

(49)

STATE VS AQIB
CASE NO.: 55/3, FIR NO.: 111, DATED: 14.09.2021, U/S 9 (D)
CNSA, PS: KALAYA

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

SPECIAL CASE NO. : 55/3 OF 2021
DATE OF INSTITUTION : 01.10.2021
DATE OF DECISION : 28.03.2022

STATE THROUGH MUQADAR KHAN ASHO, PS KALAYA,
DISTRICT ORAKZAI

.....(COMPLAINANT)

-VERSUS-

AQIB S/O AMIN KHAN, AGED ABOUT 22 YEARS, R/O CASTE
STORI KHEL, ANJANI, DISTRICT ORAKZAI

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

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

FIR No. 111 **Dated:** 14.09.2021 **U/S:** 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019

Police Station: Kalaya

JUDGEMENT
28.03.2022

The accused named above faced trial for the offence
u/s 9 (d) of KP CNSA Act, 2019 vide FIR no. 111, dated
14.09.2021 of PS Kalaya.

- (2). The case of the prosecution as per contents of Murasila
Ex. PA/1 converted into FIR Ex. PA is; that on 14.09.2021
complainant, Muqadar Khan ASHO, the PW-4 alongwith
other police officials during routine patrolling, at about 1030
hours stopped a person walking on foot. The person disclosed
his name as Aqib s/o Ameen Khan. His person was searched
which led the complainant to the recovery of 02 packets of
chars wrapped in yellow colour adhesive tape, each weighing
1200 grams, a total of 2400 grams from his trouser-fold. The

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complainant/PW-4 separated 10 grams of chars from each of the packet for chemical analysis through FSL, sealed the same in parcels no. 1 & 2 whereas the remaining quantity of chars weighing 1190/1190 grams were sealed in parcels no. 3 & 4. The accused was accordingly arrested by issuing his card of arrest Ex. PW 4/1. The complainant/PW-4 took into possession the recovered chars vide recovery memo Ex. PC. Murasila Ex. PA/1 was drafted and sent to the PS through constable Abbas Ali Shah/PW-5 which was converted into FIR Ex. PA by PW-3, Muhammad Ayyub AMHC.

(3). After registration of FIR, it was handed over to PW-6, Mehdi Hassan SI for investigation. Accordingly, after receipt of FIR, he/PW-6 reached on the spot, prepared site plan Ex. PB on the pointation of complainant, sent the samples for chemical analysis to FSL vide his application Ex. PW 6/2 and road permit certificate Ex. PW 6/3 through constable Shams Ul Ghani PW-2, the result whereof Ex. PK was received and placed on file by him. After completion of investigation, he handed over the case file to SHO who submitted complete challan against the accused facing trial.

(4). Upon the receipt of case file for the purpose of trial, the accused was summoned, copies of the record were provided to him in line with section 265-C Cr.P.C and formal charge was framed against him to which he pleaded not guilty and claimed


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trial. Accordingly, the witnesses were summoned and examined. The gist of the evidence of prosecution is as follow;

- I. Shal Muhammad SHO is PW-1. He has submitted complete challan Ex. PW 1/1 in the instant case on 17.09.2021.
- II. Constable Shams Ul Ghani appeared in the witness box as PW-2. He has taken the samples of recovered chars in parcels no. 1 & 2 to the FSL alongwith application Ex. PW 6/2 and road permit certificate Ex. PW 6/3 for chemical analysis on 16.09.2021 and after submission of the same, he was given the receipt of the parcels which he handed over to the IO upon his return.
- III. Muhammad Ayyub AMHC is PW-3. He reduced the contents of Murasila Ex. PA/1 into FIR Ex. PA. He further deposed that he has received the case property from the complainant which he has kept in mal khana in safe custody and to that effect he has made entry in register no. 19 Ex. PW 6/5. Similarly, he has also handed over samples of chars in parcels no. 1 & 2 to the IO for sending the same to FSL on 16.09.2021.
- IV. Muqadar Khan ASHO appeared in the witness box as PW-4. He repeated the story as narrated in the FIR Ex. PA.


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V. Constable Abbas Ali Shah appeared in the witness box as PW-5. He besides eyewitness of the occurrence, is the marginal witness of recovery memo Ex. PC as well, vide which the complainant/PW-4 has taken into possession the recovered chars. He also reiterated the contents of FIR in his statement.

VI. Lastly, Investigating Officer Mehdi Hassan SI appeared in the witness box as PW-6. He carried out the investigation 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 of Judicial Magistrate vide his application Ex. PW 6/1, sent the representative samples to FSL vide his application Ex. PW 6/2 alongwith road permit certificate Ex. PW 6/3 and result of the same Ex. PK was placed on file by him, placed on file copy of DD Ex. PW 5/4 alongwith copy of register 19 Ex. PW 6/5 and submitted the case file to the SHO for onward proceedings.



