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

Case no. 09/03 of 2022

Date of institution: 14.04.2022

Date of decision: 12.01.2024

Date of consignment:

State through Muhammad Imtiaz SI NET of Kalaya Police Station Orakzai
(complainant)

Versus

Hameed s/o Sarmal Khan (aged about 27 years) r/o Kamar Khel, Tappa
Yousaf Khel, PO Bara, presently Manzahi, Wachpal (accused facing trial)

FIR No. 09 DATED: 01.02.2022 U/S 9-D CNSA

KALAYA POLICE STATION, ORAKZAI

JUDGMENT

1. Accused Hameed is facing trial in the subject case registered under section 9-D CNSA of Kalaya Police Station, Orakzai.
2. Muhammad Imtiaz SI, the complainant, along with police officials during the routine patrolling, about 1400 hours, noticed a person, who was carrying a heavy sack on his shoulder; that the said person on seeing police party tried to escape but intercepted by them; that the sack was taken from his possession and searched, which led the police to recovery of 20 packets of chars wrapped in yellow scotch tape; that each packet weighed 1000 grams of chars through digital scale making total quantity to be 20000 grams; that 10/10 grams of chars was separated from each packet for chemical analysis, which were sealed in parcels no. 1 to 20 while remaining 19800 grams chars along with white sack was sealed in parcel no. 21; that accused

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disclosed his name as Hameed son of Sarmal Khan who was arrested on the spot; that murasila was drafted at the place of occurrence and sent to police Station for bringing criminal law into motion which was given effect in the stated FIR that culminated into present case; hence, the FIR.

3. On completion of investigation, complete challan under section 9-D CNSA was put in court against the accused facing trial.
4. Accused facing trial was summoned through *zamima bay*. On his attendance, the copies of the case furnished to accused under section 265-C Cr.PC. The accused was then charge sheeted u/s 9-D CNSA to which he pleaded not his guilt and claimed trial.
5. Prosecution produced following evidence in support of its case;
6. Wali Ullah Muharrir, was examined as PW-1, who on receipt of the murasila report, card of arrest and recovery memo has registered the FIR, Ex.PA. He also kept the case property in the *malkhana* for safe custody vides register no. 19, Exh.PW 1/1. He also exhibited daily diary, Exh.PW 1/2, pertaining to the departure and arrival of the complainant. Muhammad Shafiq SI, was examined as PW-2, who has submitted complete challan, Exh.PW 2/1, against accused in the instant case. The statement of Muhammad Imtiaz SI (complainant) was recorded as PW-3. He confirmed the initial report Ex.PA to be true. Recovery of contraband vide recovery memo, Exh.PW 3/1, was testified to be genuine. He arrested the accused and issued his card of arrest, Exh.PW 3/2. He drafted murasila, Exh.PA/1. Investigation Officer of the case was Minhaz Hussain SI, who has entered in the witness box as PW-4. He prepared the site plan, Exh.PW 4/2. He

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prepared application to FSL; Exh.PW 5/3 and road permit certificate, Exh.PW 5/4. He again produced accused before Judicial Magistrate vide application, Exh.PW 4/5. FSL result was also produced by him, Exh.PW 4/6. One of the marginal witness to the recovery memo was Gul Kareem Constable, who was examined as PW-5. 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 the same to the Muharrir for registration of FIR. He has taken the parcels 1 to 20 to FSL Peshawar containing samples of chars.

7. Prosecution closed its evidence.
8. The statement of accused was recorded under section 342 CrPC, wherein, he again denied from the charge 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 Dy.PP 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 narcotics from accused; that FSL result in respect of the samples, separated from the contraband recovered from the accused, is in positive; that there is no malafide on part of the prosecution to falsely involve the accused facing trial in the case commission of heinous offence, therefore, he requested to award him maximum punishment.

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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 has not confessed his guilt; that the case against the accused is not proved and request is made for the acquittal of accused.

12. In light of valuable assistance furnished by the learned counsel for parties, the evidence and record before the court, it is observed that complainant has allegedly recovered 20 packets of chars weighing 20000 grams on search of sack carried by accused on his shoulder, which all proceedings of seizure of contraband and arrest of accused were witnessed by police witnesses; therefore, prosecution was duty bound to prove the allegation against accused beyond shadow of doubt from the moment of their presence on spot to till submission of challan against the accused.

