

*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.34/3 of 2021  
Date of institution: 04.09.2021  
Date of decision: 28.02.2022

The State

...Versus...


1. Feroz Khan son of Ghafoor Khan, resident of Qaum Khwaidad Khel, Qambar Khel, Bara, District Khyber. .... (Accused facing trial)

**Case FIR No.17, Dated 04.09.2021 u/s 9-D KP-CNSA, 2019  
Registered at Police Station Kurez Boya Orakzai.**

**JUDGMENT**

Accused named above faced trial before this Court in case FIR No.17 dated 04.09.2021 u/s 9-D of Khyber Pakhtunkhwa Control of Narcotics Substance Act, 2019, registered at Police Station Kurez Boya Orakzai.

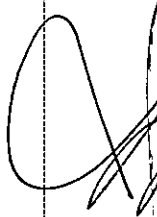
2. Facts of the case are such that complainant along with other police officials of Police Station Kurez Boya Orakzai, reportedly were on patrolling of the area. On getting spy information, regarding smuggling of chars, Inspector Farooq has laid barricade on main road at Ghodzara. One person was coming from Kalaya side while riding on his Motorcycle. Complainant stopped the person on suspicion. In the lap of driver, the police found a white colour sack. On search of said sack, the local police found 05 packets of chars which were wrapped in yellow scotch tape. On weighing, each packet came out 900 grams with a total of 4500 grams. The person, disclosed his name as Feroz Khan. Accused was arrested on the spot.

  
**SAYED FAZAL WADOOD**  
Addl. District & Sessions Judge  
Orakzai at Hangu

Murasilla was drafted at the place of occurrence and sent to Police Station for bringing criminal law into motion which was given effect in the captioned FIR that culminated into present case.

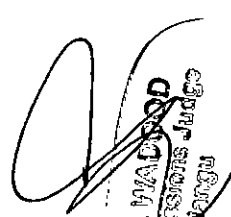
3. After conclusion of the investigation, complete challan against the accused facing trial was presented. He was summoned through Zamima Bay being in custody and on appearance he has been provided copies in line with Section 265-C of the Code of Criminal Procedure-1898. Charge against the accused was framed to which he pleaded not guilty and claimed trial. Prosecution was directed to produce evidence. The prosecution in order to prove its case against the accused, produced and examined as many as four (04) witnesses. The prosecution evidence is sketched below for ease of reference and determination of guilt or innocence of accused:

(i). Farooq Khan Inspector, NET Incharge Orakzai, was examined as PW-1, stated that *“on 04.09.2021 at 1500 hours I along with other police officials namely Alam Jan HC-1395, Wahid HC-320, Munawar Khan belt No. 43 and Hameed Khan were on routine patrolling in the official pickup of area. I received information that huge quantity of narcotics will be smuggled through Motorcycle. Relying upon the same information I made barricade on the spot at main road Kalaya to Bara, Ghozdara at 1500 hours. One Motorcar came which was stopped for the purpose of checking. In the lap of driver, one sack of white color was found. The driver of*

  
SAYED FAZAL WAROOD  
Addl: District Sessions Judge  
Orakzai at Hangmu

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Motorcycle was de-boarded who disclosed his name as Feroz Khan son of Ghafoor Khan caste Khwaidad Khel Bara District Khyber. On search of the above white color sack, which containing 05 packets of chars which were wrapped in yellow scotch tape. Each packet came out 900/900 grams on its weightment through digital scale. The empty sack was separately weighed which came out 40 grams. 10/10 grams were separated from each packet for FSL and sealed the same in parcel no. 01 to 05 and remaining 4450 grams along with the white sack were sealed into parcel no.6. The monogram in the name of IH were affixed on each parcel. I took the above contrabands alongwith the motorcar without registration number D-Price 70-CC of red color having engine No. RP70315138 and Chassis No. 70315138 key through the recovery memo Ex. PW-1/1 in the presence of marginal witnesses namely Alam Jan HC and Wahid HC. I arrested the accused and issued card of arrest Ex. PW-1/2. I charged the accused for the commission of offence. I drafted the Murasila which is Ex. PA/1 and sent the same to the PS along with recovery memo and card of arrest for registration of the case through the hand of constable Munawar Khan belt No. 43. When IO came to the spot, I have shown the case property to him and after its examination he handed over the same to me. The IO prepared the site plan on my pointation. When I returned to the PS I handed over the case property to the Moharrir of the PS and locked the accused in the lock up of the PS. Today I produced the case property parcel no. 6 Ex.P-1 and

