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In the name of almighty Allah who has unlimited jurisdiction over and beyond the universe.

BEFORE THE COURT OF
ADDITIONAL SESSIONS JUDGE/JUDGE SPECIAL COURT, ORAKZAI

Special case No.5/III of 2021

Date of institution: 21.01.2021

Date of decision: 27.09.2021

The State ...Versus...

Salih Khan son of Islam Shah, resident of Qaum Shekhan, Tappa Umarzai
Tehsil Upper Orakzai District Orakzai. ... (Accused facing trial)

**Case FIR No.123, Dated 03.12.2020 u/s 9-D KP-CNSA, 2019
registered at Police Station Kalaya Orakzai.**

JUDGMENT

Accused named above faced trial before this Court in case FIR No.123 dated 03.12.2020 u/s 9-D Khyber Pakhtunkhwa Control of Narcotics Substance Act, 2019, registered at Police Station Kalaya Orakzai.

2. Facts of the case are such that Khurshid Anwar ASHO Police Station Kalaya Orakzai was on patrolling of the area noticed accused as suspicious. He overpowered the accused and recovered chars measuring 1050 grams from the fold of his trouser which was wrapped in yellow scotch tape. Out of 1050 grams of chars recovered, 10 grams was separated for examination through Forensic Science Laboratory. The accused was arrested on the spot who disclosed his name as Salih Khan Son of Islam Shah Resident of Shekhan Upper Orakzai. Murasilla was drafted on the spot and sent to Police Station for lodging the case which was given effect in the captioned FIR culminated into present case.

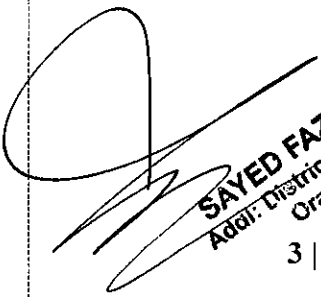

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3. After conclusion of the investigation, complete challan against the accused facing trial was presented. He was summoned for being on bail and on appearance provided copies in line with Section 265-C (1) of the Code of Criminal Procedure-1898. Charge against the accused was framed to which he pleaded not guilty and claimed trial. Prosecution was directed to produce its evidence. The prosecution in order to prove its case against the accused, produced and examined as many as six (06) witnesses. The essence of the prosecution evidence is given below:-

i. (PW-1) is Khurshid Khan ASHO PS Lower Orakzai, Stated that on 03-12-2020 he was on gasht along with other police officials and during gasht at Wam Parha two persons namely Pir Muhammad and Saleh Khan were coming on foot who were stopped on suspicion and during their search from the accused Pir Muhammad one pistol 30 bore without number along with fixed and a spare charger containing 25 live rounds of 30 bore was recovered from the fold of his shalwar and on search of accused Saleh Khan, from the fold of his shalwar one packet chars garda which was wrapped in yellow scotch tape was recovered. The chars was weighed on digital scale which was 1050 grams out of which 10 grams were separated for FSL and sealed into parcel No. 01 whereas the remaining was sealed in parcel No. 02 by affixing three stamps of SM. He prepared recovery memo EX.PW-1/1 and card of arrest Ex.PW-1/2 and drafted the Murasila Ex.PA

which was sent to the PS through constable Azmat for registration of FIR later on the IO prepared the site plan on his instance and pointation. In re-examination he further stated that on 16-02-2021 his statement was recorded as PW-1 in the instant case however during his examination the case property was not produced but later on in re-examination he produced the case property chars sealed in parcel No.2 as Ex.P1 and the pistol 30-bore without number with fixed and spare charger and 25 live rounds sealed in parcel No.2 Ex.P2 recovered by him from the possession of accused.

ii. (PW-2) is Shah Wali HC Police Station Kalaya. Stated that on 03-12-2020 he was present along with ASHO Khurshid Khan and other police official. The accused were coming on foot near Wam Parha. The complainant searched accused Pir Muhammad and one pistol 30 bore was recovered from his possession while from accused Saleh Khan Chars 1050 grams were recovered. 10 grams was separated for FSL and sealed into parcel No. 1 while 1040 grams were separately sealed. The *chars* were weighed on scale present with the complainant. The complainant prepared Murasila and sent the same through constable Azmat to the PS. The complainant prepared some other documents but he do not know the contents of those documents as he is illiterate. The complainant handed over the recover contraband and pistol to the IO on the spot.


