

IN THE COURT OF SYED OBAIDULLAH SHAH
SESSIONS JUDGE/JUDGE SPECIAL COURT, ORAKZAI
(AT BABER MELA)

SPECIAL CASE NO. : 26/3 OF 2023
DATE OF ORIGINAL : 05.06.2023
DATE OF DECISION : 23.01.2024

STATE THROUGH AFTAB AHMAD SHO POLICE STATION
KALAYA

.....(COMPLAINANT)

-VERSUS-

MUHAMMAD ISRAR AFRIDI S/O MUHAMMAD KHAN, AGED
ABOUT 19 YEARS, R/O CASTE SHALOBAR QAMBAR KHEL,
BARA, DISTRICT KHYBER

..... (ACCUSED FACING TRIAL)

Present : Umar Niaz, District Public Prosecutor for State.
: Hamid Sarfaraz Advocate, the counsel for accused facing
trial.

FIR No. 24 **Dated:** 12.03.2023 **U/S:** 9 (d) of the Khyber
Pakhtunkhwa Control of Narcotic Substances Act, 2019

Police Station: Kalaya

JUDGEMENT
23.01.2024

The above-named accused faced trial for the offence
u/s 9 (d) of the Khyber Pakhtunkhwa CNSA, 2019 vide FIR
No. 24, dated 12.03.2023 of Police Station Kalaya.

- (2). The case of the prosecution as per contents of
Murasila based FIR is; that on 12.03.2023, the complainant
Aftab Ahmad SHO along with constables Abdul Sattar,
Amir Ullah and Muhammad Rasool, acting on information
regarding smuggling of narcotics via Carry Daba from
District Khyber through Orakzai, laid a picket on main road
near Utman Khel Petrol Pump where at about 0830 hours a
white colour Carry Daba bearing Registration No. LXB
3248 on way from Feroz Khel Bazar towards the picket was


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stopped for the purpose of checking. The driver of the motorcar was made come down who disclosed his name as Muhammad Israr Afridi s/o Muhammad Khan. Upon search of the vehicle, 20 packets of chars each wrapped with yellow colour scotch tape, each weighing 1000 grams, making a total of 20,000 grams were recovered from a secret cavity. The complainant separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to 20 whereas the remaining quantity of chars weighing 990 grams each were sealed in parcels no. 21 to 40, by placing/affixing of monograms of 'AA' on all parcels. The complainant took into possession the recovered chars and the vehicle in question vide recovery memo. The accused was arrested on the spot by issuing his card of arrest. Murasila was drafted and sent to Police Station through Constable Muhammad Rasool which was converted into FIR by Muhammad Jameel MHC.

- (3). After registration of FIR, it was handed over to Investigating Officer Muhammad Hanif for investigation. Accordingly, after receipt of FIR, he reached the spot, prepared site plan on pointation of the complainant and recorded the statements of PWs u/s 161 Cr.P.C. On 15.03.2023, the IO sent the samples of chars for chemical analysis to FSL through constable Gul Karim, the result whereof was received and placed on file by him. The IO sent


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the vehicle to FSL for its examination. The result of which was received and placed on file by him which shows its chassis number welded and refitted, on the basis of which section 468/471 PPC were added in the instant case. After completion of investigation, he handed over the case file to SHO who submitted complete challan against the accused facing trial.

(4). Upon receipt of the case file for the purpose of trial, the accused was summoned through addendum-B, copies of the record were provided to him in line with section 265-C CrPC 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. Constable Gul Karim appeared as PW-1. He has taken the samples of chars in parcels no. 1 to 20 to the FSL for chemical analysis on 15.03.2023 and after submission of the same, he has handed over the receipt of the parcels to the IO.

II. Muhammad Jameel MHC appeared in the witness box as PW-2. He has incorporated the contents of Murasila Ex. PA/1 into FIR Ex. PA. He has received the case property from the complainant duly packed and sealed which he had kept in mal khana in safe custody besides parked the vehicle in


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vicinity of the police station. The witness further deposed that he has recorded entry of the case property in Register No. 19 Ex. PW 2/1, entries in the DDs which are Ex. PW 2/2 & Ex. PW 2/3 and has handed over the samples of the case property and the vehicle to the IO for sending the same to FSL.

III. Aftab Ahmad SHO is the complainant of the case. He as PW-3 repeated the same story as narrated in the FIR. He has submitted complete challan Ex. PW 3/2 against the accused facing trial in the instant case.