  
SAYED FAZAL HAIDOOD  
Addl: District & Sessions Judge  
Orakzai Waziristan

*Motorcycle Ex. P-2. Today I have seen all the relevant documents which are correct and correctly bear my signatures."*

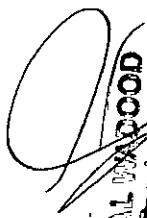
(ii). PW-2 is the statement of Wajid HC, NET Orakzai, who deposed that "on 04.09.2021 at 1500 hours I along with the Incharge NET Orakzai Inspector Farooq and other police officials namely Alam Jan HC-1395, Munawar Khan belt No. 43 and Hameed Khan were on routine patrolling in the official pickup of area. We made barricade on the spot and started searching. One Motorcar of red colour which was coming from Kalaya side was stopped for the purpose of checking. In the lap of driver, one sack of white color was found. Seizing officer de-boarded him, who disclosed his name as Feroz Khan son of Ghafoor Khan caste Khwaidad Khel Bara District Khyber. On search of the above white color sack, which containing 05 packets of chars which were wrapped in yellow scotch tape. Each packet came out 900/900 grams on its weighment through digital scale. The empty sack was separately weighed which came out 40 grams. 10/10 grams were separated from each packet for FSL and sealed the same in parcel no. 01 to 05 and remaining 4450 grams along with the white sack were sealed into parcel no.6. The monogram in the name of IH were affixed on each parcel.

Seizing Officer took the above contrabands alongwith the motorcar without registration number D-Price 70-CC of red color having engine No. RP70315138 and Chassis No. 70315138 key through the recovery memo

  
Wajid HC  
District & Sessions Judge  
Orakzai/Hangu

already Ex. PW-1/1 in my presence as well as in the presence of other marginal witnesses namely Alam Jan HC. I along with the other marginal witness Alam Jan HC signed the recovery memo on the spot. He also prepared Murasila and card of arrest of the accused which was sent to the PS for registration of the case through hand of the constable Munawar Khan. After registration of the case IO came to the spot and recorded our statement under section 161 Cr.PC. After spot proceedings we returned back to the PS where Seizing Officer handed over the case property to the Muharrir of the PS and locked the accused in the lockup of the PS. Today I have seen the recovery memo which is correct and correctly bears my signature."

(iii). Ishtiaq Hassan, PS Kurez Boya, Orakzai, was examined as PW-3, stated that "during the days of occurrence, I was posted as IO in the PS Kurez Boya. Copy of FIR was handed over to me, I proceeded to the spot of occurrence. during spot inspection, I prepared the site plan on pointation of complainant which is Ex.PW-3/1. On dated 05-09-2021, I prepared the letter of FSL for recovered contrabands and Motorcycle which is Ex.PW-3/2, and in this respect, I also drafted an application for FSL before the DPO which is Ex.PW-3/3. The accused was arrested by the SHO which was handed over to me and on dated 05-09-2021, I produced the accused before the Illaqa Magistrate for physical custody. My application was turned down and the accused was sent to Judicial Lockup vide my application Ex.PW-3/4. Application for FSL in prepared by me which is available on the file and is Ex.PW-3/5. The Naqal mad/Roznamcha report is also placed on file

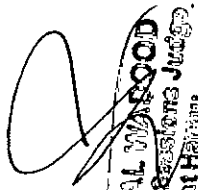
  
**FAZAL MAHOOD**  
 District Sessions Judge  
 Orakzai District

which is prepared by the Muharrir of the PS which is Ex.PW-3/6. On dated 07-09-2021, I sent the contraband to the FSL Peshawar through constable Shamshir 678, in this respect receipt rahdari is Ex.PW-3/7. I received the copy of FSL of contraband chars which is placed on file and is Ex.PK while the FSL regarding Motorcycle is also placed on file which is Ex.PK/1. I received the copy of the examination of the vehicle from the DPO office Orakzai which is placed on file Ex.PW-3/8. I recorded the statement of accused and PWs under section 161 Cr.PC. After completion of investigation, I submitted the file to the SHO for onward submission of challan."

