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

SPECIAL CASE NO. : 31/3 OF 2020
DATE OF INSTITUTION : 02.03.2021
DATE OF DECISION : 25.06.2021

STATE THROUGH AFSAR KHAN SI, MAMOZAI CHECK-POST

.....(COMPLAINANT)

-VERSUS-

HAFIZ KHAN S/O GUL ASGHAR, AGED ABOUT 56 YEARS, R/O
KHWAJA KHEL, BHOTAN DISTRICT KHYBER

..... (ACCUSED FACING TRIAL IN CUSTODY)

Present: Umar Niaz, District Public Prosecutor for state.
: Sana Ullah Khan Advocate for accused facing trial.

FIR No. 05 **Dated:** 21.01.2021 **U/S:** 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019

Police Station: Upper Orakzai Ghiljo

JUDGEMENT
25.06.2021

The accused named above faced trial for the offence
u/s 9 (d) of KP CNSA Act, 2019 vide FIR no. 05, dated
21.01.2021 of PS Ghiljo Upper Orakzai.

(2). The case of the prosecution as per contents of Murasila
Ex. PA/1 converted into FIR Ex. PA is that; on 21.01.2021,
complainant, Afsar Khan SI, PW-4 alongwith other police
officials having laid a picket, was present at Arghinja check-
post where, at about 08:00 am, a person on way from Mamazo
side having a brown colour sack on his shoulder, was stopped
which was checked on the basis of suspicion wherefrom chars

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garda were recovered, which on weighing turned 10800 grams. The complainant/PW-4 separated 10 grams chars from the total quantity for chemical analysis of FSL, packed and sealed the same into parcel no. 1 whereas the remaining quantity of chars weighing 10790 grams were packed and sealed in separate parcel no. 2. Similarly, the brown colour sack weighing 250 grams was packed and sealed by the complainant/PW-4 into parcel no. 3. The accused disclosed his name as Hafiz Khan s/o Gul Asghar who was accordingly arrested by issuing his card of arrest Ex. PW 4/1. The complainant/PW-4 took into possession the recovered chars vide recovery memo Ex. PC. Murasila Ex. PA/1 was drafted and sent to the PS through constable Sultan Akbar which was converted into FIR Ex. PA by PW-3 Moharrir Abdul Manan.

- (3). After registration of FIR, it was handed over to PW-6, Sajjad Khan for investigation. Accordingly, after receipt of FIR, PW-6 reached on the spot he prepared site plan Ex. PB at the pointation of complainant. The sample for chemical analysis was sent to FSL vide application PW 6/1 through constable Abdul Malik PW-2 vide road permit certificate Ex. PW 6/2, the result whereof Ex. PK was received and placed on file by him. After completion of investigation, he handed over the case file to Naseem Khan SI, PW-1, who submitted complete challan Ex. PW 1/1 against the accused facing trial.


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(4). Upon the receipt of case file for the purpose of trial, the accused was summoned through Addendum 'B' from jail being in custody, copies of the record were provided to him u/s 265-C Cr.P.C 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. Naseem Khan SI as PW-1 deposed in respect of submission of complete challan Ex. PW 1/1 on 25.01.2021 in the instant case against the accused facing trial.

II. Abdul Malik ASI is PW-2 who deposed that he has taken the samples of recovered chars in parcel no. 1 to the FSL for chemical analysis on 22.01.2021 and after submission of the same, he was given the receipt of the parcel which he handed over to the IO upon return.

III. Moharrir Abdul Manan deposed as PW-3 in respect of registration of FIR Ex. PA by incorporating the contents of Murasila therein. He also deposed in respect of the case property received by him from the complainant duly packed and sealed which he had kept in mal khana in safe custody. The witness further deposed in respect of recording of entry of the


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case property in register 19, Ex. PW 3/1 as well as handing over of samples of the case property for sending the same to FSL to the IO on 22.01.2021.

IV. Afsar Khan SI is the complainant of the case. He appeared in the witness box as PW-4. In his statement he repeated the story narrated in the FIR.

V. Constable, Muhammad Wakil appeared in the witness box as PW-5, he is the eyewitness of occurrence as well as the marginal witness of recovery memo Ex. PC vide which the complainant/PW-4 has taken into possession the recovered chars. He also reiterated the contents of FIR in his statement.

VI. Lastly, investigating officer Sajjad Khan SI 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, produce the accused before the court, sent the representative to FSL and result of the same was placed on file by him.

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(5). Thereafter, prosecution closed their evidence where after statement of the accused was recorded U/S 342 Cr.P.C but the accused neither wished to be examined on oath nor produced evidence in defence. Accordingly, arguments of the learned DPP for the state and counsel for the accused facing trial heard and case file perused.

(6). Learned DPP for the state submitted that the accused facing trial is directly nominated in the FIR, huge quantity of chars have 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 has been transmitted to the FSL within the prescribed period of 72 hours

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which has been found positive for chars vide report of FSL Ex. PK, the complainant, the witness 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, 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. 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 the learned DPP for the state and 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 recovery is proved to have been made from possession of accused facing trial in the mode and manner as detailed in the Murasila?
- (ii). Whether the occurrence has taken place and the investigation have been conducted in the mode and manner as detailed in the file?
- (iii). Whether the recovered substance is proved through report of FSL as chars?