13. It is settled principle of law that courts decide the disputes on the basis of evidence irrespective of its nature. There is, however, difference of degree of quantum of evidence to be considered in deciding civil and criminal disputes. In civil nature disputes, cases are decided on the basis of preponderance of evidence, while, in criminal nature disputes, cases are decided beyond the shadow of reasonable doubt irrespective of the heinousness of the offence. In the instant, case prosecution has led the evidence of many witnesses

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as it wished, however, handing over of the test samples for safe transmission to laboratory for FSL and many other anomalies noted in the prosecution story, which badly affected the prosecution case. Complainant (PW-3) stated that he has handed over case property to Muharrir Waliullah of police station for safe custody. Waliullah (PW-1) has admitted the receipt of case property and making its entry in register no. 19 of police station for safe custody, however, there is admittedly no signature of the complainant about delivery of contraband to Muharrir of the police station nor the latter has acknowledged the receipt/signed register no. 19, Exh.PW 1/1, about receiving the case property. Similarly, Waliullah stated that on 02.02.2022, he has handed over the sealed test parcels no. 1-20 to investigation officer for FSL Peshawar and did not hand over any parcel of the instant case to Gul Kareem, which is also corroborated by Gul Kareem (PW-5) and envisages that Muharrir of the police station has handed over the test samples to investigation officer, who has either himself or through someone else has transmitted the same to laboratory at Peshawar for FSL. The statement of Gul Kareem (PW-5), nevertheless, suggests that those parcels were handed over to him by investigation officer for safe transmission to Peshawar but complete record is admittedly silent about handing over test parcels by Muharrir to investigation officer and the investigation officer to Gul Kareem. Even, the investigation officer (PW-4) admitted that register no. 21, which pertains to route certificate to establish the safe transmission of case property, is not available on record.

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14. In same way, order of learned Judicial Magistrate-I, Orakzai dated: 02.02.2022 provides that when investigation officer has produced accused before him for physical remand, the case property was also produced before him, however, the investigation officer admitted that he has not mentioned the fact of production of the case property before the learned Judicial Magistrate in application, Exh.PW 4/2, seeking the physical remand of the accused, whereas, statement of Muharrir (PW-1) also provides that the case property i.e. parcel 21 was never removed/shifted from police station for any proceedings during his posting in the police station, which leads to inference that on one hand the investigation officer has cheated the learned Judicial Magistrate by producing some other material exposing it be case property of the case and on the other hand infers that the actual case property was not produced before the court of learned Judicial Magistrate within the meaning of section 33 of the Act.

15. Record provides that though a huge quantity of chars has been allegedly recovered from possession of accused but the complainant admittedly did not mention the kind of chars in his report that as to whether the recovered chars was in *pukhta* or *garda* form. This fact is, nevertheless, explained by investigation officer in his statement deposing that complainant has disclosed him that it was cars *garda*, which is further endorsed by Gul Kareem, stating that the recovered chars was unbaked, however, FSL report provides that it was in solid shape, which leads to inference that actual recovered article/stuff from accused was something else and the test samples sent to the laboratory for expert opinion was chars to obtain desirable results.

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16. There are also some interesting points noted in the case. Contents of the murasila report provides that complainant has accompanied with him Mustafa and Gul Kareem for patrolling of the area in the official vehicle but complainant in his statement deposed that Constable Muhib had also accompanied them as a driver. If his statement is believed to be true, even then, site plan is silent about the presence of Muhib on the spot. Similarly, complainant (PW-3) stated that he has not shown point mark B to investigation officer at the time of preparation of the site plan, however, site plan not only shows the existence of point mark B, which provides detail about recovery of sack from accused that contained the alleged case property. As the site plan was prepared on the pointation of complainant; therefore, he has shown point mark 2 be the position of accused, however, the murasila report provides the point mark 2 to be that of complainant, which means that the investigation officer has prepared the site plan at his own and not on the pointation of complainant. It is interesting to note that complainant has admitted drafting of the murasila, card of arrest, recovery memo by himself in his own hand-writing on the spot and prepared other documents, however, when he was asked to read his hand written words "ma'ay" and "kandhay", he read these words as "jama" and "gandam" respectively, which shows that those documents were not his handwritten but were written and prepared by someone else. All this not only questions his presence on the spot but also his character, credibility and veracity attached to his statement, which cannot be believed to be based on true depiction of the facts and mode and manner of the commission of offence.

