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IN THE COURT OF ABDUL BASIT
ADDITIONAL SESSIONS JUDGE-II/JUDGE SPECIAL COURT,
ORAKZAI

Case no. 18/3 of 2023

Date of institution: 15.05.2023

Date of decision: 08.01.2024

Date of consignment:

State through Mujahid Khan SI/NET of the Kalaya Police Station Orakzai
(complainant)

Versus

1. Imtiaz Khan (aged about 24 years) s/o Muhammad Ali r/o Ghazani Khel, Kaka Khel, Tehsil and District Lakki Marwat
2. Zahid Ullah (aged about 36 years) s/o Muhammad Ayub Khan r/o Mulla Khel, Tehsil and District Lakki Marwat (**accused facing trial**)
3. Rauf son of Ayub caste Stori Khel Tarkho Saam
4. Irfan son of Fazal Manan caste Stori Khel
5. Faid Khan son of Ahmad Shah caste Stori Khel (**absconding accused**)

FIR NO. 20 DATED 01.03.2023 U/S 9-D CNSA
KALAYA POLICE STATION, ORAKZAI

JUDGMENT

1. Accused Imtiaz Khan and Zahid Ullah are facing trial and accused no. 3-5 are absconding in the subject case registered under section 9-D CNSA of Kalaya Police Station, Orakzai.

Mujahid Khan, the complainant, along with police officials upon receiving spy information regarding smuggling of narcotics through white color motorcar bearing registration no. BFR-596 (car), has arranged barricade at place of occurrence, where, around 0800 hours the above mentioned car approached and stopped by complainant for search; that Imtiaz Khan was driving the car and Zahid Ullah was sitting on front seat of the car; that both persons were bodily searched

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but nothing incrementing recovered from their possessions, however, during cursory interrogation, they disclosed that they had placed the chars in secret cavities made beneath the mudguard of rear wheels; that on their pointation, mudguard of the two rear wheels of the car were opened with screw driver, which led the recovery of 13 packets of chars from secret cavity made near the right side of rear wheel of the car and 12 packets of chars from the left side of rear wheel of the car; that each recovered packets of chars weighed 1000 gram making total quantity to be 25000 grams; that 10 grams chars was separated for FSL from each packet, which were sealed into parcels no. 1 to 25 and the remaining 24750 grams chars was sealed into parcel no. 26; that accused were arrested on the spot, murasila was drafted at the place of occurrence and sent to police station for bringing criminal law into motion; hence, the FIR.

3. During the investigation, accused facing trial revealed that three persons namely Irfan, Rauf and Faid Khan were actual owners of recovered motorcar and chars and thus they were also nominated in the case as co-accused.

On completion of investigation, complete challan under section 9-D CNSA was put in court against the accused facing trial and the absconding accused. As accused Irfan, Rauf and Faid Khan were absconding; therefore, statement of search witness was recorded and prosecution was permitted to lead the evidence against absconding accused within the meaning of Section 512 of the Code of Criminal Procedure, 1898 to preserve the same.

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5. Accused facing trial were summoned through *zamima bay*. On their attendance, the copies of the case furnished to accused under section 265-C Cr.PC. The accused were then charge sheeted u/s 9-D CNSA to which they pleaded not their guilty and claimed trial.
6. Prosecution produced following evidence in support of its case;
7. The statement of Mujahid Khan SI (complainant) was recorded as PW-1. He confirmed the initial report Exh.PA to be true. Recovery of contraband and motorcar vide recovery memo, Exh.PW 1/1, was testified to be genuine. He arrested the accused and issued his card of arrest, Exh.PW 1/2, and drafted murasila, Exh.PA. He produced remaining chars excluding samples for FSL weighing 24750 in parcel no. 26, Exh.P-1, and recovered motorcar, Exh.P-2. One of the marginal witnesses to recovery memo was Yaqoot Marjan Constable, who was examined as PW-2. He testified that the recovery was made from accused and was documented vide recovery memo. He took the murasila, recovery memo and card of arrest to the police station and handed over to the muharrir of the police station for registration of FIR. Asmat Ali Muharrir was examined as PW-3, who on receipt of murasila, the card of arrest and recovery memo, registered an FIR, Exh.PA. He also kept the case property in the *malkhana* for safe custody vide register no. 19, copy of which Exh.PW 3/1. PW-4 is the statement of Muhammad Khalil constable, who has taken the parcels 1 to 25 containing samples of chars to FSL Peshawar for chemical analysis and application to FSL through road permit certificate. Muhammad Haneef SI was investigation officer of the case. He was entered in the witness box as PW-5. He prepared site plan Exh.PB.