- (9). As per contents of Murasila Ex. PA/1, the occurrence has taken place at 0800 hours during brought day-light on a public road but no effort has been made by the complainant to

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associate any private witness with the process of search and recovery. Even the Investigation Officer has not examined any witness regarding the proceedings conducted on the spot.

The occurrence has allegedly taken place in front of a police check post Arghinja where the police officials deputed at Arghinja check post are natural witnesses of the occurrence but not a single statement of any of the police official deputed over there is recorded.

The accused facing trial is shown walking on foot on way from Mamozai side on Kacha road passing in front of a Police Post Arghinja where a picket was also laid by the police. As per site plan Ex. PB a paved road is also shown

leading from Mamozai side towards Ghiljo but it is astonishing to note that the accused facing trial with a huge quantity of chars in his possession has opted to pass through a picket laid by Police in front of the police check post instead of adopting alternate route or changing his route and has not tried to avoid the police. This unnatural behaviour of the accused shown by the police casts doubt upon the story of prosecution regarding the mode and manner of occurrence.

As per contents of Murasila Ex. PA/1 read with recovery memo Ex. PC the complainant of the case after recovery of alleged chars, has weighed the same on the spot through a digital scale and has separated 10 grams of chars for chemical analysis. The complainant of the case has appeared

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in the witness box as PW-04. On the aforementioned point of weighing and separation of sample from the chars, when he was cross examined, he stated that the sack was tied with a thin piece of cloth. After opening the sack, the recovered chars were placed on a Chaddar of Constable, Sultan Akbar, that the recovered chars were in powdered form which was weighed in one go while placing the same on a digital scale of 1x1½ feet in size and that the chars while weighing did not fall from the scale. The statement of the complainant as PW-04 to that extent on one hand is not appealable to prudent mind to the fact that how the complainant was able to place almost 11 kg of chars in powdered form on a small scale of 1x1½ feet in size, while on the other hand he has also been contradicted by PW-05, the marginal witness of the recovery memo where in his cross examination he has stated that after removing the sack from the chars these were placed in the parcel and thereafter weighed along with the parcel.

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PW-05, the marginal witness of the recovery memo when cross examined in respect of the fact that as to how the complainant separated 10 grams of chars for chemical analysis, he stated that the 10 grams of chars were separated through a knife which again pricks the prudent human mind that how a material in powdered form can be separated through a knife.

As per the story of prosecution, after recovery of the chars from accused facing trial, the recovery memo, Murasila and the card of arrest were prepared by the complainant on the spot. The Murasila was sent to PS for registration of FIR where PW-03, Moharrir of the PS registered the FIR by incorporating the contents of Murasila therein. As per story of prosecution, the card of arrest and the recovery memo have been prepared prior to registration of FIR which means that these documents must not bear the particulars of FIR i.e., serial number, date, sections of law and name of PS but on record the case is otherwise. Both the recovery memo and card of arrest bear the particulars of FIR. In this respect neither the complainant in his statement as PW-04 nor the IO as PW-06 have explained this phenomenon that when and by whom these particulars were added either prior or after registration of the FIR. So much so complainant as PW-04 when cross examined on this point, he stated that

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"I have seen the card of arrest, recovery memo and Murasila which are in same condition from top to bottom as prepared by me with no alteration or addition."

Even a suggestion has been put to him in this respect which has been answered by him in affirmative i.e.,

"It is correct that the FIR number on the top of card of arrest and the recovery memo are scribed by me on the spot."

The aforementioned discussion leads to the conclusion that neither the recovery has been made in the mode and manner as detailed in the Murasila Ex. PA/1 nor the proceedings have been conducted on the spot as shown by the police.

(10). As per record, the occurrence has taken place on 21.01.2021 while as per report of FSL Ex. PK, the sample for chemical analysis has been received to it on 22.01.2021 within the period of less than 72 hours as prescribed under the Control of Narcotics Substances (Government Analysts) Rules, 2001.

Similarly, the chain of custody beginning with the seizing of chars on the spot till receipt of the sample at FSL is also proved i.e., the seizing officer has separated 10 grams of chars and sealed into parcel no. 1 which has been handed over by him to the Moharrir of the PS on his return. The IO has collected the samples from the Moharrir and transmitted the same to FSL on the very next day. The report of FSL is also positive for chars. Hence, to that extent, the case of the prosecution is substantiated by the report of FSL Ex. PK.

(11). Accordingly, in the light of what is discussed above, it is held that though the case of prosecution is substantiated by the report of FSL, however, as the prosecution failed to prove

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the alleged recovery of chars from possession of the accused facing trial and it also failed to prove the mode and manner of recovery and the mode and manner of proceedings conducted on the spot as alleged by the prosecution leading to failure of the prosecution to prove the case against the accused beyond shadow of doubt, therefore, the accused namely, Hafiz Khan is acquitted of the charges levelled against him by extending the benefit of doubt. Accused is in custody, he be released forthwith if not required in any other case. The Chars be destroyed after the expiry of period provided for appeal/revision in accordance with law. Consign.

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CERTIFICATE

Certified that this judgement consists of eleven (11) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 25.06.2021



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