

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

SPECIAL CASE NO. : 38/3 OF 2021
 DATE OF INSTITUTION : 15.06.2021
 DATE OF DECISION : 17.11.2021

STATE THROUGH MUHAMMAD SHAFIQ SI, POLICE STATION
 LOWER ORAKZAI KALAYA
(COMPLAINANT)

-VERSUS-

MUHAMMAD KHALID S/O MOMIN KHAN, AGED ABOUT 18
 YEARS, CASTE UTMAN KHEL, SUB CASTE BRANKA KHEL PO
 FEROUZ KHEL, TANDA, TEHSIL LOWER, DISTRICT ORAKZAI

..... (ACCUSED FACING TRIAL ON BAIL)

Present: Umar Niaz, District Public Prosecutor for State.
 : Farida Qureshi Advocate for accused facing trial.

FIR No. 01 **Dated:** 02.01.2021 **U/S:** 9 (d) of the Khyber
 Pakhtunkhwa Control of Narcotic Substances Act, 2019 & 468/471 PPC
Police Station: Kalaya Lower Orakzai

JUDGEMENT
 17.11.2021

The accused named above faced trial for the offence
 u/s.9 (d) of KP CNSA Act, 2019 PPC vide FIR no. 01, dated
 01.02.2021 of PS Kalaya Lower Orakzai.

- (2). The case of the prosecution as per contents of Murasila
 Ex. PA/1 converted into FIR Ex. PA is; that on 02.01.2021,
 complainant, Muhammad Shafiq SI, PW-3 along with other
 police officials having laid a picket, were present on the spot.
 Meanwhile, at about 1700 hours, a motorcycle on way from
 Feroz Khel side towards the picket, was stopped by the local

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police for checking. The driver of the motorcycle was having a white colour plastic bag in his lap which was searched by the complainant/PW-3, wherefrom 02 packets of chars wrapped with yellow colour scotch tape, each weighing 1210 grams (total of 2420 grams of chars), were recovered. The complainant/PW-3 separated 10 grams of chars from each of the packet for chemical analysis through FSL, packed and sealed into parcels no. 1 and 2 whereas the remaining quantity of chars weighing 2400 grams were packed and sealed in parcel no. 3 by affixing monogram of MS on all the parcels. The accused was accordingly arrested by issuing his card of arrest Ex. PW 3/1. The complainant/PW-3 took into possession the recovered chars along with the motorcycle without number vide recovery memo Ex. PW PC. Murasila Ex. PA/1 was drafted and sent to the PS which was converted into FIR Ex. PA by PW-1 Muhammad Fayyaz MHC.

- (3). After registration of FIR, it was handed over to PW-5, Aftab Hassan SI for investigation. Accordingly, after receipt of FIR, PW-5 reached on the spot, he prepared site plan Ex. PB at the pointation of the complainant. The samples for chemical analysis were sent by him to FSL vide application Ex. PW 5/2 through constable Nikzad Ali/PW-2 and road permit certificate Ex. PW 5/3, the result whereof Ex. PK was received and placed on file by him. The IO sent the motorcycle without registration number vide letter no. 132/PA/DPO/OKZ

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to FSL for verification of its chassis number/engine number, the result of which Ex. PK/1 was received and placed on file. As per report of FSL Ex. PK/1, the chassis number of the motorcar was found tempered, as a result of which section 468/471 PPC were added in the instant case. After completion of investigation, the IO handed over the case file to Muhammad Shafiq SHO, PW-3, who submitted complete challan Ex. PW 3/2 for the offence u/s 9 (d) CNSA while separate challan u/s 468/471 PPC was submitted.

(4). Upon receipt of case file for the purpose of trial, the accused was summoned, 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 produced and examined as many as 05 witnesses. The gist of the evidence is as follow;

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I. MHC Fayyaz Ali is PW-1. He has registered FIR Ex. PA by incorporating the contents of Murasila Ex. PA/1 therein. He has also received the case property from the complainant duly packed and sealed which he has deposited in mal khana in safe custody and parked the motorcycle in the premises of the Police Station. The witness further deposed that he has made entry in respect of deposit and handing over of the case property to the IO in register 19, Ex. PW 1/1.

