

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

SPECIAL CASE NO. : 56/3 OF 2021
DATE OF INSTITUTION : 12.10.2021
DATE OF DECISION : 25.04.2022

STATE THROUGH SHAL MUHAMMAD ASHO, POLICE STATION
KALAYA

.....(COMPLAINANT)

-VERSUS-

ABDUL REHMAN S/O SWAT KHAN, AGED ABOUT 18 YEARS,
R/O CASTE STORI KHEL, TAPA MALA KHEL, TARI KALAY,
DISTRICT ORAKZAI

..... (ACCUSED FACING TRIAL)

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

FIR No. 114 **Dated: 19.09.2021** **U/S: 9 (d)** of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019
Police Station: Kalaya

JUDGEMENT
25.04.2022

The accused named above faced trial for the offence u/s 9 (d) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 vide FIR no. 114, dated 19.09.2021 of PS Kalaya, District Orakzai.

(2). The case of the prosecution as per contents of Murasila Ex. PA/1 converted into FIR Ex. PA is; that on 19.09.2021, the complainant, Shal Muhammad SHO alongwith constables Abdul Sattar and Zeeshan Haider during routine patrolling on receiving information regarding smuggling of narcotics, laid a picket at Mandra Khel check-post where at about 1100 hours, a motorcycle on way from Syed Khalil towards the picket was stopped. A bag was tied

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with the rear seat of the motorcycle. The person was deboarded who disclosed his name as Abdul Rehman s/o Swat Khan but nothing incriminating was recovered from his person. The search of the bag led to the recovery of 08 packets of chars, each weighing 1100 grams, a total of 8800 grams of chars. The complainant separated 10 grams of chars from each packet for chemical analysis through FSL, packed and sealed the same into parcels no. 1 to 8 whereas the remaining quantity of chars weighing 1090/1090 grams were packed and sealed in separate parcels no. 9 to 16 while the empty bag weighing 192 grams was sealed into parcel no. 17, affixing monograms of 'SH' on all the parcels. The accused was arrested by issuing his card of arrest. The complainant took into possession the recovered chars alongwith motorcycle without registration number vide recovery memo. Murasila was drafted and sent to the PS through constable Zeeshan Haider which was converted into FIR by Muqadar Khan ASHO.

- (3). After registration of FIR, it was handed over to PW-6, Mehdi Hassan SI for investigation. Accordingly, after receipt of FIR, he reached the spot, prepared site plan Ex. PB on pointation of complainant and recorded statements of PWs u/s 161 Cr.P.C. On 21.09.2021, the IO sent the samples for chemical analysis to FSL vide application Ex. PW 3/1 through constable Shams Ul Ghani/PW-3, vide road permit

certificate Ex. PW 3/2, 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 Shal Muhammad/PW-4 who submitted complete challan Ex. PW 4/1 against the accused facing trial.

(4). Upon receipt of the 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 witnesses were summoned and examined. The gist of the evidence is as follow;

I. *Muqadar Khan ASHO is PW-1. He has registered FIR Ex. PA on the basis of Murasila Ex. PA/1.*

II. *Muhammad Ayyub AMHC is PW-2. He has received the case property from the complainant duly packed and sealed which he had kept in mal khana in safe custody while parked the motorcycle in vicinity of the PS. He has recorded entry of the case property in register no. 19 and handed over the samples of the case property to the IO for sending the same to FSL on 21.09.2021.*

III. *Constable Nikzad Ali is PW-3. He has taken the samples of recovered chars in parcels no. 1 to 8 to the FSL for chemical analysis on 21.09.2021 vide application Ex. PW 3/1 & road permit certificate Ex.*

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PW 3/2 and after submission of the same, he was given the receipt of the parcels which he has handed over to the IO.

IV. Shal Muhammad SHO is the complainant of the case. He appeared in the witness box as PW-4. In his statement he repeated the story as narrated in the FIR. Besides above he has also submitted complete challan Ex. PW 4/1 against the accused facing trial.

