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**IN THE COURT OF SYED ABBAS BUKHARI, JUDICIAL
MAGISTRATE-II TEHSIL COURTS KALAYA, DISTRICT
ORAKZAI**

Case No. 4/3 OF 2022
Date of Original Institution: 17.12.2022
Date of Transfer In: 08.03.2023
Date of Decision: 03.08.2023

State through: Mujahid Khan SI NET SHO PS Kalaya.
.....Complainant

VERSES

1. SHAH MUHAMMAD S/O KHIAL MUHAMMAD,
RESIDENT OF QOUM MALAK DEEN KHEL AFRIDI,
PRESENTLY LERRI DISTRICT ORAKZAI.

....**ACCUSED FACING TRIAL**

2. ATFA ULLAH ALIAS AUNTULA S/O NAJAL KHAN,
RESIDENT OF QOUM FERAZ KHEL, DISTRICT
ORAKZAI.

.....**ACCUSED ABSCONDING**

Present: Sayed Amir Abbas, Deputy Public Prosecutor for
complainant.
Sana Ullah Khan Advocate, for accused facing trial.

JUDGMENT
06.07.2023

Through this judgement, I am going to dispose of the
instant case registered against accused Shah

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Muhammad facing trial and accused Atta Ullah was absconding vide Case FIR No. 99, Dated: 08.10.2022 U/S 11 A CNSA, PS Kalaya.

1. Brief facts as per contents of FIR are that, on 08.10.2022 at about 11:00 hours, SI/complainant Mujahid Khan alongwith other police officials had held the barricade when the accused namely Shah Muhammad was intercepted being suspected and upon search, a white plastic bag containing ice was recovered from his side pocket and after weighing the same through digital scale, the same came out to be 40 grams in total. The police officials separated 01 gm ice from the packet and packed and sealed the same in parcel no. 01 for chemical analysis of FSL, whereas, remaining 39 gram ice was packed and sealed in a separate parcel no. 02. The local police took into possession the recovered ice through recovery memo. The accused was accordingly arrested vide card of arrest, which is Ex.PW-2/2. Murasila Ex.3/2 was drafted and sent to the PS, which was converted into FIR which is Ex.PA. Hence, the case in hand.
2. After completion of investigation, complete challan was submitted by prosecution against the accused Shah

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Muhammad facing trial and supplementary challan against accused Atta Ullah.

3. Accused was summoned. He appeared before the court and all the legal formalities under Section 241-A Cr. PC were complied. Accused was formally indicted. He pleaded not guilty and claimed trial, hence prosecution was directed to produce its evidence. Accused Atta Ullah s/o Najal Khan failed to appear before the court and thus in this regard statement of search witness was recorded as SW-01, wherein he deposed that he visited the village of accused Atta Ullah but his whereabouts were not known. In this respect he also recorded the statements of the elders of locality and accordingly proceedings u/s 204/87 Cr.P.C. were completed and accused Atta Ullah was declared as proclaimed offender and afterwards prosecution was directed to produce its evidence.
4. Prosecution produced seven (07) witnesses to prove its case against the accused and thereafter closed its evidence.
5. **PW-01** is the statement of Shal Muhammad SHO. Stated that during the day of occurrence, I was posted as SHO

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PS Kalaya, L/Orakzai. On 20.10.2022 I submitted interim challan against the accused Shah Muhammad which is Ex. PW-1/1 and on 13.11.2022 I submitted complete challan against the accused Shah Muhammad and challan u/s 512 Cr. PC against the accused Atta Ullah which is Ex. PW-1/2.

6. PW-02, is the statement of SI/complainant Mujahid Khan. Stated that during the days of occurrence, I was posted as In-charge NET District Orakzai. On 08.10.2022 at 11:00 hrs I alongwith constables Haji Rehman and Yaqoot Marjan were present at barricade. Meanwhile accused came from HQ Chowk, who was stopped, on the body search of the accused 01 plastic bag white in color was recovered from the side pocket of shirt, which contained ice. Accused disclose his name as Shah Muhammad S/O Khayal Muhammad. On weighing the same through digital scale, it came out to be 40 grams ice, from which 01 gram was separated for FSL and sealed in parcel No. 1 and the remaining 39 grams were sealed in parcel No. 2, which is Ex. P-1. I affixed monogram "SH" on both parcels while affixed 3/3 monograms on each parcel. I prepared the recovery

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memo which is Ex. PW-2/1 in presence of marginal witnesses. I arrested the accused and issue of his card of arrest which is Ex. PW-2/2 and prepared a Murasila which is Ex. PW-2/3. After drafting the Murasila I sent the recovery memo, Murasila and card of arrest to PS through Constable Yaqoot Marjan. IO prepared site plan on my pointation. Today I have seen the relevant documents which is correct and correctly bears my signatures.

