

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.14/III of 2021

Date of institution: 27.07.2021

Date of decision: 19.02.2022

THE STATE

...Versus...

NIAZ WALI S/O LAL BAT KHAN, R/O QAUM MISHTI, TAPPA
DARVI KHEL, KHWAJA KHIZAR, DISTRICT ORAKZAI.


..... (Accused facing trial)

**Case FIR No.77, Dated 20.06.2021 u/s 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotics Substance Act, 2019
registered at Police Station Kalaya Orakzai.**

JUDGMENT

Accused named above faced trial before this Court in case FIR No.77 dated 20.06.2021 u/s 9 (d) of the Khyber Pakhtunkhwa Control of Narcotics Substance Act, 2019, registered at Police Station Kalaya Orakzai.

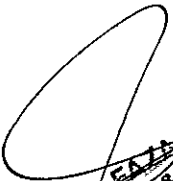
2. Facts of the case are such that Malak Abdul Janan SHO along with other police officials of Police Station Kalaya Orakzai, were on patrolling of the area, by receiving of spy information regarding smuggling of huge quantity of chars from village Utman Khel side towards Kohat via motorcycle bearing registration No. ED4053, complainant laid a barricade on the spot at the time of occurrence. A young person riding on his motorcycle came towards the barricade and was stopped for the purpose of


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checking. He disclosed his name as Niaz Wali son of Lalbat Khan. On search of accused riding on the motorcycle, local police recovered one white color sack tied on motorcycle containing 08 packets of chars; each packet containing 1100/1100 grams of chars with total of 8800 grams. Out of 8800 grams of chars recovered, 10/10 grams were separated from each packet for examination through Forensic Science Laboratory. The accused was arrested on the spot who disclosed his name as Niaz Wali son of Lal Bat Khan, resident of Qaum Mishti Tappa Darvi Khel, Khwaja Khizar Orakzai. Murasila 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.

3. After conclusion of the investigation, complete challan against the accused facing trial was presented. He was summoned through Zamima Bay being in custody and on appearance provided copies in line with Section 265-C of the Code of Criminal Procedure, 1898. Charge against the accused was framed to which he pleaded not guilty and claimed trial.


4. Prosecution was directed to produce evidence. The prosecution in order to prove its case against the accused, produced and examined as many


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as five (05) witnesses. The prosecution evidence is sketched below for ease of reference as well as for determination of guilt or innocence of accused.


(i). PW-1 is the statement of Nikzad Ali Constable of Police Station Kalaya Orakzai, who deposed that *"on 22-06-2021 Shal Muhammad SI/IO handed over to me the parcel No.1 to 8 in sealed condition having monogram in the name of MJ for the FSL along with application Ex.PW-1/1 and road certificate Ex.PW-1/2. I went to the FSL Peshawar where I submitted the parcel for the FSL and obtained receipt on the road certificate. On my returned to PS I handed over the receipt to the IO. My statement was recorded under section 161 Cr.PC.*

(ii). Muhammad Ayub Muharrir, PS Kalaya Orakzai, was examined as PW-2, who Stated that *on 20-06-2021 I was present on my duty at Kalaya. The constable Yasir Ali brought Murasila to the PS which was sent by Malak Abdul Janan SHO. I chalked out the FIR Ex.PA on the basis of Murasila. When SHO returned to the PS he handed over to me the case property i.e parcel No.1 to parcel No.17 in sealed condition and one Motor Cycle registration No. ED-4053 of black color having engine No.7055057 and chassis No. BJ-055022 along with the accused. I locked the accused in the PS lockup and also entered the detail of the case property in register*


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No.19 and kept the case property in the Malkhana of the PS for safe custody. To this extent my statement under section 161 Cr.PC was recorded. On 22-06-2021 I handed over the parcel No.1 to 8 for the FSL to the IO and my statement to this extent was recorded under section 161 Cr.PC. Today I have seen the FIR which is correct and correctly bears my signature.