V. Constable Zeeshan Haider appeared in the witness box as PW-5. He besides being eyewitness of occurrence is a marginal witness of recovery memo Ex. PC as well vide which the complainant/PW-4 has taken into possession the recovered chars alongwith the motorcycle. He also reiterated the contents of FIR in his statement. The witness also deposed that he has taken the copies of Murasila, card of arrest and recovery memo to PS for registration of FIR.

VI. Lastly, Investigating Officer Mehdi Hassan 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 u/s 161 CrPC, produced the accused before the court vide his application Ex. PW 6/1, sent the representative

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samples to FSL and result of the same Ex. PK was placed on file by him and annexing copy of register no. 19 Ex. PW 6/2 as well as daily diary regarding departure and return of the complainant Ex. PW 6/3.

(5). 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 any evidence in defence. Accordingly, arguments of the learned DPP for the State and learned 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 sealed and sampled on the spot by the complainant, the IO has conducted investigation on the spot, the samples for chemical analysis have been transmitted to the FSL within the prescribed period 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 the prosecution and their statements have been lengthy cross examined but nothing contradictory could be extracted from the mouth of any of the

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witness of the prosecution and 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 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. The recovery has been shown made from the motorcycle. The ownership of which is not linked with the accused facing trial. 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 further submitted that the safe custody of the case property and its transmission from the spot to the PS has not been proved, that the representative samples have been sent to FSL with a delay of two days and that the copies of the statements of witnesses recorded u/s 161 CrPC are different from that of copies of statements of witnesses available on 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.

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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 in the file?
- (iii). Whether the recovered substance is proved through report of FSL as chars?

- (9). With respect to mode and manner of recovery and the mode and manner of investigation allegedly conducted on the spot, the case of prosecution is, that on 19.09.2021, complainant, Shal Muhammad SHO/PW-4 alongwith constables Abdul Sattar and Zeeshan Haider during routine patrolling on receiving information regarding smuggling of narcotics, laid a picket at Mandra Khel check-post where at about 1100 hours, a motorcycle on way from Syed Khalil towards the picket was stopped. A bag was tied with the rear seat of the motorcycle. The person was deboarded who disclosed his name as Abdul Rehman s/o Swat Khan but nothing incriminating was recovered from his person. The search of the bag led to the recovery of 08 packets of chars, each weighing 1100 grams, a total of 8800 grams of chars. The complainant/PW-4 separated 10 grams of chars from

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each packet for chemical analysis through FSL, packed and sealed the same into parcels no. 1 to 8 whereas the remaining quantity of chars weighing 1090/1090 grams were packed and sealed in separate parcels no. 9 to 16 while the empty bag weighing 192 grams was sealed into parcel no. 17, affixing monograms of 'SH' on all the parcels. The accused was arrested by issuing his card of arrest Ex. PW 4/1. The complainant/PW-4 took into possession the recovered chars alongwith motorcycle without registration number vide recovery memo Ex. PC. Murasila Ex. PA/1 was drafted and sent to the PS through constable Zeeshan Haider/PW-5 which was converted into FIR Ex. PA by PW-1, Muqadar Khan ASHO. After registration of FIR, it was handed over to PW-6, Mehdi Hassan SI for investigation. Accordingly, after receipt of FIR, he reached the spot, prepared site plan Ex. PB on pointation of complainant and recorded statements of PWs u/s 161 Cr.P.C.

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In order to prove its case, the prosecution produced Shal Muhammad SHO, the complainant of the case as PW-4, constable Zeeshan Haider as PW-5 who besides being eyewitness of the occurrence is a marginal witness of the recovery memo Ex. PC and has also taken the Murasila to the PS for registration of FIR, Muqadar Khan ASHO as PW-1 who upon receipt of Murasila has registered the FIR, Mehdi Hassan OII as PW-6 who on receipt of FIR has gone to the

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spot, prepared the site plan and recorded the statements of PWs on the spot and Muhammad Ayyub as PW-2 who on return of complainant from the spot, has received the case property from complainant and deposited the same in Mal Khana, making entry of the same in register no. 19 while constable Shams Ul Ghani has been examined as PW-3 who has taken the representative samples to FSL for chemical analysis. All the aforementioned PWs told the story of the prosecution as described above.