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(5). Prosecution closed its evidence whereafter statement of the accused was recorded u/s 342 Cr.P.C but he neither wished to be examined on oath nor opted to produce any evidence in defence. Accordingly, arguments of the learned DPP for the

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State, arguments of 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, 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 transmitted to the FSL within the prescribed period of 72 hours which have 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 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.


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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 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

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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. 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.

(8). In the light of arguments advanced by the learned DPP for the state and 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 and the investigation have been conducted in the mode and manner as detailed in the file?
- (ii). Whether the recovered substance is proved through report of FSL as chars?

(9). The case of prosecution is that, as per DD no. 06 on

14.09.2021 complainant, Muqadar Khan ASHO, the PW-4

alongwith Abbas Ali Shah PW-5 and constable Abdul Sattar

left the PS at 10:10 hours for patrolling. As pre Murasila Ex.

PA/1 during routine patrolling at about 1030 hours the

complainant PW-4 stopped a person walking on foot. The

person disclosed his name as Aqib s/o Ameen Khan. His

person was searched which led the complainant to the recovery

of 02 packets of chars wrapped in yellow colour adhesive tape,

each weighing 1200 grams, a total of 2400 grams from his

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trouser-fold. The complainant/PW-4 separated 10 grams of chars from each of the packet for chemical analysis through FSL, sealed the same in parcels no. 1 & 2 whereas the remaining quantity of chars weighing 1190/1190 grams were sealed in parcels no. 3 & 4. The accused was accordingly arrested by issuing his card of arrest Ex. PW 4/1. The complainant/PW-4 took into possession the recovered chars vide recovery memo Ex. PC. Murasila Ex. PA/1 was drafted and sent to the PS through constable Abbas Ali Shah/PW-5 which was converted into FIR Ex. PA by PW-3, Muhammad Ayyub AMHC. After registration of FIR, it was handed over to SI Mehdi Hassan who as per his court statement as PW-6, went to the spot where he conducted investigation. As per DD no. 6 the complainant PW-6 accompanied by PW-5 and constable Abdul Sattar alongwith accused and case property returned to the PS at 12:20 hours the accused was put in lockup while the case property was handed over to Moharrir Muhammad Ayyub PW-3.

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As mentioned above the case of prosecution regarding the mode and manner of proceedings conducted by the complainant on the spot is, that after recovery and sampling of chars in parcels no. 1 to 4, the complainant arrested the accused on the spot. He prepared recovery memo Ex. PC and then card of arrest Ex. PW 4/1 followed by the Murasila Ex. PA/1 on the spot; however, when the complainant was cross examined regarding the scribing of these documents, he

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disclosed that the Murasila, recovery memo and card of arrest were scribed by the constable Abdul Sattar on his dictation, but this fact is neither mentioned in the Murasila and other documents nor any certificate in this regard has been furnished by him even this fact has not been disclosed by the complainant in his examination in chief as PW-4. So much so the said constable Abdul Sattar despite being listed as witness of the prosecution in the challan form was not produced by the prosecution.

The prosecution in order to prove the presence of the complainant party on the spot, has placed on file extract of daily diary (DD) no. 6 of 14.09.2021 and daily diary (DD) no. 10 of the same date Ex. PW 6/5 vide which the complainant alongwith constable Abdul Sattar and PW-6 constable Abbas Ali Shah left the PS for patrolling at 1010 hours. On the same day at 1230 hours, he has returned to the PS but the said daily diary (DD) is neither original nor a photocopy of the original rather it is extract allegedly prepared from the original. With respect to scribing of the extract PW-3 Moharrir Muhammad Ayyub stated that the same is not in his handwriting and that the original of the same can be produced by the IO. But the IO when examined as PW-6 neither produced the original nor explained the fact that as to who has prepared the extract from original.

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Perusal of recovery memo Ex. PC shows that both the witnesses of recovery memo are police officials who through,

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are considered as good witnesses as private witnesses but in peculiar circumstances of the instant case, the complainant was at least bound to make some effort for associating any private witness with process of search and recovery; for the reasons, that the occurrence has allegedly taken place at 1030 hours, during brought day light and the place of occurrence is a main road. When the complainant was cross examined on this point, he stated that;

“It is correct that the spot of occurrence is congested place. It is correct that the place of occurrence is situated near the bus stand and market. I have not associated any private witness to the recovery memo. Self-stated that no one is willing to depose against the accused in such likes cases due to fear of enmity. It is incorrect to suggest that my self-stated statement is afterthought just to strengthen the prosecution version. I have not made any effort to associate any private witness to this effect.”


