.

Third, as per contents of Murasila Ex. PA/1, the occurrence has taken place at 1500 hours while the report has been made at 1530 hours. As per cross examination of Shal Muhammad SHO/PW-3, first he prepared recovery memo Ex. PC then card of arrest and thereafter Murasila Ex. PA/1 within 15 minutes and after preparation of these documents he handed over the same to HC Taj Gul for taking the same to the police station for registration of FIR which means that the Murasila being the last document would have been prepared sometime after 1530 hours whereafter these documents would have been

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handed over to HC Taj Gul/PW-4, but when this question was put to HC Taj Gul/ PW-4, he stated that he left the spot at 03:15 pm (15:15 hours) for taking the documents to the police station but at that time as per contents of Murasila Ex. PA/I even the report was not made; however, after realizing his mistake he corrected his statement that he has left the spot at 03:30 pm (1530 hours) but even at that time the Murasila was not drafted.

Fourth, the witnesses are also not unanimous on the point of the time of arrival of the IO and the time spent by him on the spot for conducting investigation. As per cross examination of SHO Shal Muhammad/PW-3, the IO arrived at the spot at 1630 hours and he remained with the IO on the spot for about 40/45 minutes on the spot and then he along with his team left the spot at about 1700/1710 hours leaving the IO on the spot. The statement of the IO/PW-5 tallies the statement of complainant in respect of arrival of the IO on the spot at 1630 hours, leaving the spot by the SHO first and consuming about 50 minutes by the IO on the spot but HC Taj Gul/PW-4 who is eyewitness of the occurrence, has told a different story i.e., that IO came on the spot at 1600 hours and that the complainant party first left the spot at 04:30 hours (1630 hours) which as per statements of the complainant and IO, is the time of arrival of the IO on the spot.

Fifth, the witnesses of the complainant party i.e., complainant as PW-3 and the eyewitness as PW-4 are also not

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unanimous on the points, as to the mode and manner of leaving on the spot, the taking of case property and the accused from the spot to the police station i.e., as per cross examination of SHO Shal Muhammad/PW-3 he was occupying the front seat of the vehicle along with the driver at the time of return to the police station while the rear seat was occupied by the rest of police officials and case property i.e., parcel no. 1 and parcel no. 2 along with the motorcycle but he has not spoken a single word regarding the accused. Similarly, he has also been contradicted on this point by HC Taj Gul/PW-4 in his cross examination where he has stated that the motorcycle was taken from the spot to the police station by constable Muhammad Rasool.

In view of aforementioned discussion, it is held that there are serious doubts regarding the presence of complainant party on the spot, laying a barricade over there, the making of investigation by the IO on the spot and the mode and manner of their return from the spot to the police station.

With respect to transmission of the case property from the spot to the Police Station and sending of the representative sample 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-3 to the Police Station and handed over the same to Muhammad Jameel MHC/PW-2, who deposited the same in Mal khana while parked the motorcycle in vicinity of police station. The


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representative sample was handed over by Moharrir of the Police Station to the IO on 29.01.2023 who transmitted the same to FSL through constable Khalil Khan/PW-1 vide road permit certificate Ex. PW 5/3. In order to prove its case, the prosecution produced Muhammad Jameel MHC as PW-2, constable Khalil Khan as PW-1 and Muhammad Hanif OII as PW-5. PW-2/Muhammad Jamil MHC who has allegedly made entry of the case property in Register No. 19, in his cross examination when confronted with the original Register No. 19 produced by him and the photocopy of the Register No. 19 available on the judicial file, he admitted that the original Register No. 19 bears his signature while there is no such signature over the photocopy of Register No. 19 Ex. PW 2/1 admitting that he has signed the same later on. The relevant portion of his cross examination is as;

“In the second column of register no. 19 Ex. PW 2/1 in original register no. 19, there is signature of mine with date mentioned while in the photocopy annexed with the judicial record as Ex. PW 2/1 there is no signature with date. Self-stated that I have signed the same later on”.

The aforementioned lacuna admitted by the PW-2 creates doubt regarding the entry of register no.19 as to the fact that as to whether these are made at the date and time as alleged by the prosecution or prepared later on.


Hence, in view of what is discussed above, though the representative sample, as per report of FSL Ex. PK, has been


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found as chars but keeping in view the failure of the prosecution to prove the safe custody of the case property and transmission of the representative sample, 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 the safe custody of the case property. All these facts lead to the failure of prosecution to prove the case against the accused beyond shadow of doubt. Therefore, the accused namely, **Abdul Wali** 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 released of the liabilities of bail bonds. The case property i.e., chars be destroyed after the expiry of period provided for appeal/revision in accordance with law while the motorcycle be returned to its lawful owner. Consign.


Pronounced
23.08.2023


SHAUKAT AHMAD KHAN
Sessions Judge/Judge Special Court,
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CERTIFICATE

Certified that this judgement consists of thirteen (13) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 23.08.2023


SHAUKAT AHMAD KHAN
Sessions Judge/Judge Special Court,
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