(iii). Malak Abdul Janan, SHO under training, Training Centre Kalaya Orakzai, was examined as PW-3, stated that "on 20.06.2021 along with the other official constable Ayaz Ali 612 and Yasir Ali 1534 were on gasht/patrolling. Meanwhile, I received information that narcotics will be smuggled through motorcycle bearing No ED-4053, upon the same information I made barricade upon the spot. After sometime one person came to spot on above motorcycle having sack, who was stopped for the purpose of checking, he disclosed his name as Niaz wali. I Searched him. Nothing was recovered from his body search. On search of said sack I recovered 08 packets of chars. On weighment of each packet came out 1100/1100 total 8800 grams. 10/10 grams were separated and sealed the same into parcel No. 01 to 08 while remaining 1090 grams total 8720 were separately sealed into parcel No. 09 to 16. The sack was also weighed which came out 40 grams and sealed the same into parcel No. 17. 3/3


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monogram in the name of MJ were affixed on each parcel. I charged the accused for the commission of offence. I prepared the Murasila EX-PA/I and took above contraband along with the above motorcycle with its key through the recovery memo Ex-PW 3/1 and also issued the card of arrest which is Ex-PW-3/2 and sent the Murasila to the PS through the hand of constable Ayaz Ali to the PS for registration of the case. The IO prepared site plan on my pointation. On my return back to the PS, I handed over the case property and accused to the Muharrir of the PS. Today I have seen all the relevant documents which are correct and correctly bear my signature”

(iv). PW-4 is the statement of Constable Yasir Ali-1534 of Police Station Kalaya, who deposed that “on 20-06-2020 I along with the other marginal witness to the recovery memo constable Ayaz Ali and Malak Abdul Janan SHO were present at barricade on the spot. meanwhile one person on motorcycle bearing No. ED-4053 of black color deluxe engine No. 7055057 chassis No. BJ055022 came to the spot having white color sack. On search of the said sack the SHO recovered 8 packets of chars. Each packet came out 1100/1100 grams total 8800 grams after its weighment through digital scale. The SHO separated 10/10 grams of chars for the FSL and sealed the same into parcel No. 1 to 8 while remaining 1090/1090 grams total 8720 grams and sealed the same into parcel No. 9 to 16 Ex. P-1 to P-8. The sack

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was also weighed which came out 40 grams and sealed the same into parcel No. 17 Ex. P-9. 3/3 monogram in the name of MJ were affixed on each parcel. The above contraband along with the motorcycle were taken through the recovery memo already Ex.PW-3/1. I along with the other marginal witness Yasir Ali signed the recovery memo on the spot. I took the Murasila, card of arrest and recovery memo to the PS and handed over the same to the Moharrir of the PS. My statement was recorded by the IO under section 161 Cr.P.C. Today I have seen all the relevant documents which are correct and correctly bear my signature.”

(v). Shal Muhammad SI/IO PS Lower Orakzai, was examined as PW-5; stated that “on 20-06-2020, I was present in the PS and received card of arrest of accused, recovery memo, Murasila and copy of FIR from the Muharrir of the PS. I went to the spot and prepared site plan on the pointation of complainant. The complainant shown me the case property. I have examined the same on the spot and I recorded the statement of recovery witnesses u/s 161 Cr.PC. On return back to the PS I have interrogated the accused in PS on 21-06-2020. I produced him before the Illaqa Magistrate for obtaining 05 days police remand vide my application Ex.PW-5/1. My application was turned down and the accused was sent to Judicial Lockup. I recorded the statement of the accused u/s 161 Cr.CP. I

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sent the case property to the FSL through the hand of constable Nikzad on 22-06-2021 vide my application already Ex.PW-1/1 vide road certificate already Ex.PW-1/2 and received the FSL result Ex.PZ. I have annexed DD regarding departure and arrival of the SHO which is Ex.PW-5/2. I have annexed the copy of register No.19 on the file which is Ex.PW-5/3. I have recorded the statement of PWs u/s 161 Cr.P.C. After completion of investigation, I handed over the case file to the SHO for onward submission of complete challan against the accused. Today I produced the case property before the court containing parcel No.9 to 17 already Ex.P-1 to P-9 and Motorcycle bearing registration No.ED4053 deluxe of black color having engine No. 7055057 and chassis No. BJ055022 Ex.P-10. Today I have seen the above documents which are correct and correctly bears my signatures.


