

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

SPECIAL CASE NO. : 47/3 OF 2021
DATE OF INSTITUTION : 17.08.2021
DATE OF DECISION : 28.09.2021

STATE THROUGH HASSAN JAAN ASHO, PS KUREZ BOYA

.....(COMPLAINANT)

-VERSUS-

ULFAT HUSSAIN S/O SHAHID ALI AGED ABOUT 36 YEARS, TRIBE
SIPOYE, MITHA KHAN, VILLAGE WAZIR GARHI, DISTRICT
ORAKZAI

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

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

FIR No. 09 **Dated:** 01.07.2021 **U/S:** 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019
Police Station: Kurez Boya

JUDGEMENT
28.09.2021

The accused named above faced trial for the offence
u/s 9 (d) of KP CNSA Act, 2019 vide FIR no. 09, dated
01.07.2021 of PS Kurez Boya, District Orakzai.

The case of the prosecution as per contents of Murasila
Ex. PA/1 converted into FIR Ex. PA is, that on 01.07.2021,
complainant, Mujahid Khan SI, PW-4 in the company of ASI
Shah Sawar, constable Junaid Ali, PW-2 and other police
officials having laid a picket on main road Kalaya to Kacha
Paka, acting on the information regarding smuggling of huge
quantity of narcotics, at about 1440 hours, a person walking

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on foot on way from Kurez side, on seeing the police party tried to escape but he was overpowered. He disclosed his name as Ulfat Husain s/o Shahid Ali. He was having blue colour plastic bag in his hand which on checking led the complainant to the recovery of chars garda turned 3500 grams when weighed on digital scale. The complainant/PW-4 separated 10 grams of chars for chemical analysis of FSL, packed and sealed the same into parcel no. 1 whereas the remaining quantity of chars weighing 3490 grams were packed and sealed in separate parcel no. 2, affixing monograms of IH on both the parcels. The accused was accordingly arrested vide card of arrest Ex. PW 1/1. The complainant/PW-4 took into possession the recovered chars vide recovery memo Ex. PC. Murasila Ex. PA was drafted and sent to the PS through constable Junaid Ali, PW-2 which was converted into FIR Ex. PA by PW-3 Naimat Ali SHO.

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(3). After registration of FIR, it was handed over to PW-6, Mohsin Ali SI for investigation who, after receipt of FIR, reached on the spot, prepared site plan Ex. PB on the pointation of complainant and recorded the statements of witnesses on the spot. The sample for chemical analysis was sent to FSL through constable Rameez Ul Hassan, PW-5, 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, the IO handed over the case file to SHO Naimat

Ali, PW-3, who submitted complete challan Ex. PW 3/1 against the accused facing trial.

(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 prosecution examined as many as 06 witnesses. The gist of the evidence of prosecution is as below;

I. Hassan Jaan ASHO is the complainant of the case. He appeared in the witness box as PW-1. In his statement he reiterated the story narrated in the FIR. He has issued the card of arrest Ex. PW 1/1, prepared the recovery memo Ex. PC, separated 10 grams of chars for chemical analysis and made pointation on the spot of occurrence to the IO.

II. Constable Junaid Ali appeared in the witness box as PW-2. He besides being eyewitness of the occurrence is a marginal witness of recovery memo Ex. PC vide which the complainant/PW-1 has taken into possession the recovered chars, as well. He also reiterated the contents of FIR in his statement. The witness deposed that he took the copies of Murasila, card of arrest and recovery

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memo to PS. He further deposed that the complainant has made recovery, prepared recovery memo and separated 10 grams of chars for chemical analysis in his presence and that the recovery memo Ex. PC correctly bears his signature as marginal witness.

III. SHO Naimat Ali as PW-3 deposed in respect of registration of FIR Ex. PA by incorporating the contents of Murasila therein. He further deposed that he had submitted complete challan Ex. PW 3/1 on 06.07.2021 in the instant case against the accused facing trial.

IV. Moharrir Zaman Ali deposed as PW-4. He stated that the case property was received by him from the complainant duly packed and sealed which he had kept in mal khana in safe custody in respect of which he has made entry in register 19 Ex. PW 4/1. He has also made entries in daily diaries no. 12 and 18 dated 01.07.2021 Ex. PW 4/2 regarding departure and return of complainant. He has also made entry in the daily diary in respect of handing over of sample of the case property to the IO for sending the same to FSL on 05.07.2021.

V. Constable Rameez Ul Hassan is PW-5 who deposed that he has taken the sample of recovered

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chars in parcel no. 1 to the FSL for chemical analysis on 05.07.2021 and after submission of the same, he was issued the receipt of the parcel which he handed over to the IO upon his return.

VI. Lastly, investigating officer Mohsin Ali 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, produced the accused before the court, sent the representative sampled to FSL and result of the same was placed on file by him.