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In view of aforementioned circumstances, though, police official is considered as good witnesses as private witnesses but despite availability of the people on the spot, not making any effort to associate any private person with the process of search and recovery, amounts to blatant violation of provision of law and puts a question mark at least upon the mode and manner of search and recovery and other proceedings conducted on the spot. The combined effect of the failure of prosecution to produce the scribe of the Murasila,

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recovery memo and card of arrest, the non-production of the original of the daily diary (DD) proving the presence of the complainant party on the spot and other proceedings conducted over there despite repeated objections on behalf of the defense regarding authenticity of the extract of the DD and making no effort to associate any private witnesses, with the process of search and recovery, is that the prosecution has failed to prove the mode and manner of occurrence and other proceedings conducted on the spot.

With respect of sealing and sampling of the case property in parcels no. 1 to 4, transmission of the same from the spot to the PS, depositing it in mal khana and transmission of the representative sample to the FSL, the case of prosecution is, that after sampling and sealing of case property in parcels on the spot, these were brought by the PW-4/complainant to the PS and handed over the same to Moharrir of the PS, the PW-3, who deposited the same in Mal khana making entry of the same in register no. 19. The representative sample on 16.09.2021 were handed over by PW-3 to the IO who transmitted the same to FSL through constable Shams Ul Ghani/PW-2 vide road permit certificate Ex. PW 6/3 and application to the FSL Ex. PW 6/2.

The prosecution in order to prove the aforementioned transaction of events, examined the complainant as PW-4, the IO as PW-6, the Moharrir as PW-3 and constable Shams Ul Ghani as PW-2. With respect of deposit of the case property in


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mal khana the prosecution relied upon extract of register no. 19 Ex. PW 6/5 but the same is neither original nor photocopy of the original. When PW-3, the Moharrir of the PS who has allegedly made entry of the case property in register no. 19 was cross examined, he stated that the original of the register no. 19 is not available in the court and that the same can be produced by the IO, but the IO in his statement as PW-6 did not produce original register no. 19. In this respect when he was cross examined, he stated that;

“I have not annexed any photocopy of register 19. Self-stated that one copy of register 19 Ex. PW 6/5 is available on file. The same has been prepared by me; however, it bears signature of investigation Moharrir Hanif Khan. Again, stated that it is prepared by Moharrir of the PS Muhammad Ayyub”

In view of above statement of the IO, perusal of statement of Muhammad Ayyub shows that he has not spoken a single word regarding scribbling of the same. Moreover, there is cutting in serial number of register no. 19 which has not been explained. The non-production of original despite repeated objections to extract on behalf of defense coupled with the fact that even the official who has prepared the extract has not been produced before the court, puts question mark upon safe custody of case property. With respect to sending of representative samples to the FSL, the occurrence has taken place on 14.09.2021 and the representative samples have been sent to FSL on 16.09.2021 by the IO/PW-6 through PW-2 vide

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road permit certificate PW 6/3 and application for FSL Ex. PW 6/2. Both the documents are photocopies. The application Ex. PW 6/2 and road permit certificate Ex. PW 6/3, do not bear the signature of the IO. In this respect when the IO was cross examined, he stated that the road permit certificate was prepared by him and the Moharrir Investigation Hanif Khan has signed the same. However, the name of the said Moharrir Investigation is neither mentioned in challan form nor he has been produced before the court as a written.

The aforementioned discussion led to the conclusion that there is doubt regarding the safe custody of the case property from the spot to the PS, deposit of the same in mal khana and transmission of the representative samples to the FSL; therefore, the report of FSL Ex. PK cannot be relied upon for recording conviction.

(10). In the light of aforementioned discussion, it is held that

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the prosecution has failed to prove the alleged recovery of charrs from possession of the accused facing trial. 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. Similarly, the prosecution has also failed to prove the safe custody of case property and transmission of the representative sample. All these facts lead to the failure of prosecution to prove the case against the accused beyond shadow of doubt. Therefore, the accused namely, Aqib is acquitted of the charge levelled against him by extending him


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the benefit of doubt. Accused is on bail, his bail bonds stand cancelled and his sureties are released of the liabilities of bail bonds. The chargs be destroyed after the expiry of period provided for appeal/revision in accordance with law. Consign.


Pronounced
28.03.2022


SHAUKAT AHMAD KHAN
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

CERTIFICATE

Certified that this judgement consists of thirteen (13) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 28.03.2022


SHAUKAT AHMAD KHAN
Sessions Judge/Judge Special Court,
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