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Preparation of site plan and examination of witnesses was confirmed by him. He drafted applications regarding the recovered motorcar in the instant case to DPO Orakzai and Taxation Officer as Exh.PW 5/1 and Exh.PW 5/2. He has produced the accused before the Illaqa Magistrate vides application, Exh.PW 5/3. He has also drafted the application to FSL, Exh.PW 5/4, application to Judicial Magistrate, Exh.PW 5/5, notices u/s 160 Cr.PC, Exh.PW 5/6 and Exh.PW 5/8, and nomination memo, Exh.PW 5/9. He, vide separate applications, Exh.PW 5/10 and Exh.PW 5/11, has applied to Judicial Magistrate for obtaining warrant u/s 204 and proclamation notices u/s 87 Cr.PC. FSL results regarding chars and motorcar are Exh.PZ and Exh.PZ/1. Arrival and departure reports of the complainant are Exh.PW 5/12 and attested copy of the transit receipt is Exh.PW 5/13. Attested copies of entry/exit register of vehicle are Exh.PK and Ex.PK/1. Interim challan and complete challan are Exh.PW 5/14 and Exh.PW 5/15.

Prosecution closed its evidence. The statement of accused was recorded under section 342 CrPC, wherein, he again denied from the charges and adhered to his innocence. In reply to a question, he neither wished to be examined under oath nor to produce evidence in defense.

9. Arguments heard and record perused.
10. Learned APP for State argued that the prosecution has proved the case against accused beyond shadow of doubt; that recovery of contrabands is proved from possession of accused; that prosecution witnesses are consistent in their statements in respect of recovery of

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narcotics from accused; that FSL result in respect of the samples, separated from the contraband recovered from accused is in positive; that there is no malafide on part of the prosecution to falsely involve them in the case, therefore, he requested to award them maximum punishment.

11. Counsel for the accused argued that prosecution has failed to prove its case against accused beyond reasonable shadow of doubt; that prosecution evidence contradicts & suffers major inconsistencies; that prosecution case is full of doubts because prosecution witnesses materially contradicted each other; that complainant has not recorded the statement of any private person regarding recovery; that recovery is not effected from the immediate possession of accused; that the accused have not confessed their guilt; that the case against the accused is not proved and request is made for their acquittal.

12. Viewing the arguments advanced by learned counsel for parties and record available before the court, it is concluded that the local police on spy information had arranged a barricade and intercepted the car, wherefrom, recovered 25000 grams chars placed inside the secret cavities made near the two rear wheels of the car, which were taken into possession and accused facing trial were arrested on the spot. It is bounden duty of prosecution to prove its case against them beyond shadow of a reasonable doubt from the moment of receiving the spy information by local police to the interception of the accused, their transportation of contraband in car, taking of samples from recovered contraband, preparation of recovery memo, drafting the murasila, witnessing of whole proceedings by marginal witnesses, registration

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of case, safe custody of recovered articles, investigation of the case and laboratory reports etc. To prove this, prosecution has led the evidence of many witnesses and the court has to see the mode and manner of the recovery of contraband and chain of safe transmission of the contraband from spot to the police station and then FSL, which are the most important aspects of the case. As per record, the complainant has allegedly recovered the contraband, taken samples from each packet, packed and sealed each test sample in separate parcel bearing no. 1-25; however, record is silent about the fact that who has delivered test samples to Muharrir of police station for safe custody in the *maalkhana*. In this respect, statement of investigation officer (PW-5) also perused, who stated that the entry pertaining to sample of parcels no. 1-25 made in register no. 19 do not provide any detail as to whether those were collected in sealed condition and born the monogram or not, which makes the receipt of samples by the Muharrir of the police station in sealed condition quite dubious. There is no second opinion that when case property is handed over to Muharrir of the police station, he enters it in register no. 19 of the police station maintained for said purpose, however, Muharrir of the police station in his statement (PW-3) initially admitted that there was no record of receiving case property in this case on 01.03.2023. If the delivery of case property is admitted, even then, there is no record of police station or daily diary produced before the court showing delivery of case property by Muharrir of the police station to the investigation officer for its production before the Area Judicial Magistrate nor about handing over of the test samples by Muharrir of

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police station to investigation officer, who has allegedly handed over to Muhammad Khaleel for onward transmission to Peshawar for chemical analysis. No doubt the relevant extract of register no. 19, Exh.PW 3/1, speaks about delivery of test samples to Muhammad Khaleel for chemical analysis but the statement of carrier of samples (PW-4) provides that those test samples were delivered to him by investigation officer, which is also evident from daily diary no. 5 and thus chain of safe custody of samples was broken and transmission thereof to the laboratory had become doubtful; therefore, forensic laboratory report cannot be relied against the accused facing trial.