(iv). PW-4 is the statement of Zaman Ali, constable at Police Line Orakzai, who deposed that "during the days of occurrence, I was posted as Muharrir in the PS Kurez Boya. I received the Murasila through constable Munawar Khan constable No.43. I incorporated the contents of Murasila in the FIR which Ex.PA.

STO by defense counsel FIR is photocopy and cannot be exhibited.

On dated 04-09-2021, the SHO handed over to me the recovered contraband along with the accused in the PS. Naqalmad/Roznamcha No.11 and 17 report dated 04-09-2021 was prepared by me which is placed on file and is already Ex.PW-3/6. On dated 07-09-2021 I handed over the parcel No. 5,4,3,2 and 1 to the IO for sending to FSL laboratory Peshawar. My statement was recorded by the IO regarding safe custody. I write down the detail of contrabands in register No.19. The copy of which is placed on file which is Ex.PW- 4/1. I also prepared the copy of register No.19 regarding the detail of case property (Motorcycle). The copy of which is placed on file which is Ex.PW-4/2."


  
SAYED FAZAL MASOOD  
Addl. District & Sessions Judge  
Orakzai at Haripur

4. On closure of prosecution evidence, statement of accused was recorded u/s 342 of the Code of Criminal Procedure-1898; wherein, accused professed his innocence and did not opt to produce defense evidence or to be examined on oath.

5. Learned Sr. PP for the State argued that the barricade was established on spy information that led the police to spot arrest and recovery. Accused is directly charged in the contents of FIR followed by spot arrest and evidence available on the file are sufficient to establish a proved case of the commission of offence by the accused. He added that the offence is heinous in nature and prosecution has proved its case beyond doubt entailing conviction of the accused.

6. On the contrary, learned counsel for the accused contended that evidence available on file is deficient and the story advanced by the prosecution is not appealable to prudent mind. It was added that there is no independent witnesses 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 reasonable doubt and requested for acquittal of the accused.

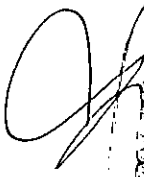
7. Perusal of case record would reveal that according to FIR the accused was intercepted at barricade on 04.09.2021 at 15:00 hours and contraband/chars weighing 4500 grams was recovered from accused, in

  
SAYED FAZAL WADOOD  
District & Sessions Judge  
Orakzai at Hangu

presence of marginal witnesses. The recovered material has been reported by the Forensic Science Laboratory as chars and the accused has committed the offence. The mode and manner in which crime has been committed required to be proved by prosecution.

A. Munawar Khan has been stated to be the person to whom Murasila, recovery memo and card of arrest have been handed over for transmission to Police Station for registration of case but this person has not been produced for recording statement. He was material witness and non-production thereof for examination in Court is fact that cannot be ignored.

In a case, "Javid vs State" reported as 2020 YLR, 311, Hon'ble the Peshawar High Court, Peshawar has ordained in following terms. *"Benefit of doubt, non-production of material witness and Register maintained at police Malkhana effect Prosecution case against accused persons was that they were sitting in a car, on search of the car 10 packets of charas, concealed in its secret cavities, and were taken out. Prosecution case was that murasila was drafted and handed over to a police official for its transmission to police station for lodging formal FIR but the said police officer was not produced as a witness. Cross-examination of prosecution Witness revealed that recovery memo and card of arrest were also handed over to the said police official by the complainant. Production of said police official as prosecution witness was necessary. Prosecution had also failed*

  
SAYED FAZAL WAQOOD  
District & Sessions Judge,  
Guzerat at Haripur

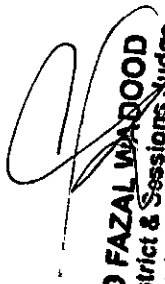


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*to produce an extract from the relevant Register, which was kept at police malkhana for entering therein the recovered and sent contraband. Recovery was neither effected from personal possession of the accused persons nor was the same taken out of the vehicle on their pointation. Prosecution had not proved its case against the accused persons beyond reasonable doubt, in circumstances, appeal was allowed, convictions and sentences of the accused persons were set aside."*