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7. PW-03, is the statement of Constable Haji Rehman. Stated that during the days of occurrence, I was posted as constable NET. On 08.10.2022 the SI NET Mujahid Khan recovered and took into possession 40 grams of ice from the side pocket of accused facing trial. One gram was separated and sealed in parcel No. 1 for FSL while 39 grams were sealed in parcel No. 2 which is already Ex. P-1 and prepared the recovery memo which is already Ex. PW-2/1. I signed the recovery memo on the spot. The IO recorded my statement u/s 161 Cr.PC.

8. PW-04, was examined as one Muhammad Hanif IO, who stated that during the days of occurrence, I was posted as investigation officer in PS Kalaya. On

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08.10.2022 case file was handed over to me for investigation. I visited the spot and prepared the site plan on the pointation of complainant, which is Ex. PW-4/1. I also produced the accused before the court of 05 days custody, 01 day custody was granted on the application which is Ex. PW-4/2. On 10.10.2022, I produced the accused before the court for recording his confessional statement u/s 164 Cr.PC, which is Ex. PW-4/3, however the accused did not confessed his guilt before the court and was sent to the judicial lockup. I also made an application to the FSL which is Ex. PW-4/4 and handed over the road certificate which is Ex. PW-4/5. I recorded statement of PWs u/s 161 Cr. PC. I noticed u/s 160 Cr. PC to the accused Atta Ullah which is Ex. PW-4/6 and charged the accused Atta Ullah in the present case which is Ex. PW-4/7. I also made an application u/s 204 Cr. PC against the accused Atta Ullah which is Ex. PW-4/8 and application u/s 87 Cr.P.C against the accused Atta Ullah which is Ex. PW-4/9. I received the FSL report and place the same on file, which is Ex. PW-4/10. On completion of investigation I handed over the case file to SHO.

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Today I have seen all the relevant documents which are correct and correctly bear my signatures.

9. **PW-05**, is the statement of Constable Muhammad Khalil. Stated that on the day of occurrence, I was posted as constable in PS Kalaya. The IO handed over the samples to me for FSL, which I accordingly took to FSL, Peshawar. The IO recorded my statement u/s 161 Cr.PC.
10. **PW-06**, is the statement of Moharrir Asmat Ali. Stated that during the days of occurrence, I was posted as Moharrir in PS Kalaya. I chalked out the FIR u/s 11 A CNSA. After registration of FIR, I handed over the copy of FIR and other relevant documents to the IO for investigation in the instant case. My statement was recorded by the IO u/s 161 Cr.PC.
11. **Re-examination of PW-06**, Moharrir Asmat Ali. Stated that I also made entries i.e. arrival and departure to the PS in DD of complainant Mujahid Khan and Muhammad Hanif IO which is Ex. PW-6/1. The complainant handed over to me 02 parcels in sealed form and entered in Register No. 19, which is Ex. PW-6/2. (STO the exhibit PW-6/1 and PW-6/2 are photocopies

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and cannot be exhibited neither admissible in evidence).

I also chalked out the FIR which is already exhibited as Ex. PA. IO recorded my statement u/s 161 Cr. PC.

12. PW-07, is the statement of Constable Yaqoot Marjan. Stated that during the days of occurrence, I was posted as constable NET. On 08.10.2022 SI NET Mujahid Khan recovered and took into possession 40 grams of ice from the side pocket of accused facing trial. One gram was separated and sealed in parcel No. 1 for FSL and 39 grams was sealed in parcel No. 2, which is already Ex. P-1 and prepared the recovery memo, which is already Ex. PW-2/1. I signed the recovery memo on the spot. The complainant handed over to me Murasila and I brought the same to the PS and handed over the same to Moharrir. The IO recorded my statement u/s 161 Cr. PC.
13. Afterwards, statement of accused U/S 342 Cr. PC was recorded, wherein he pleaded not his guilt and did not wish to be examined on oath. He did not opted to produce defense evidence.
14. Thereafter arguments were heard from both the sides.
15. Now on perusal of the available record, valuable assistance of learned Dy. P.P for the state and learned

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counsel for the accused facing trial, this court is of the humble view that as for as the monogram "SH" is concerned, it is pertinent to mention here that PW-01, the SHO, had deposed in his cross examination that the monogram "SH" belongs to him. Furthermore, complainant in the instant case when appeared as PW-02, had deposed in his cross examination that he affixed monogram "SH" over the parcels and furthermore, said monogram is not his personal one. In given circumstances, the story narrated by the prosecution would reveal that as per version of complainant, SHO Shal Muhammad was not present on the spot while all the proceedings including weighing and sealing of parcels were conducted by complainant on the spot, hence the question arise that as to why the complainant failed to affix his personal monogram over the parcels and furthermore, how he obtained the monogram of SHO, while the presence of SHO has not been shown on the spot. This stance of police creates serious doubts regarding the manner of commission of offence as well as place of occurrence as narrated by complainant and further make the case of prosecution one of further

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inquiry. Furthermore, lead this court to presume that all the proceedings were conducted in the PS in presence of SHO Shal Muhammad.