IV. Constable Muhammad Rasool appeared as PW-4. He besides being eyewitness of the occurrence is marginal witness of recovery memo Ex. PC as well vide which the complainant has taken into possession the recovered chars and the vehicle. He also reiterated the contents of FIR in his statement.


V. Investigating Officer Muhammad Hanif was examined as PW-5 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 pointation of the complainant, recorded the statements of witnesses on the spot, produced the accused before the court of Judicial Magistrate vide


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his applications Ex. PW 5/1 and Ex. PW 5/4, sent the representative samples to FSL along with application addressed to the incharge FSL Ex. PW 5/2 and road permit certificate Ex. PW 5/3 and result of the same Ex. PK was placed on file by him, sent the vehicle to the FSL and the result whereof received and placed on file by him as Ex. PK/1, added section 468/471 PPC in the instant case, placed on file copy of Register No. 19 Ex. PW 2/1, copies of daily diaries and submitted the case file to SHO for onward proceedings.

(5). Prosecution closed its evidence whereafter the statement of 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 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 and the same have been found positive for chars vide


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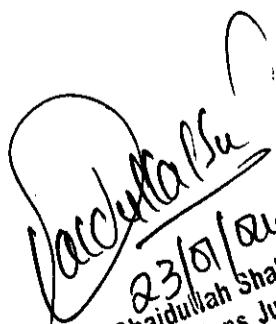
report of FSL Ex. PK. The complainant, the witnesses of the recovery, the official transmitted the samples to the FSL and the IO have been produced by the prosecution as witnesses, whom have fully supported the case of the prosecution and their statements have been lengthy cross examined but nothing contradictory could be extracted from the mouth of any of the witness 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 and the report of FSL supports the case of prosecution; however, the accused facing trial is falsely implicated in the instant case and nothing has been recovered from his possession. 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 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 learned DPP for the State, arguments of learned counsel for the defence and the available record, following are the points for determination of charge against the accused facing trial:

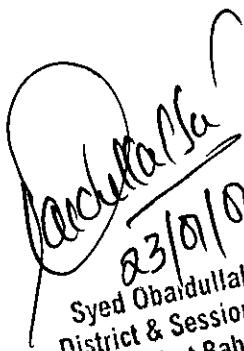

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- (i). Whether the occurrence has taken place in the mode and manner as alleged by the prosecution?
- (ii). Whether the investigation has been carried out in the mode and manner as alleged by the prosecution?
- (iii). Whether the case of prosecution is substantiated through report of FSL?
- (9). The case of prosecution, as per contents of Murasila Ex. PA/1, court statements of Aftab Ahmad SHO as PW-3 and Constable Muhammad Rasool as PW-4 is, that the complainant Aftab Ahmad SHO/PW-3 along with Constables Abdul Sattar, Amir Ullah and Muhammad Rasool/PW-3 acting on information regarding smuggling of narcotics via Carry Daba from District Khyber through Orakzai, laid a picket on main road near Utman Khel Petrol Pump where at about 0830 hours a white colour Carry Daba bearing Registration No. LXB 3248 on way from Feroz Khel Bazar towards the picket was stopped. The driver of the vehicle was made come down who disclosed his name as **Muhammad Israr Afridi** s/o Muhammad Khan. Upon search of the vehicle, 20 packets of chars each wrapped with yellow colour scotch tape, each weighing 1000 grams, making a total of 20,000 grams were recovered from a secret cavity. The complainant/PW-3 have shown himself to have separated 10 grams of chars from each packet for chemical analysis through FSL, sealed the same into parcels no. 1 to


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20 whereas the remaining quantity of chars weighing 990 grams each were sealed in parcels no. 21 to 40 by placing/affixing monograms of 'AA' on all parcels. The complainant/PW-3 have taken into possession the recovered chars and the vehicle in question vide recovery memo Ex. PC. The accused was arrested on the spot by issuing his card of arrest Ex. PW 3/1. The Murasila Ex. PA/1 has been transmitted by Constable Muhammad Rasool/PW-4 to police station where, after registration of FIR by Muhammad Jameel MHC/PW-2, it has been handed over to Muhammad Hanif/PW-5, the IO of the case. The IO has visited the spot and conducted investigation by making a site plan Ex. PB on pointation of Aftab Ahmad SHO/PW-3 and recorded the statements of marginal witnesses u/s 161 CrPC.