B. The Investigation Officer while recording his statement as PW-1 speaks that monogram with the name of IH is not owned by him. In this regard, "State vs Javid Iqbal" reported as 2021 YLR, 662, provides following guidelines. *"After allegedly recovering in the charas from possession of the accused the parcels of the recovered substance where sealed with monogram reading as WK, which was neither the abbreviation of the name of Seizing Officer/Recovery Officer nor Investigation Officer. Prosecution witnesses had not been able to advance any explanation whatsoever as to why Recovery Officer had not put his own monogram on the seals of the parcels prepared by him and as to why he had used the monogram of some other officer, whose posting was even not shown at Police Station at the relevant time."*

C. The person transmitted the parcels for FSL examination has not been produced for examination of the Court which makes the chain of custody


  
**SAYED FAZAL WAHOOD**  
District & Sessions Judge  
Orakzai at Hangu

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as disconnected. Wisdom can be drawn from “Zahir Shah vs State” case reported as 2019 SCMR, 2004 which hold as following. *“Prosecution did not produce that constable who deliver sealed parcels of narcotics substance to FSL, validity, safe custody and safe transmission of drugs from the spot of recovery till its receipt by Narcotics Testing Laboratory must be satisfactorily established. Such chain of custody was fundamental as report of Government Analyst was the main evidence for the purpose of conviction secure. Any break in the chain of custody i.e safe custody of transmission would impair and vitiate conclusiveness and reliability of the report of Government Analyst thus rendering it incapable of sustaining conviction.”*

D. The place of occurrence has been stated to be 50 to 70 paces from main road Kalaya by PW-3 in his statement; whereas, PW-2 has termed the place of occurrence as 5 Kilometers away from main Kalaya Road. This is huge difference that cannot be covered under the plea of human miscalculations. This major contradiction is sufficient alone to question the mode and manner of the crime committed as advanced by the prosecution.

E. 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

  
**SAYED FAZAL MADOOD**  
District & Sessions Judge  
Orakzai at Hangu

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have not been brought on record that renders the chain of custody disconnected.

F. Besides, no witness from public either associated with recovery of chars or to cite as marginal witness to the recovery memo Ex.PW-1/1. The Investigation Officer examined as PW-1 speaks about the spy information but no private witness has been associated that create serious doubt as was laid down in 2015 PCr.LJ-1430 [Peshawar].

G. The colour of recovered chars has not been mentioned by any witness nor its nature being pukhta or garda has been identified. The IO has not investigated regarding the ownership of the Motorcycles and neither any oral or documentary evidence has been produced in this respect.

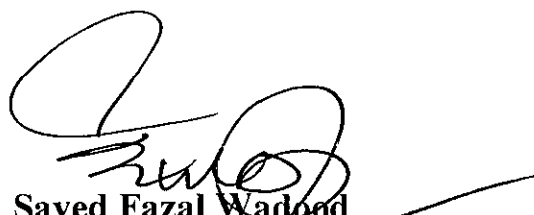
H. The accused facing trial has not recorded confession before the Court. He remained in police custody for sufficient time but no further recovery was made. The case property has not been produced before learned Area Magistrate while producing accused for grant of police custody and thus mandatory provision of law has been violated. The accused has no criminal history in such like offences.

  
**SAYED FAZAL WAHEED**  
Additional District & Sessions Judge  
Orakzai at Hangu

The examination of record as discussed above has given birth to reasonable doubt, the benefit of which has to be extended in favour of accused as was ordained in 2003 PLD 84 [Peshawar]. These facts and circumstances render the evidence as insufficient to believe the mode and


manner of the crime narrated. In the light of above discussion, it is being held that the prosecution evidence is falling in insufficient category of cogency; whereas, the secure category evidence is full of material contradictions that had given birth to reasonable doubt. Consequently, the benefit of doubt is extended to the accused facing trial and resultantly, accused Feroz Khan son of Ghafoor Khan resident of resident of Qaum Khwaidad Khel, Qambar Khel, Bara, District Khyber is acquitted from the charges levelled against him. The accused is in custody, he be released forthwith, if not required in any other case. Case property be destroyed as per law after expiry of period of appeal/revision. File be consigned to District Record Room, Orakzai after its necessary completion and compilation within the span allowed for.

9. **ANNOUNCED**  
28.02.2022

  
Sayed Fazal Wadood  
Additional Sessions Judge/Judge Special  
Court Orakzai

**CERTIFICATE:**

Certified that this Judgment is consisting upon twelve (12) 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