- II. Constable Nikzad Ali is PW-2. He deposed that he had taken the samples of chars in parcel no. 1 and 2 alongwith application Ex. PW 5/2 and road permit certificate Ex. PW 5/3 for chemical analysis and handed over its receipt to the IO upon his return to the Police Station.
- III. Muhammad Shafiq SHO is complainant of the case. He appeared in the witness box as PW-3. In his statement he repeated the story narrated in the FIR. He has also drafted card of arrest Ex. PW 3/1 and submitted complete challan Ex. PW 3/2 in the instant case against the accused facing trial.
- IV. Constable, Najib Ullah appeared in the witness box as PW-4. He besides the eyewitness of occurrence is the marginal witness of recovery memo Ex. Ex. PC as well, vide which the complainant/PW-3 has taken into possession the recovered chars alongwith motorcycle. He also reiterated the contents of FIR in his statement.
- V. Lastly, Investigating Officer, Aftab Hassan SI 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 site plan Ex. PB on the pointation of the complainant, recorded the statements of witnesses on the spot,


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produced the accused before the court, sent the representative samples to FSL and result of the same was placed on file by him which is Ex. PK/1. He has drafted letters, Ex. PW 5/5 and Ex. PW 5/6 for verification of the particulars of the motorcycle and its involvement in other cases. The result of the FSL in respect of parcels no 1 and 2 Ex. PK was received and placed on file by him. He has also added section 468/471 PPC and submitted the case file to SHO for submission of complete challan in the instant case.

(5). After the closure of the evidence of prosecution, statement of accused facing trial 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. 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 has been recovered from possession of the accused facing trial, the recovered chars are sampled and sealed on the spot by the complainant, the IO has conducted investigation on the spot, the samples for chemical analysis has been transmitted to the FSL within the prescribed period of 72 hours which have been found positive for chars vide report of FSL

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Ex. PK, the motorcycle has been verified from the FSL by the IO through his application, the complainant, the witness of the recovery, the official transmitted the samples 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 has been shown recovered from possession of the accused facing trial and the report of FSL support the case of prosecution; however, the accused facing trial is falsely implicated in the instant case. 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. The learned counsel for defence 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.

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(8). In the light of arguments advanced by the learned DPP for the State, arguments of the 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 on the case file?
- (iii). Whether the recovered substance is proved through report of FSL as chars?

(9). The case of the prosecution, as per contents of Murasila Ex. PA/1 is, that on 02.01.2021, complainant, Muhammad Shafiq SI, PW-3 along with constables Najib Ullah PW-3, Yasin Ullah and other police officials having laid a picket, were present on the spot. In the meanwhile, at about 1700 hours, a motorcycle on his way from Feroz Khel side towards the picket, was stopped by the local police for checking. The driver of the motorcycle was having a white colour plastic bag in his lap which was searched by the complainant/PW-3 wherefrom 02 packets of chars wrapped with yellow colour scotch tape, each weighing 1210 grams (total of 2420 grams of chars), were recovered. The complainant/PW-3 separated 10 grams of chars from each of the packet for chemical analysis through FSL and sealed the same into parcels no. 1 and 2 whereas the remaining quantity of chars weighing 2400 grams were packed and sealed in parcel no. 3 by affixing monograms of MS on all the parcels. He conducted the search,

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seizure and in this respect prepared the recovery memo Ex. PC on the spot in the presence of marginal witnesses, constables Najib Ullah, PW-4 and Yasin Ullah. The prosecution in order to prove the recovery of chars in the mode and manner as detailed in the Murasila Ex. PA/1 and recovery memo Ex. PC, examined the complainant Muhammad Shafiq SI as PW-3. In his examination in chief, he has reiterated the story detailed in the Murasila Ex. PA/1. The stance of the prosecution is further supported by the statement of constable Najib Ullah as PW-4 who besides being eyewitness of the occurrence is a marginal witness of the recovery memo Ex. PC as well. He has almost narrated the same story as that of narrated by the complainant in his statement as PW-3. The defence objected to the mode and manner of recovery on the following grounds;