The prosecution in order to prove its case in the mode and manner as alleged, has examined Aftab Ahmad SHO, the complainant of the case, as PW-3 who has reiterated the contents of Murasila Ex. PA/1 and Constable Muhammad Rasool, the eyewitness of the occurrence and marginal witness of recovery memo Ex. PC as PW-4 who besides repeating the same story as narrated in the FIR, has stated to have taken the documents to the police station for registration of FIR and handed over the documents to Muhammad Jameel MHC/PW-2 who has registered the FIR


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As per Murasila Ex. PA/1, the complainant/PW-3 had stopped a vehicle driven by the accused, made him come down from the vehicle and searched the vehicle wherefrom he had recovered contraband chars; however, the recovery has not been effected on pointation of the accused. This witness of paramount importance has neither in his court statement as PW-3 nor in his report Ex. PA/1 has mentioned that whether the chars were pukhta or garda which were recovered in the instant case. The texture of the recovered chars was also not mentioned in the Murasila Ex. PA/1. The witness stated that;

"It is not mentioned in the report that it was chars garda or pukhta and what was the colour of the same. The texture and appearance of the alleged contraband is also not mentioned in the report."

The case property i.e., parcels of chars were produced before the court ~~for~~ its exhibition, amongst them one parcel was opened before the court whereupon court observations were given and it was noted that the packet was having inscription of 'A20', but the complainant has nowhere brought on record an iota of documentary evidence that the parcels were having any inscription. The eyewitness of the occurrence in his cross examination admitted that no number was given to the packets either by him nor by the complainant and stated that;


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"I do not remember about any writing on the packets.

No number was given to open packets."

Constable Muhammad Rasool as PW-4 stated that after registration of the FIR, he returned back to the spot where the IO recorded his statement u/s 161 CrPC. During his cross examination, he stated that his statement u/s 161 CrPC was recorded by the IO on 02.11.2023 which create serious doubt in the case of prosecution. The relevant portion of his statement is as under;


"I have mentioned the chassis and engine number of the vehicle at the time of recording my statement in this case on 02.11.2023."

The Murasila outlines that the recovery has not been made from personal possession of the accused rather it was made from the secret cavity in the vehicle and the registration card of the vehicle was taken into possession by the complainant vide recovery memo. But neither the vehicle was registered in the name of accused nor there was any document which could show any nexus with him nor there was any receipt through which the vehicle was given to him on rent. Moreover, a driving license was not taken into possession from the accused which is repellent to the common sense that without driving license a person would drive a vehicle or whether he is able to drive or not, which aspect of the case has created reasonable doubt in the


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prosecution case. The arrival of the complainant/PW-3 is mentioned in DD No. 08 of 12.03.2023 wherein 11-A CNSA and 15AA are recorded as sections of law but the IO has failed to dig out this adverse effect causing a blow to the case of prosecution and failed to produce any documentary evidence in this regard.

With respect to process of search and recovery on the spot, as per contents of Murasila Ex. PA/1, the recovery has allegedly been effected from secret cavity of the vehicle. The size of the secret cavity is mentioned by the complainant as 01 foot in length and less than 01 foot in width. Ironically, how come it possible that such a quantity of chars is placed in such a small area. Moreover, the particulars of the vehicle as mentioned in the Murasila Ex. PA/1 are: Registration No. LXB 3248, Chassis No. 841562 and Engine No. T.725037. The same particulars are noted in the recovery memo Ex. PC. The complainant, after returning to the PS, has handed over the case property including the vehicle to Muhammad Jameel MHC/PW-2 who has received the same by making its entry in register no. 19 Ex. PW 2/1. The record is silent regarding handing over of the registration card and the key of the vehicle besides no entry has been recorded in register no. 19, a copy of which is placed on file. The register no. 19 bears no mentioning of the case property being received by the Moharrir in sealed condition or having any monogram.


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In view of what is discussed above, it is held that there are glaring contradictions between the statements of PWs, creating doubts regarding the mode and manner of the occurrence as alleged by the prosecution.

- (10). With respect to process of investigation on the spot, as per contents of Murasila Ex. PA/1, the IO has visited the spot and prepared site plan Ex. PB on pointation of the complainant. Nevertheless, careful examination of the site plan Ex. PB shows that the place of occurrence is a straight road but how come it possible that a person having huge quantity of chars in his possession would straightaway proceed towards the police party despite being visible to him. The site plan Ex. PB also shows that a point has been allotted to an official vehicle driven by Constable Muhammad Ayaz whose name is mentioned in the daily diary; however, nither the name of the driver has been mentioned in the Murasila nor the official vehicle has been mentioned therein. It is also evident from the record that a Carry Van bearing Registration No. LXB 3248 has been taken into possession in the instant case, but no registration plate was displayed on the vehicle produced before the court at the time of its exhibition during the statement of Constable Muhammad Rasool/PW-4 and no explanation has either been given by this PW or by the IO/PW-5. These contradictions regarding the spot of occurrence as told by the complainant/PW-3 and


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eyewitness/PW-4 in their statements and that of the site plan Ex. PB shows that either the occurrence has not taken place on the spot or the IO has not visited the spot at all.