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iii. (PW-3) is Muhammad Shafiq SHO Police Station kalaya. Stated that after completion of investigation the case file was handed over to him by the IO and he submitted complete challan Ex.PK in the instant case.

iv. (PW-4) is Aftab Hassan SI/IO Police Station Kalaya Orakzai. Stated that after register of FIR, the Murasila, recovery memo and card of arrest along with copy of FIR was handed over to him for investigation. He proceeded to the spot for spot inspection and prepared site plan Ex.PB on the pointation of complainant. He recorded the statement of witnesses to the recovery memo on the spot. He returned to the PS from the spot and recorded the statements of Muharrir in the PS. The accused was handed over to him in the PS. He recorded the statement of accused u/s 161 Cr.PC who confessed his guilt. On 04-12-2020 he produced accused before the magistrate vide his application Ex.PW-4/1 for recording his confessional statement but the accused refused to confess and was sent to judicial lock-up. He dispatched samples in parcel No. 1 to the FSL through Constable Ifikhar vide his application Ex.PW-4/2 and road certificate Ex.PW-4/3. He also sent pistol 30 bore to the arm expert FSL Peshawar for report vide his application Ex.PW-4/4 and road certificate Ex.PW-4/5. He placed on file DD Ex.PW-4/6 and copy of relevant page of register 19 already Ex.PW-4/7. After completion of investigation he handed over the case file to the SHO for submission of challan who submitted complete challan in the instant case.



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v. (PW-5) is Khanwada constable Police Station Lower Orakzai. He stated that he took the parcel No.1 containing chars and parcel No.3 containing 30 bore pistol to the FSL on 07.12.2020 for report vide road certificate already Ex.PW-4/3 and Ex.PW-4/5 along with application Ex.PW-4/2 and 4/4. He deposited the above parcels in the FSL against a receipt and when he returned to the PS he submitted the receipts to the IO. The IO recorded his statement u/s 161 Cr.PC.

vi. (PW-6) is Muhammad Ayub Muharrir Police Station Lower Orakzai. He stated that on 03-12-2020 he received Murasila sent by Khurshid Anwar ASHO through constable Azmat Khan and he correctly incorporated the contents of Murasila in FIR Ex.PA/1. The complainant handed over to him parcel No.1 containing 10 grams chars for FSL and parcel No.2 the remaining chars as case property. The complainant also handed over to him parcel No.3 containing 30 bore pistol along with spare charger and 25 live rounds of 30 bore. He handed over parcel No.1 and 3 to constable Khanwada for FSL who took the same to the FSL. The FSL report is placed on file which is Ex. PZ. His statement was recorded by IO u/s 161 Cr.PC.

4. On closure of prosecution evidence, statement of accused was recorded u/s 342 of the Code of Criminal Procedure-1898; wherein, accused professed innocence and did not opt to produce defense evidence

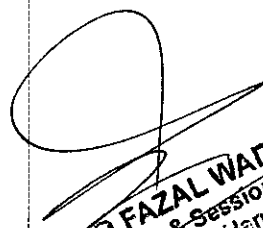
or to be examined on oath.


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5. Learned APP for the State argued that accused is directly charged in the FIR and evidence available on the file is sufficient to connect him with the commission of offence. He added that the offence is heinous in nature and prosecution has proved its case beyond doubt entailing conviction of the accused.

6. On the contrary, learned counsel for the accused contended that evidence available on the file is deficient and the story advanced by the prosecution is not appealable to prudent mind. It was added that there is no independent witness of the occurrence and the evidence available on the file is full of contradictions. He submitted that prosecution has not been able to prove the case beyond shadow of doubt and requested for acquittal of the accused.

7. Perusal of case record would reveal that according to FIR the accused was intercepted during routine patrolling of the area at the scene of occurrence on 03.12.2020 at 11:00 hours and contraband/chars weighing 1050 grams was recovered in presence of marginal witnesses namely Shah Wali HC and Constable Noor Hassan vide recovery memo (Ex. PW-1/1). The former marginal witness (PW-2) was examined; whereas, the later marginal witness was abandoned. According to (PW-2), he was present with seizing officer on the eventful day. He stated that on body search of accused, chars wrapped in yellow scotch tape (Ex.P-1) was recovered from