With respect to the mode and manner of the occurrence, the complainant PW-4 in his cross examination told that they left the PS at about 08:20 hours in the morning by making entry of his departure in daily diary and reached the spot of occurrence at 10:50 hours, PW-5, the eyewitness of the occurrence is also unanimous with complainant on this point. The complainant confirmed in his cross examination that during patrolling he had received information regarding the smuggling which prompted him to lay a picket on the spot but the eyewitness of the occurrence as PW-5 in cross examination told that he is unaware of the information received to the complainant regarding the smuggling. As per site plane Ex. PB, the spot of occurrence is a main road from Headquarter to Kohat in front of Mandra Khel check-post. The PW-4/complainant in this respect stated that the road is straight and there is no curve on the road but eyewitness as

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PW-5 in his cross examination negated the complainant and stated that beyond 20 meters of picket there is a curve on the road. Further as mentioned above as per site plan, the occurrence has allegedly taken place in front of Mandra Khel check-post where, as per cross examination of complainant/PW-4, four police officials were deputed on the check-post and at that time only one official was present on duty; however, he has neither visited the check-post nor met the official on duty. Similarly, he also does not remember the name of the police official on duty. The eyewitness/PW-5 also confirmed in his cross examination that the complainant has neither visited the check-post nor met the police official on duty. The aforementioned conduct of the complainant on one hand is against the natural course of things, for, had the occurrence taken place in the mode and manner as described by complainant, he being SHO of the locality and being superior of the incharge of the check-post would have paid visit to the check-post or at least he would have mentioned the name of police official on duty, on the file, what to talk of not knowing even the name of police official on duty, while on the other hand the police official on duty an Mandra Khel check-post being natural witness present on the post would have been associated with the occurrence. So much so, the complainant, as per cross examination of eyewitness/PW-5, till arrival of the IO was waiting on the road side at the place

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of Naka Bandi, but even at that time he has not gone inside the check-post. The aforementioned unnatural conduct of the complainant party on the spot of occurrence coupled with the contradiction between the statements of the complainant and eyewitness regarding the location of the spot of occurrence creates doubt regarding the place of occurrence to the fact that the occurrence has not taken place on the spot as alleged by the prosecution and the mode and manner of recovery as alleged by prosecution. Similarly, the arrival of the IO on spot and the investigation conducted over there also seem not occurred in the mode and manner as alleged by the prosecution, for, as per cross examinations of complainant as PW-4 and eyewitness as PW-5, the IO was accompanied by three police officials but the IO when cross examined on this point, he stated that he was accompanied by constable Shams Ul Ghani only. Further, when the IO was confronted with the statements of the witnesses recorded on the spot provided to the accused u/s 265-C CrPC and the statements of the witnesses available on police file are placed on file as Ex. P/D-1 and Ex. P/D-2 respectively, he admitted that both sets of statements are different from each other which create doubt as to the fact, that whether the statements have been recorded on the spot or otherwise and which of the statements are actually recorded by the IO.

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The story of prosecution regarding transmission of the case property from the spot to the PS and its deposit over there, also seems doubtful, for, as per statement of complainant as PW-4, after his return from the spot he handed over the case property to PW-2/Moharrir who made entry of the same in register no. 19 and deposited the same in mal khana; however, as per Daily Diary Ex. PW 6/3-D-1 Moharrir Muhammad Ayyub was on leave on that day. Moreover, the occurrence has taken place on 19.09.2021 while the representative samples have been received to the FSL on 21.09.2021 with a delay of two days and there is no explanation on behalf of prosecution regarding the delay.