- (11). With respect to safe custody of transportation of case property from the spot to the police station, entry of the same in register No. 19 Ex. PW 2/1 and later on sending the same to the FSL for chemical analysis, the case of prosecution is, that the complainant/PW-3 transported the case property from the spot to the police station and handed over the same to Moharrir who makes its entry in register no. 19 and the IO on 15.04.2023 sent the representative samples in parcels no. 1 to 20 to the FSL through constable Gul Karim/PW-1 vide road permit certificate Ex. PW 5/3. The IO on 17.03.2023 sent the vehicle in question to the FSL for chemical analysis. In order to prove its case, the prosecution relied upon the statements of Aftab Ahmad SHO as PW-3, Muhammad Jameel MHC as PW-2, constable Gul Karim as PW-1 and Muhammad Hanif OII as PW-5.


As per application to the FSL Ex. PW 5/2, road permit certificate Ex. PW 5/3, statements of PW-5, the IO of the case, the representative samples have been sent to the FSL on 15.03.2023 through constable Gul Karim/PW-1 but no daily diary has been produced before the court to show the departure or arrival of the said constable. Moreover, the occurrence has taken place on 12.03.2023 while the samples


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have been transmitted to the FSL on 15.03.2023 with a delay of 04-days and the unexplained delay breaks the chain of the transmission of representative samples and its safe custody. According to the statements of PW-2 and PW-5, Muhammad Jameel MHC/PW-2 has handed over the vehicle on 17.03.2023 to the IO/PW-5 for sending it to the FSL but no oral or documentary evidence has been produced before the court to show that who has taken the vehicle for chemical analysis. In addition, the register no. 19 is silent regarding handing over of the parcels for its production before the court of Judicial Magistrate. The register no. 19 is also silent regarding handing over of the vehicle for its examination from FSL Peshawar.

Though the FSL report Ex. PK regarding chars is positive but these glaring contradictions between the statements of prosecution witnesses and the record significantly undermine the strength of the prosecution's case and the FSL report alone cannot be taken into consideration for conviction of the accused.

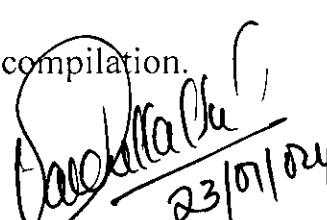
- (12). The investigating officer did not gather any documentation regarding the accused's prior involvement in similar cases and no records were obtained indicating that the accused had been either charged or convicted in such like cases. Consequently, it is reasonable to conclude that the accused is a first offender. In these circumstances, it is


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imperative to consider this aspect when evaluating the evidence presented by the prosecution. As the prosecution has failed to prove the alleged recovery of chars from possession of the accused facing trial in the mode and manner as detailed in the report. Similarly, the prosecution has also failed to prove the alleged mode and manner of the investigation carried out by the IO on the spot. The prosecution also failed to prove the safe custody of case property. All these facts lead to the failure of prosecution to prove the case against the accused beyond shadow of doubt; therefore, the accused namely, **Muhammad Israr Afridi** is acquitted of the charge levelled against him by extending him the benefit of doubt. Accused is in custody. He be released forthwith, if not required in any other case. Case property i.e., chars be destroyed after the period provided for appeal/revision.

Judgment announced. File of this court be consigned to record after its necessary completion and compilation.

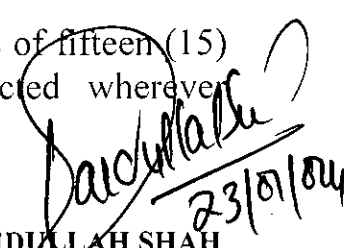
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CERTIFICATE

Certified that this judgement consists of fifteen (15) pages. Each page has been read, corrected wherever necessary and signed by me.

Dated: 23.01.2024


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SYED OBAIDULLAH SHAH
Sessions Judge/Judge Special Court,
Orakzai at Baber Mela