5. 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.

6. Learned DyPP for the State argued that accused is directly charged in the contents of FIR followed by spot arrest and recovery. The evidence

available on file is sufficient to establish a proved case of the commission of offence by the accused. He added that the offence is heinous in nature for which prosecution has adduced ocular evidence supported by corroboratory evidence and thus proved its case beyond doubt entailing conviction of the accused.

7. 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. He concluded that it is the outcome of another. Forest case where co-accused were relived and accused facing trial was malafidly indicted.

8. Perusal of case record would reveal that according to FIR the accused was intercepted during routine patrolling of the area at barricade established on spy information on 20.06.2021 at 1000 hours and contraband/chars weighing 8800 grams was recovered in presence of marginal witnesses namely, Constable Ayaz Ali and Constable Yasir Ali Vide Recovery memo


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(Ex. PW 3/1). The latter marginal witness (PW-4) was examined; whereas, the former marginal witness was abandoned. According to (PW-4), he was present with seizing officer on the eventful day. He stated that on search, a blue bag tied with the motorcycle containing 8800 grams of chars was recovered from possession of the accused. Chain of custody of the recovered material play pivotal role in the cases of Narcotics. The departure and arrival of the Police Party, transportation of the recovered material to Police Station, its entry in the relevant register, custody at Police Station and other material questions have been brought on record that renders the chain of custody fully connected.

9. Careful perusal of the material available on file coupled with statements of the PWs, shows; as far as the objection of not taking into possession the rope with which the bag was tied with the motorcycle is concerned, the complainant as PW-3 in his cross examination stated that the bag was placed on the oil tank of the motorcycle. 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 Section 103 of Criminal Procedure Code , 1898 has specifically been excluded in the cases under the Khyber Pakhtunkhwa CNSA Act, 2019 vide Section 231 of the ibid Act; therefore, the failure of the seizing officer or the investigating

officer to associate any private witness with the occurrence does not adversely affect the case of prosecution. Secondly, as per Daily Dairy, the complainant was accompanied by constables Ayaz Ali and Yasir. Thirdly, witnesses of prosecution are unanimous regarding all material facts; therefore, the minor contradictions between the statement of PWs, cannot be taken to defeat the case of prosecution and in no way create reasonable doubts to shatter the case of prosecution.

10. Hence, in view of what is discussed above, it is held that the statements of the complainant and the eyewitness are consistent regarding the date, time and place of occurrence and the mode and manner of the recovery. Therefore, the recovery of contrabands is proved by the prosecution beyond shadow of any doubt.

11. 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 PW-4 constable Yasi Ali who took the same to PS and handed over to Muhammad Ayyub Moharrir/PW-5, who registered FIR Ex. PA on the basis of such Murasila. He handed over copy of the FIR, Murasila, card of

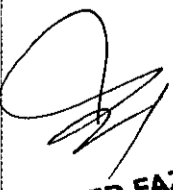
arrest and recovery memo to Incharge investigation Shal Muhammad SI/PW-5. The said PW proceeded to the spot where he prepared site plan Ex. PB on the pointation of the complainant and recorded the statements of witnesses u/s 161 Cr.P.C. In order to prove its stance, the prosecution has produced constable Yasir Ali as PW-4, Muhammad Ayyub Moharrir as PW-2 and Shal Muhammad SI as PW-5. All the three witnesses narrated the aforementioned story and the sequence of different events in their statements. Constable Yasir Ali as PW-4 in his cross examination has confirmed that he left the spot and reached the PS and handed over Murasila, card of arrest and recovery memo to Moharrir Muhammad Ayyub and then returned back to the spot. Muhammad Ayyub Moharrir as PW-2 has confirmed that the Murasila, card of arrest and recovery memo were handed over to him by constable Yasir Ali and he drafted the FIR at 1130 hours. Similarly, Shal Muhammad SI as PW-5 has confirmed that the case was handed over to him for investigation at 1130 hours whereafter he left the PS and reached the spot. That the case property was shown to him on the spot by the seizing officer in sealed condition. He has also confirmed that the site plan Ex. PB was prepared on the spot and the statements of marginal witnesses were also recorded by him on the spot. The witnesses are also unanimous on the points of arrival of the IO on the spot, his

departure and return to PS and the time of arrival of the complainant party to the PS. The statements of all the three witnesses are consistent regarding proceedings conducted by the IO on the spot, their statements could not have been shattered in cross examinations and the prosecution has proved its stance regarding proceedings conducted on the spot in the mode and manner as alleged by it, without shadow of any doubt.