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17. A huge contradiction is also noted in the statement of complainant and investigation officer because the earlier deposed that Gul Kareem has taken murasila to police station for registration of the case, who returned to the spot along with copies of murasila, card of arrest and recovery memo, which he handed over to investigation officer on the spot for investigation, however, latter deposed that those documents were received by him in the police station at 1540 hours.

18. Contents of the report shows that complainant was accompanied by Mustafa and Gul Kareem and after the occurrence, complainant has allegedly handed over the murasila to Gul Kareem for taking the same to police station for registration of case, who accordingly took it to police station and the case was registered but complainant stated that Gul Kareem returned to the spot with copy of murasila report etc., whereas, statement of Gul Kareem shows that he remained in the police station, where, the investigation officer has recorded his statement. Statement of Gul Kareem is also found to be in conflict with the statement of complainant because the earlier deposed that investigation officer has recorded his statement in the police station, where the second marginal witness Mustafa was also present, which shows that Mustafa had also accompanied Gul Kareem while leaving the spot for submission of murasila report. In similar manner, there are no complete daily diaries of arrival & departure of police officials brought on record by the investigation officer of the case so as to show entry and exit of police officials to corroborate the evidence. Likewise, there were total 21 parcels allegedly prepared on the spot, which were witnessed and signed by marginal witness to recovery memo, however, Gul Kareem (PW-5) deposed that total 20 parcels

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were prepared in his presence, which creates doubt about preparation of parcel no. 21 in presence of marginal witnesses. Gul Kareem also deposed that nothing was in possession of accused except CNIC, which alone was recovered and taken into possession in his presence but recovery memo and record are not only silent about recovery and taking into possession of CNIC of the accused but also leads to inference that alleged chars was not recovered from possession of accused in presence of this witness and he has signed the recovery memo being sub-ordinate official later on to fill up the lacunae.

19. 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 case and FIR is registered. In the instant case, statement of Gul Kareem (PW-5) provides that seizing officer had already written the FIR number etc. on recovery memo and card of arrest of the accused when these were handed over to him for taking to police station for registration of case. In the same manner, investigation officer (PW-4) deposed that he has not written any FIR number on parcel no. 21, which was already written by the seizing officer before he reached there, which both facts are not possible before registration of case and therefore apprehends that recovery memo, card of arrest of the accused and parcel no. 21 were prepared in the police station and not on the spot specially when Muharrir of the police station denies tampering (addition etc.) in recovery memo and creates doubt about the mode and manner about the recovery of contraband from accused.

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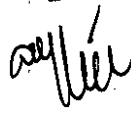
20. It is also on record that one of the prosecution witnesses namely, Mustafa, who was second marginal witness to the recovery memo, was abandoned by prosecution for reasons best known to them on the pretext that he was also witness of the same facts, which not only leads to adverse inference under Article 129 (g) of The Qanun-e-Shahadat Order, 1984 in respect of withholding the best available evidence but the legal inference could also be drawn that if the said witness had entered into the witness box, then, he would not have supported the prosecution case. In this regard wisdom is derived from case laws reported in NLR 2015 SCJ 121, PLD 2016 SC 17.

21. From above appreciation of evidence and lacunae noted above, it is evident that the prosecution has badly failed to prove the mode and manner of making arrest and seizure of narcotics from accused, which has become doubtful. Moreover there are many discrepancies and contradictions in prosecution case, which have been discussed in detail above. In view of above facts, it is held that admittedly a huge quantity of chars has been shown to be recovered by police but the accumulative effect of lacunae noted makes the prosecution case doubtful and this is the cardinal principle of law that benefit of the slightest doubt in criminal cases would be extended to the accused being favorite child of law. It is, therefore, held that prosecution has failed to bring home the guilt against accused beyond shadow of reasonable doubt: hence, accused Hameed is acquitted from the charge leveled against him. He is behind the bars; therefore, he be released forthwith if not required in any other case.

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22. Case property be destroyed in accordance with law after expiry of period provided for appeal/revision.
23. File consigned to record room after completion and compilation.



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CERTIFICATE

It is certified that this judgment of consists of eleven (11) pages and each page is duly signed by me after necessary corrections.



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