13. More so, complainant (PW-1) has though separated the test samples from each packet and sealed it in parcels no. 1-25, however, he has not given corresponding numbers to those packets, from which he has taken the test samples and thus he was unable to tell as to from which packet, each sample was separated. On the other side, Yaqoot Marjan (PW-2), marginal witness to recovery memo, contradicted him saying that no number was given to samples in his presence, which also questions the separation of contraband from each packet and its sampling by complainant on the spot and in presence of the marginal witnesses. Admittedly, at another place, PW-2 deposed that Exh.P1 was a single parcel present before him in the court and each packet of the remaining packets were given separate parcel numbers, however, he also admitted this true that none of those packets produced before him in the court were found to be in separately sealed parcels. Similarly, no veracity or weight can be given to the statement of complainant (PW-1), who at one place stated that he

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has shifted the accused facing trial and case property to the police station himself, whereas, at another place deviated stating that he has handed over the accused and case property to investigation officer on the spot, which makes it hard for court to rely on any part of the statement of complainant.

14. Importantly, complainant (PW-1) admitted that there are two kinds of chars i.e. chars *garda* and chars *pukhta*, whereas, its colors and appearances may also vary. In the instant case, he admitted that he has not mentioned the kind of chars in his report, however, stated that it was chars *garda* and in yellow *khar* color, which fact is also endorsed by Yaqoot Marjan (PW-2), however, FSL report available on file transpires the color of chars to be brown solid, which is not only different in color but also appears to be *pukhta* and apprehends that the contraband allegedly recovered from accused facing trial was different from the one sent to laboratory for chemical analysis. On the other side, complainant (PW-1) has admitted that on the basis of registration of narcotics case, police is awarded with cash prizes and also considered for promotions, which is not only alarming but also leads to strong probability that the local police has planted the alleged contraband against accused facing trial in order to get reward and promotion.

15. As per record accused facing trial have allegedly kept the contraband in secret cavities near the rear wheels of the car so that it may not be visible to anyone but this is surprising to note that on the cursory interrogation by the local police, they have not only disclosed them placing the alleged contraband in the secret cavities but also pointed

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out to local police the secret cavities, where they had hidden the chars, which does not appeal to prudent mind because if accused facing trial had placed the alleged contraband in secret place, then, why they would disclose and point out those secret cavities to local police, which would surely lead to their involvement, arrest and the punishment in the case. Similarly, movement of complainant is not proved from the evidence because he has admittedly not made any entry of his departure in the police record, which is admittedly maintained for this purpose. Likewise, complainant told that when he has received the information, he was in the area between Bezot and Uthman Khel, however, neither the investigation officer has collected the mobile number of the complainant nor those of other police officials, who had accompanied the complainant so as to check the veracity through call data record that they were actually present at that place and received the information, which also clouds the prosecution version. The complainant has also not mentioned the make and model of the car allegedly recovered from the accused facing trial. Even sizes of the cavities have not been shown in the report so as to believe that such a huge quantity of contraband could have been actually placed in those cavities. In similar way, contents of report provide that the secret cavities were opened through screw driver but complainant (PW-1) deposed that he has not unscrewed any nut/screw but removed the secret cavity by pulling the same with the help of screw driver, which fact also does not attract to human mind because placing the huge quantity of chars near the cavities of rear wheels of a car without tightening it with nuts/screws

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is always exposed to risk of its falling at any time when the car is in motion/speed or jumps. Even, the complainant (PW-1) admitted that nothing incriminating was recovered from accused facing trial, which is also admitted by PW-2, then, question arises that why did complainant charge the accused facing trial for transporting the contraband.

16. Since, both the marginal witnesses to the recovery memo are police officials and were allegedly present with the complainant at the time of arrest of accused facing trial and seizure of the contraband and in this respect Muhammad Haneef, investigation officer, has stated to have recorded their statements u/s 161 CrPC but Yaqoot Marjan (PW-2) deposed otherwise stating that investigation officer of the case was SHO Shaal Muhammad, who has recorded his statement at 10.00 am in the police station, which is 10 minutes earlier than the registration of case and speaks volume about hatching of false story against the accused facing trial because on one hand investigation officer of the case was Muhammad Haneef, whereas, on the other hand, FIR was lodged at 10.10 am, where after, copy of FIR was handed over to investigation officer, who allegedly visited the spot and recorded the statements of witnesses afterwards. PW-2 also deposed that when his statement was recorded, the accused facing trial were in police lock-ups of the police station. Even, this witness went little farther stating that when his statement was recorded, constable Manzoor was also present there and his statement was also recorded, which give rise to question that if both these witnesses were present in the police station at 10.00 am and the investigation

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officer has recorded their statements in the police station, then, of which recovery witnesses and driver, the investigation officer has recorded the statement on the spot. Likewise, investigation officer has shown in inability to name the person, who has driven the car belonging to the accused facing trial to the police station.