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Budh Shalwar of the accused which contained single packet weighing 1050 grams. The statement of (PW-2) is self-explanatory that contraband chars was not recovered from the direct possession of the accused Pir Muhammad rather recovery was made from *Budh Shalwar* of accused Salih Muhammad who is facing trial in this case; while, for accused Pir Muhammad, separate challan under Section 15-AA of Arm Act-2013 has been put in the Court. According to recovery memo (Ex. PW-1/1), the contraband chars was contained in a packet wrapped in yellow scotch tape as narrated by PW-2. The Investigation Officer being examined as PW-2 stated in his cross-examination that the parcel (Ex.P-2) separated for the purpose of examination through Forensic Science Laboratory was sealed through sewing machine available in his official vehicle which availability of such sewing machine is obviously out of the ambit of secure degree of cogency of evidence. This narration leads the Court to hold that the recovery process is dubious. Similarly, the Investigation Officer (PW-1) and PW-2 (the witness of recovery memo) contradicts each other regarding place of sealing the parcel as PW-2 testifies the parcel for FSL being sealed on the spot; whereas, PW-1 admits in cross examination that sealing was carried out at Police Station. Furthermore, the statement of PW-6 (Muharrir of the Police Station) by not mentioning the entry of case property in the relevant register shatters the chain of custody as well.

8. Distance between the Police Station and place of occurrence has been shown 55-60 kilometers in Murasila Ex.PA as well as in FIR bearing No.123 of the year 2020, Police Station Kalaya. The travelling time between the Police Station and place of occurrence has been admitted by PW-1 and PW-2 as 3 to 4 hours for being hilly terrain. Astonishingly, the occurrence has reportedly been timed as 11:00 AM; whereas, FIR has been lodged on 11:25 AM of the same day gives birth to a serious question that how the patrolling party of Police has covered 4 hours long distance of 50-60 kilometers in 25 minutes; that too, when Khurshid Khan ASHO of the PS lower Orakzai, confirms his stay over the spot for 30 minutes. These facts and circumstances render the evidence as insufficient to believe the mode and manner of the crime committed.

9. The constable who was authorized for transportation of the case property to FSL authorities was not produced in the witness box as the road certificate Ex.PW-4/5 and receipts Ex.PW-4/3 are in the name of constable Iftekhar who without authority delivered it to constable Khanwada PW-5. This unauthorized handing taking was not recorded and was made under the cover of feeling not well by constable Iftekhar; hence, the case property has been dealt with in a casual manner. Similarly, Moharrir Police Station was examined as PW-6 to show safe custody of the parcel but he bluntly denied entry in register No.19. According to FSL report Ex.PZ, the parcel

was received at FSL on 09.12.2020; meaning thereby, that it consumed almost 07 long days after the alleged occurrence. The delay in sending parcel Ex.PZ to FSL was not explained.

10. The recovery was effected from the accused facing trial in the peak hours of the day at Wam Panra road but despite this fact there is no independent witness of the occurrence which is glare violation of Section 103 Cr.PC and renders the entire episode highly doubtful. The Investigating Officer (PW3) has stated that he has not recorded statement of any disinterested witness for which he has not given any explanation.

11. The accused facing trial has not recorded confession before the court. He remained in police custody for sufficient time but no further recovery was made. The case property was also not produced before the learned Illaqa Magistrate which is mandatory requirement u/s 33 of the KP-CNSA-2019. The accused has no criminal history in such like offences.

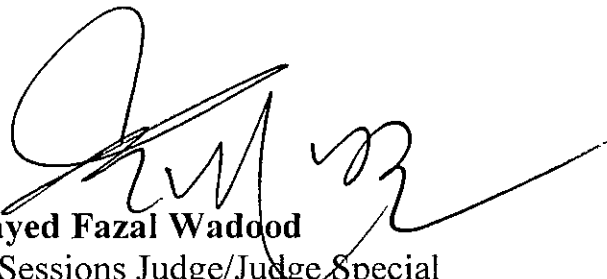
12. In the light of above discussion, it is held that the prosecution evidence is in falling in insufficient category of cogency; whereas, the secure category evidence is full of material contradictions and doubt. Consequently, the benefit of doubt is extended to the accused facing trial and resultantly, accused Salih Khan son of Islam Shah resident of Qaum Shekhan Tappa Umarzai, Kaaso Kalay Tehsil and District Orakzai is

acquitted from the charges levelled against him. He is on bail, his bails

bonds stand canceled and his sureties are absolved from the liabilities of bail bonds. Case property be dealt with as per law after expiry of period of appeal/revision. File be consigned to District Record Room, Orakzai after its necessary completion and compilation within the span allowed for.

ANNOUNCED

27.09.2021



Sayed Fazal Wadood
Additional Sessions Judge/Judge Special
Court Orakzai

CERTIFICATE:

Certified that this Judgment consists of (10) pages; each page has been read over and signed by me after making necessary corrections therein.



Sayed Fazal Wadood
Additional Sessions Judge/Judge Special
Court Orakzai