As for as the time of occurrence is concerned, complainant in murasila Ex-PW-3/2 had mentioned the same as 11:00am while PW-06, Moharrir PS Kalaya, had stated in his cross examination that he received Murasila on 11:00PM i.e. after 12 hours of the alleged occurrence. This statement of PW-06 was neither rebutted through suggestion nor subsequently denied or explained by the prosecution, which amounts to admission on the part of prosecution and further create doubts and dents in the prosecution case. On the other hand, if in case, the word "PM" is considered as clerical mistake and is presumed to be AM instead of PM, in circumstances the same also creates doubts, for the reason that as per version of the complainant the occurrence took place at 11:00AM, then how the Moharrir received murasila at the same time.

As for as the arrival of IO to the spot is concerned, PW-02 stated in his cross examination that IO reached the spot at 11:45AM while PW-03 stated in

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his cross examination that IO reached to the spot at 12:00PM. On the other hand when IO appeared as PW-04, he deposed in his cross examination that he reached the spot at 12:25PM. This contradiction in the statements of PWs further creates dents in the prosecution case. Moreover as for as the police officials accompanied with the IO to the spot are concerned, PW-02 and PW-03 had deposed in their respective cross examination that IO was accompanied with 05 police officials while IO deposed in his cross examination as PW-04 that he was accompanied by 02 police officials, which also make the case of prosecution one of further inquiry and lead this court to presume that either at the time of arrival of the IO to the spot, PW-02 and PW-03 were not present or IO did not visited the spot.

As for as presence of IO on the spot is concerned PW-02 had deposed in his cross examination that IO spent 20 to 25 minutes at the spot while IO of the instant case when appeared as PW-04, had deposed in his cross examination that he remained for about one hour on the spot.

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16. In light of the evidence produced by the prosecution to establish its case against accused facing trial, it has been noticed that there exist a vast contradiction in the statements of PWs and the witnesses were contradicted in material particulars. Furthermore, there exist dents in the prosecution case, which make the same one of further inquiry and thus, the prosecution miserably failed to bring home the charge against the accused facing trial.

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17. As prosecution failed to prove its case against the accused facing trial beyond the shadow of doubt, therefore, by extending the benefit of doubt to the accused facing trial namely Shah Muhammad, he is hereby acquitted from the charges leveled against him. As he is on bail, his Sureties are discharged from the liability of bail bonds.

18. Case property stands confiscated in favour of state.

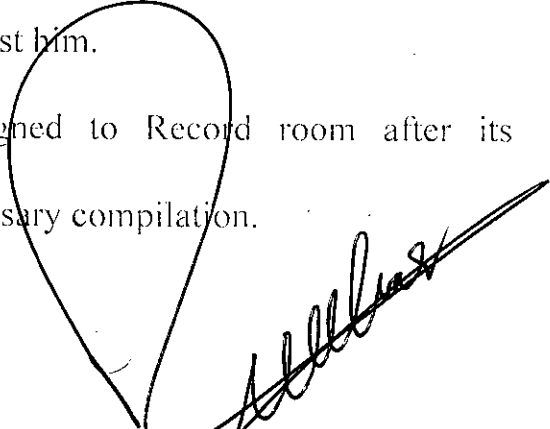
19. Prima facie case exists against absconding co-accused namely Atta Ullah who is intentionally avoiding his lawful arrest, hence, accused named above is hereby declared as proclaimed offender. His name be entered in

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register/list of proclaimed offender. Perpetual warrant of arrest be issued against him.

20. Case file be consigned to Record room after its completion and necessary compilation.

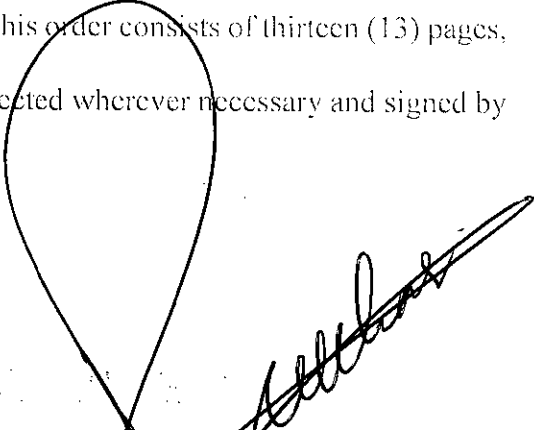
Announced
03.08.2023


Syed Abbas Bukhari,
Judicial Magistrate-II
Tehsil Courts, Kalaya, Orakzai

CERTIFICATE

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

Dated: 03.08.2023.


Syed Abbas Bukhari,
Judicial Magistrate-II
Tehsil Courts, Kalaya, Orakzai