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that as per content of murasila Ex.PA/1 the time of occurrence is 1700 hours while according to FIR Ex.PA the time of occurrence is 1720 hours, that the conduct of accused as shown in the murasila Ex.PA/1 seems not natural i.e. having laid a bag of chars in his lap and having not tried to escape is against the rule of prudence, that the occurrence despite having taken place near petrol pump, has not been substantiated to be witnessed by any private witness, that the seizing officer despite having an android cellphone has not made any videoclip of the occurrence, that there are various contradictions between the statement of complainant and eye

witness i.e. according to statement of complainant as PW-3, the police nafri consisted of 5 police officials while as per statement of PW4, the eyewitness, they were 4 in numbers, that as per statement of PW3, while on way from police station towards the spot of occurrence, the police vehicle was driving by him while as per statement of eyewitness as PW4, the vehicle was driving by constable Abid gul, that as per statement of PW-3, he prepared murasila, recovery memo and then card of arrest while as per PW-4, he first prepared murasila, card of arrest and then recovery memo, that as per PW-3, after conducting all the proceedings the accused was handcuffed while as per PW-4, soon after recovery the accused was handcuffed, that as per PW-3, they set out for PS from the spot at 7pm, while according to PW-4, the time of departure from the spot is 7.45pm, that as per PW3, they reached the PS at 8 pm, while as per PW4, they reached at 8.20 pm.


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Keeping the objections of the defence in juxtaposition to record it is observed that as per murasila Ex.PA/1, the time of occurrence is 1700 hours, while the time of report is 1720 hours. Similarly, Pw-3 the complainant and PW-4, the eye witness in their statements have also told the time of occurrence as 1700 hours. But in the FIR, Ex.PA, which is the verbatim copy of murasila Ex.PA/1, the time of occurrence as well as the time of report both are shown as 1720 hours which seems clerical mistake and does not in any way suggest any

discrepancy in the time of occurrence and the time of report. Second, as the accused facing trial, was driving a motorcycle, therefore, as evident from the site plan Ex. PB, when he was stopped, he seems having no opportunity to escape. Similarly, laying a bag of goods in one's lap while riding a motorcycle is quite natural and both these facts are not against the rule of prudence. Hence, the conduct of accused on the spot as shown in murasila does not in any way lead a prudent mind to believe that the occurrence has not taken place in the mode and manner as detailed in the murasila Ex.PA/1. Third, as the police witnesses are also believed to be good witnesses as private witnesses unless some malafidi is shown on behalf of police witness and as the applicability of section 103 Cr.P.C. has specifically been excluded in the cases under Khyber Pakhtunkhwa CNSA Act, 2019 vide section 31 of the ibid Act, therefore, failure of the seizing officer or the investigation officer to associate any private witness with the occurrence, does not adversely affect the case of prosecution. Forth, as the seizing officer as PW-3 and the eyewitness as PW-4 have given direct evidence regarding the occurrence, therefore, there was no need for the prosecution to produce evidence of electronic devices. Fifth, though neither PW-3, the complainant nor PW-4, the eyewitness have disclosed the factums of drafting of murasila, recovery memo and card of arrest by PW-4 at the dictation of PW-3 but both the witnesses

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when asked about this fact in their cross examination, both of them have explained that these documents are prepared by PW-4 at the dictation of PW-3 and there is no contradiction in this respect between their statements. Sixth, both the statements of PW-3 and PW-4 are unanimous regarding the date, time, place and mode and manner of the recovery and the contradictions between the statements of PW-3 and PW-4 as pointed by the defence, are minor in nature and do not in any way suggest that either the recovery has not been effected from possession of the accused or the occurrence has not taken place in the mode and manner as detailed in the murasila Ex.PA.

(10). With respect to proceedings conducted by the IO on the spot, the stance of the prosecution as per Murasila Ex. PA/1, FIR Ex. PA and recovery memo Ex. PC, is; that after drafting of Murasila, recovery memo and card of arrest of the accused by the complainant, the same were handed over to constable Saeed Gul, who took the same to PS and handed over to PW-1 Muhammad Fayyaz MHC, who registered FIR Ex. PA on the basis of Murasila. He handed over copy of the FIR, Murasila, card of arrest and recovery memo to Incharge investigation Aftab Hassan, PW-5. The said Aftab Hassan SI proceeded to the spot where he prepared site plan Ex. PB on the pointation of the complainant and recorded the statements of witnesses u/s 161 Cr.P.C. In order to prove its stance, the prosecution has produced Constable Muhammad Fayyaz,