17. Statement of complainant (PW-1) also reflects that the murasila was sent to the police station through motorcycle rider along with the police official. Contents of murasila report shows that the murasila was handed over to Yaqoot Marjan (PW-2) for registration of case. Yaqoot Marjan not only admitted brining of the murasila etc. to the police station for registration of case but also added that he has come to the police station only once in the instant case and that too with the seizing officer at about 1200 hours (noon), which not only questions the veracity of this witness but is also in conflict with the statement of complainant (PW-1), who stated that murasila carrier had left for police station with motorcycle rider. Even, complainant at another place stated that when he has shifted the accused and case property to police station, he was also accompanied by Manzoor Ali, Yaqoot Marjan and Abdul Haq, which raises doubt that as to whom the murasila was handed over for taking it to the police station and which police official sat on pillion seat with the motorcycle rider. Likewise, questions also arises that if all the police officials had accompanied the complainant to the police station, then, who drove the car allegedly recovered car from accused facing trial to the police station. Similarly, the registration number of the recovered car was BFR-596, however, when learned defense counsel asked for

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examination of car, Exh.P2, on the spot with assertion that it bears registration No. ICT-333, it was observed by the court that the car had been removed from the premises of *maalkhana* located in the Political Compound of Orakzai at Baber Mela Hangu by DSP Mehboob at his own without seeking court permission knowing the fact that cross-examination was yet to be completed, which further creates serious doubt about actual recovery of the car & registration number.

18. It is known to all that when recovery is effected from the accused, the seizing officer prepares the recovery memo, card of arrest and murasila report on the spot, where after, murasila is sent to police station for registration of the case and an FIR is registered. In the instant case, perusal of recovery memo and card of arrest of the accused provide that it contains the FIR number, however, when complainant was questioned that as to who has written this FIR number, he had no answer for this but affirmed that it was written with the same pen used for writing date and section of law etc. On the other side, investigation officer (PW-5) stated that he has not made any addition/deletion in the documents etc., whereas, marginal witness (PW-2) deposed that FIR number and contents were written by complainant on the spot with his own handwriting on those parcels, which avails that since writing of serial FIR number was not possible before registration of case and therefore apprehends that recovery memo and card of arrest of the accused were prepared in the police station and not on the spot and creates doubt about mode and manner of transportation of alleged contraband by the accused.

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19. Investigation officer of the case is considered as most expert official; therefore, investigation of the case is handed over to him so that he may not leave any stone unturned and conduct the investigation by covering all the aspects of the case. In the instant case, investigation officer (PW-5) failed to brought on record any detail, description or proof about the presence of any secret cavities in the car nor did he examine the car through any mechanical expert with respect to the presence of secret cavities in it. Likewise, he admitted that there is nothing in the FSL report regarding the presence of any secret cavity in the car in question. More so, he has though addressed application to excise department for obtaining the particulars of car but he has neither made any specification of district, from which the particulars of the car were sought nor did he succeed to bring on record the real owner of the car, which further puts dent on prosecution case.

20. From above appreciation of evidence it is held that the proceedings of making arrest of accused facing trial and seizure of the narcotics from secret cavities of the car had become doubtful. Moreover there are many major discrepancies and contradictions in the case of prosecution as discussed above. In view of above discussed facts, there exists many doubts in the prosecution story, which does not support the prosecution case against accused facing trial, hence, while extending the benefit of doubt, the accused facing trial Imtiaz Khan s/o Muhammad Ali and Zahid Ullah s/o Muhammad Ayub are acquitted from the charge leveled against them. As accused facing trial Imtiaz Khan is in custody and behind the bars; therefore, he be released forthwith if not required in any other case, whereas, accused facing trial Zahid Ullah is on bail; therefore, his sureties are discharged from the liability of bail bonds.

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21. So far absconding accused Rauf, Irfan and Faid Khan are concerned, it is held that they have also been nominated in the FIR and in absence of any rebuttal on their part, there exists prima facie strong case against them; that is why, perpetual warrant of arrest is issued against them. Name of accused Rauf son of Ayub, Irfan son of Fazal Manan, Faid Khan son of Ahmad Shah be entered in the register maintained for proclaimed offenders of the concerned police station and in the office of DPO, Orakzai. On their arrest, supplementary challan along with detail of this file be submitted before the concerned court during court hours accordingly.
22. Case properties be kept intact till arrest and trial of absconding accused and be furnished before the trial court as and when required.
23. File consigned to record room after completion and compilation.


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CERTIFICATE

It is certified that this judgment of mine consists of fourteen (14) pages & each page is duly signed by me after necessary corrections.

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Abdul Basit
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