The prosecution closed its evidence whereafter statement of the accused was recorded U/S 342 Cr.P.C but the accused neither wished to be examined on oath nor opted to produce evidence in defence.

- (6). Arguments of the learned DPP for the state and learned counsel for the accused facing trial heard and case file perused.
- (7). 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

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transmitted to the FSL within the prescribed period of 72 hours 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 and that the prosecution has proved its case beyond shadow of any doubt.

(8). 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.

(9). In the light of arguments advanced by the learned DPP for the state and learned counsel for the defence and the

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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?

(10). As per contents of Murasila Ex. PA, the occurrence has been shown taken place on main Kalaya road to Kacha Paka. The place where the occurrence has allegedly taken place is neither mentioned in the Murasila Ex. PA nor it has been shown in the site plan Ex. PB. In Ex. PB, the place of occurrence has been explained as “main road Kalaya to Kacha Paka near village Largi Tang”. In this respect when the complainant as PW-1 was cross examined, he admitted that he has not mentioned the place where he has arrested the accused; however, he has explained that it was on “main road at Kurez Farsh” which on one hand contradicts the contents of site plan Ex. PB wherein the occurrence has been shown taken place near village Largi Tang while on the other hand this place i.e., Kurez Farsh is neither mentioned by him in the Murasila Ex. PA nor in the site plan Ex. PB.

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The time of occurrence as shown in the Murasila Ex. PA and the time of registration of FIR as shown in the FIR Ex. PA/1 are also doubtful. As per Murasila Ex. PA, the time of occurrence is shown as 1440 hours (02:40 pm), the time of report is 1500 hours (03:00 pm) and the time of registration of FIR is 1630 hours (04:30 pm). On this point when the complainant was cross examined, he stated that on that day he had left the PS at about 12:50 pm and reached the spot at 02:05 pm. Constable Junaid Ali, PW-2 (who had taken the documents to the PS) had left the spot at 03:35 pm and returned to the spot at 03:55. But according to FIR, he has reached the PS at 1630 hours (04:40 pm) then how it was possible for him to return to spot at 03:55 pm. The situation becomes further doubtful when PW-2, the eyewitness of the occurrence in his cross examination took a contradictory stance. In his cross examination he has stated that the police party had left the PS at 01:00 pm, reached the spot at 01:20 pm, the accused reached the spot at 01:30 pm and the IO came on the spot at 02:00 pm, while as per contents of Murasila Ex. PA the occurrence has taken place at 02:40 pm, the FIR has been registered at 04:30 pm and as per statement of PW-6, the IO has reached the spot at 04:50 pm.

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As per contents of Murasila Ex. PA, the complainant at the time of occurrence was accompanied by ASI Shah Sawar, constable Junaid Ali and other police officials. As per daily

diary Ex. PW 4/2, the complainant besides afore-mentioned officials was also accompanied by constable Ijtehad Ali and driver Nasir Hussain. The complainant in his cross examination stated that besides Shah Sawar ASI, constable Ijtehad Ali, Junaid Ali, Nisar Ali he was also accompanied by constable Fahim Ali. PW-2, the eyewitness of the occurrence when cross examined in this respect, he stated that the police nafri consisted of Hassan Jaan ASHO (the complainant), constable Ijtehad Ali and him. He did not mention the names of constables Nasir Hussain and Fahim Ali. The statement of IO as PW-6 further casted doubt on the fact regarding the number of police officials of the complainant party i.e., he stated that Hassan Jaan ASHO (the complainant), Shah Sawar ASI and constable Junaid Ali, PW-2 alongwith accused were present on the spot.

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Hence, in view of what is discussed above, the non-disclosure of the place of occurrence coupled with the disagreement of the witnesses of prosecution regarding the place of occurrence, the material contradiction regarding the time of occurrence, the time of report, the time of registration of FIR and material contradictions regarding the number and names of police party containing the complainant party, lead to failure of the prosecution to prove the recovery and proceedings conducted on the spot in the mode and manner as alleged by the prosecution.

(11). As per record, the occurrence has taken place on 01.07.2021 while as per report of FSL Ex. PK, the sample for chemical analysis has been received to it on 05.07.2021 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 for chemical analysis. The report of FSL is also positive for chars. However, as per contents of Murasila, the alleged recovered substance was chars garda but as per report of FSL the texture of the representative sample was brown (solid) in nature. The case property as per contents of Murasila Ex. PA was alleged to be in single piece; however, when it was produced in the court, it was found in various pieces. In these circumstances, it is also doubtful that from which of the piece the representative sample has been separated. Therefore, the FSL report though supports the case of prosecution but of no help to the prosecution.

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(12). Accordingly, in the light of what is discussed above, it is held that the prosecution has failed to prove 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, Ulfat Hussain 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 chargs 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: 28.09.2021



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