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MHC as PW-1 and Aftab Hassan SI as PW-5. Both the witnesses narrated the aforementioned story and the sequence of different events in their statements. Both the witnesses have been lengthy cross examined but nothing contradictory could be extracted from their mouths. The defence objected to the process of investigation on the ground that no private witness has been examined by the IO, that the IO has not raided the house of the accused for further recovery and that the IO has not examined a person from whom the accused has allegedly purchased chars. So far the objection of the defence regarding non association of private witness is concerned, as discussed above, as the police witnesses are also believed to be good witnesses as private witnesses unless some malafidi is shown on behalf of police witness and as the applicability of section 103 Cr.P.C. has specifically been excluded in the cases under Khyber Pakhtunkhwa CNSA Act,2019 vide section 31 of the ibid Act, therefore, failure of the seizing officer or the investigation officer to associate any private witness with the occurrence, does not adversely affect the case of prosecution. The objection of the defence regarding non raiding the house of the accused for further recovery and non-examination of the person from whom the accused has allegedly purchased the chars, are also not valid, for, it is not the case of prosecution that either the accused was having stored chars in his house nor he has purchased the same from

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someone rather the accused is booked for transportation of chars, and in this respect, all the relevant evidence has been brought on the record by the prosecution.

(11). The case of the prosecution regarding proof of the recovered substance as chars through FSL, the chain of the custody of the representative samples, their transmission to the FSL within the prescribed period of time and following full protocols of the tests applied in the FSL, is; that after seizure of the contrabands by the complainant containing 02 packets, 10 grams from each of the packet has been separated and sealed by him on the spot with affixing of three monograms of MS on each of the parcel. The complainant after his arrival in the Police Station has handed over the representative samples to PW-1 Muhammad Fayyaz, MHC, who has made entry of the case property in register no. 19 and has kept the samples in safe custody. On 04.01.2021, the incharge investigation has collected the samples from Moharrir and has handed over the same to constable Nekzad Ali PW-2, to transmit the same to FSL, who has transmitted the same against a road permit certificate and deposited the same in FSL against proper receipt which on return has been handed over by him to the IO. After receipt of FSL report Ex. PK, the same has been placed on file by the IO. The prosecution in order to prove its stance has examined the complainant as PW-3, Muhammad Fayyaz

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MHC, as PW-1, Aftab Hassan SI, the IO of the case as PW-5 and constable Nekzad Ali as PW-2. All the four witnesses have narrated the aforementioned story in their statements. They were cross examined but the defence failed to point out any discrepancy in their statements which may suggest that either samples have not been transmitted on the date as alleged by the prosecution or these have not been taken by the official whose name is mentioned over there.

In view of what is discussed above, it is held that the prosecution has proved beyond shadow of any doubt the chain of the custody of the representative samples, within the prescribed period of time, from the spot till these are received in the FSL. Similarly, as per report of FSL Ex. PK, the representative samples no. 1 and 2 were found positive for chars after following full protocols of the tests applied. Hence, the case of the prosecution is substantiated by the report of FSL.

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(12). In a nutshell, in light of what is discussed above, it is held that the prosecution has successfully proved its case against the accused facing trial without any shadow of doubt. Hence, the accused facing trial, Muhammad Khalid S/O Momin Khan is held guilty for having in his possession 2420 grams of chars. He is convicted u/s 9 (d) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 and accordingly sentenced to suffer rigorous imprisonment for two

(02) years and also to pay fine of Rs. 500,000/- (five lac). In case of default of the payment of fine, the accused shall further suffer simple imprisonment for three (03) months. The benefit of section 382-B Cr.P.C is, however, extended in his favour. The accused is on bail. He be taken into custody. The case property i.e., chas be destroyed while the motorcycle in question stand confiscated to the state being used in the commission of offence but after the expiry of period provided for appeal/revision. Copy of the judgement delivered to the accused today free of cost and his thumb impression to this effect obtained at the margin of the order sheet besides the copy of judgement also be issued to the District Public Prosecutor u/s 373 of the Cr.P.C free of cost. Consign.

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CERTIFICATE

Certified that this judgement consists of fifteen (15) pages. Each page has been read, corrected wherever necessary and signed by me



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