12. The case of the prosecution regarding 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 08 packets, 10 grams from each of the packet has been separated and sealed by him on the spot with affixing of three monograms of 'MJ' on each of the parcel. The complainant, after his arrival in the PS, has handed over the representative samples to PW-2/Moharrir Muhammad Ayyub =, who has made entry of the case property in Register No. 19 and has kept the samples in safe custody. On 22.06.2021, the Incharge investigation has collected the samples from Moharrir and has handed over the same to constable Nikzad Ali/PW-1 for transmission 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. PZ, 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, Moharrir Muhammad Ayyub as PW-2, Shal Muhammad SI, the IO of the case as PW-5 and Constable Nikzad Ali as PW-1. All the four witnesses have narrated the aforementioned story in their statements. Nothing contradictory could be extracted from the witnesses in their cross examinations.

13. The single defense taken is that inspector Ajmal has arrested eight persons including accused facing trial under allegation of cutting forest and produced them before Assistant Commissioner, Orakzai where all of them have been released in a deal while accused facing trial refused such deal, was charged in present case. Photographs of such incident have been exhibited as Ex.PE to PE 1/2 in statement of accused. This plea is not appealing to mind on different score including recovery of huge quantity i.e 8800 grams chars and figuring out accused as single person especially who has not made any complaint to any authority regarding such deal. Even otherwise, maligning someone for own benefit is not proper; that too, when he or they are not associated in this case either as complainant or even witness and they have no opportunity to rebut the allegations so leveled by accused.


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14. In view of what is discussed above, it is held that the prosecution has proved case beyond shadow of reasonable doubt, establishing the chain of the custody of the representative samples; that too, within the prescribed period of time, from the spot till these are received in the FSL. Similarly, as per report of FSL Ex. PZ, the representative samples no. 1 to 8 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.

15. For what has been discussed above, it is held that the prosecution has successfully proved its case against the accused facing trial without any shadow of doubt. consequently, the accused facing trial, Niaz Wali is held guilty for having in his possession 8800 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 four (04) 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, however, the amount shall be made recoverable as arear of land revenue. The benefit of Section 382-B Cr.P.C is, however, extended in his favour. The case property i.e., chars be destroyed after the expiry of period provided for appeal/revision while the motorcycle be returned to its lawful owner, if not required in any other case. Copy of the

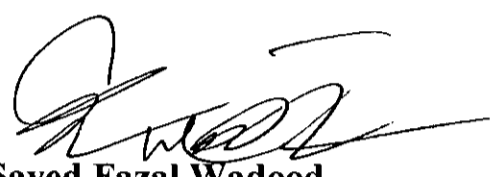

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judgement be delivered to the accused today free of cost and his thumb impression to this effect shall be obtained at the margin of the order sheet; besides, the copy of judgement shall also be issued to the District Public Prosecutor in line with Section-373 of the Cr.P.C free of cost. Case file be consigned to District Record Room, Orakzai, after completion within specified time.

ANNOUNCED

19.02.2022

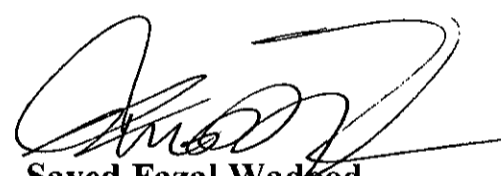


Sayed Fazal Wadood

Additional Sessions Judge/Judge Special
Court Orakzai

CERTIFICATE:

Certified that this Judgment is consisting upon fifteen (15) 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