Moreover, the report of FSL Ex. PK also does not meet the requirement of Rule (6) of the Control of Narcotics Substance (Government Analyst) Rules, 2001 and the contents in form-II of the said Rules. As per report of FSL Ex. PK, the Chemical Examiner has not applied full protocol of the test applying, for, only the Duquenois Levine test has applied which only detect presence of the 'drug' but did not determine the nature or kind of the drug. For detection of chars, Chemical Examiner report must show Tetrahydro Cannabinol Test. In this respect reliance can be placed on a case titled as "Khalid Mehmood VS State" reported in P-Cr.LJ 2020 page 462 Lahore "S.9---- Control of Narcotic Substance (Government Analysts) Rules, 2001, R. 6. Accused

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person was alleged to have been in possession of charas, for which he was convicted. Report of Chemical Examiner revealed that full protocols of the test were not applied; that the same was not in the prescribed form and not fully answered; that it contained only the result of test analysis and that Dequenois Levine test was applied and the Examiner had expressed his opinion on its basis that the sample was charas. Dequenois Levine test only detect presence of drug in the sample and it did not determine nature or kind of 'drug'. For detection of charas, Chemical Examiner's Report was to show tetrahydrocannabinol as positive. Patent infirmity in the report of Chemical Examiner was found, which was fatal to the prosecution case. Appeal was accepted and the appellant was acquitted of the charge, in circumstances."

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Second, as per story of prosecution, 8800 grams of chars from the accused has been recovered out of which 08 samples bearing no. 1 to 8 have been extracted but it is not explained that which of the sample has been extracted from which of the packet. Similarly, the chemical analyst had submitted a consolidated report of all the 08 samples as chars instead of independent test detail regarding each sample as required by law. In this respect reliance can be placed on a case titled as "Islam Khan VS State" reported in P-Cr.LJ 2021 page 1018, R. 6. "Control of Narcotic Substances Act

(XXV of 1997), S. 36. Report of Government Analyst Essential requirements. Forensic Science Laboratory Report revealed that the same was without protocol as the Office of Chemical Examiner Forensic Science Laboratory also after chemical analysis had submitted a consolidated report declaring all the 18 sample to be "Charas" instead of independent test details regarding each sample as required by law. Report of chemical examiner did not show that each sample pertaining to narcotic, allegedly recovered from the accused, had actually been analysed separately. Evidentiary value of the report of chemical examiner had been evaluated in the light of Control of Narcotic Substances (Government Analysts) Rules, 2001, R. 6 of which made it imperative on an analyst to separately mention result of each sample analysed with full protocols applied thereon along with other details in the certificate issued for test/analysis by laboratory. Circumstances established that the prosecution had failed to prove its case against the accused beyond any reasonable doubt. Appeal against conviction was allowed, in circumstances".


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Hence, in view of what is discussed above, though the representative sample, as per report of FSL Ex. PK, has been found as Chars but keeping in view the failure of the prosecution to prove the safe custody of the case property, its transmission to the PS and transmission of the representative

sample to the FSL with a delay and failure of the chemical examiner to apply full protocol of the test applied, it is held that the report of FSL cannot be relied upon for recording conviction.


(10). In the light of aforementioned discussion, it is held that the prosecution has failed to prove the alleged recovery of chars 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 samples within the prescribed period. All these facts lead to the failure of prosecution to prove the case against the accused beyond shadow of doubt. Therefore, the accused namely, Abdul Rehman is acquitted of the charge levelled against him by extending the benefit of doubt. Accused is on bail. His bail bonds stand cancelled and his sureties are released of the liabilities of the bail bonds. The chars be destroyed after the expiry of period provided for appeal/revision in accordance with law. The motorcycle be returned to its lawful owner, if not required. Consign.

Pronounced
25.04.2022


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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.
Dated: 25.04.2022


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