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

Case no. 04/03 of 2023

Date of institution: 16.01.2023

Date of decision: 01.02.2024

Date of consignment:

State through Muhammad Shafiq SHO of the Kurez Boya Police Station Orakzai (complainant)

Versus

Naveed Ali (aged about 30/31 years) s/o Ayan Ali Sect Mani Khel, Tappa Sabzi Khel, resident of District Orakzai (accused facing trial)

FIR No. 25 DATED 23.11.2022 U/S 9-D CNSA
KUREZ BOYA POLICE STATION, ORAKZAI

JUDGMENT

1. Accused Naveed Ali is facing trial in the subject case registered under section 9 D-CNSA of Kurez Boya Police Station, Orakzai.
2. Muhammad Shafeeq SHO, complainant, reported that he along with police officials had arranged barricade at place of occurrence, when at about 1430 hours silver color car registration no. LWG-3989-Punjab, engine no. F-383119 chasses no. SF310PK999973, to be referred the car, approached and intercepted by him for search; that driver of the car was deboarded, who was bodily searched but nothing incrementing recovered from his personal possession but search of the car led the complainant to the recovery of 13 packets of chars from secret cavity made beneath the driver seat and recovery of 12 packets of chars from secret cavity made beneath the front seat; that all the recovered 25 packets of chars were wrapped in yellow scotch tape, each packet having weight of 1000 grams with

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net quantity of 25000 grams; that 10 grams of chars each separated from each packet as test samples for chemical analysis, which were sealed in parcel no. 1 to 25, while, the remaining chars was sealed in parcels no. 26 to 50; that the recovered car was also taken into possession by police and accused disclosed his name as Naveed Ali son of Ayan Ali, 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. In light of the report of FSL Ex. PZ/1, the investigation officer added sections 468/471 PPC in the instant FIR and separate challan was submitted to that extent.
4. Accused facing trial was summoned through *zamima bay*. On his attendance, the copies of case were furnished to accused u/section 265-C Cr.PC. The accused was 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. Ain Ullah Muharrir, was examined as PW-1, who on receipt of the murasila report, card of arrest and recovery memo registered the FIR, Exh.PA. He made entries regarding the case property in register no. 19, Exh.PW 1/1. PW-2 is the statement of Khayal Hussain, who has taken parcels 1-25 containing samples of chars to FSL Peshawar for chemical analysis. The statement of Muhammad Shafiq SHO (complainant) was recorded as PW-3, who confirmed the initial

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report, Exh.PA; recovery of contraband and the car vides recovery memo, Ex.PW-3/1, to be true. He arrested the accused and issued his card of arrest, Exh.PW-3/2. He drafted the murasila, Ex.PA/1. He exhibited parcels no. 26 to 50, Exh.P-1 to Exh.P-25, the car, Ex.P-26, and documents of car, Ex.P-27. After completion of investigation, he submitted complete challan, Exh.PW 3/3, against accused. One of the marginal witness to the recovery memo was Zulqaid Ali, who was examined as PW-4. He testified that recovery was made from car possessed by the accused, which 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 of police station for registration of FIR. Investigation Officer of the case was Hashim Khan OII, who has entered in the witness box as PW-5. He prepared the site plan, Exh.PB, and confirmed the examination of prosecution witnesses. He had produced the accused before the Area Judicial Magistrate vides application, Exh.PW 5/1. He vides application, Exh.PW 5/2, and road permit certificate, Exh.PW 5/3, sent the parcels for FSL analysis. He exhibited FSL report, Exh.PZ. He addressed an application, Exh.PW 5/4, to Judicial Magistrate for confessional statement of accused; drafted application, Exh.PW 5/5, for FSL and application, Exh.PW 5/6, to ETO Lahore. He also exhibited application, Exh.PW 5/7, which was drafted by him for issuing docket/letter for information regarding motorcar. Letters issued by SP investigation to FSL, ETO and DD regarding arrival and departure of SHO and investigation officer are Exh.PW 5/8, Exh.PW 5/9 and Exh.PW 5/10. He produced photographs of the car,

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Exh.PW 5/11, FSL report of the car, Exh.PZ-1, summons, Exh.PW 5/12, and application for addition of sections 468/471 PPC. After the completion of investigation, he handed over the case file to SHO for onward submission of complete challan.

7. Prosecution closed its evidence. The statement of accused was recorded under section 342 CrPC, wherein, he again denied from the charges and adhered to his innocence. In reply to a question, he neither wished to be examined under oath nor to produce evidence in defense.

8. Arguments heard and record perused.

9. 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 contraband recovered from accused are positive; that there is no malafide on part of the prosecution to falsely involve the accused in the case, therefore, he requested to award him maximum punishment.

10. 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;

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

11. Viewing the arguments advanced by learned counsel for parties, the evidence and record before the court, it is observed that the local police has alleged that they had arranged a barricade at place of occurrence when at given time they have intercepted the car and during its search, recovered 25 packets of chars weighing 25000 grams of chars from secret cavities of the vehicle made beneath the driver and front seats of the car. Now, prosecution is duty bound to prove the allegation against accused beyond shadow of reasonable doubt from the moment of their presence on the spot, approaching the car to that place, their interception of the accused, his body search, his transportation of contraband in the secret cavities of the car, taking of samples from contraband, sealing of chars, preparation of recovery memo, drafting murasila, witnessing of the proceedings by marginal witnesses, registration of case, safe custody of recovered articles, investigation of the case and laboratory reports etc.

12. 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 as it wished and it was under heavy duty to prove the case against

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the accused beyond shadow of reasonable doubt, however, there are major contradictions and anomalies noted in the instant case, which were found damaging to the prosecution story. The most prominent amongst those are that complainant has though alleged the recovery of huge quantity of chars to be transported by the accused in secret cavities of the car; however, he admittedly did not mention the kind/ shape of chars in his report that whether the recovered chars was in shape of *pukhta* or *garda*. The complainant (PW-3) in his cross-examination though explained that chars was in powder form i.e. *garda*, however, when a random parcel no. 39 was unsealed in open court, the contraband inside the packet was found to be in pieces, which leads to inference that the recovered contraband was in *pukhta* form and not in powder form i.e. *garda*, which is also admitted by the witness. The witness though tried to justify that the contraband usually changes its form and appearance due to weather condition, which justification could have been believed, nevertheless, the test sample parcels no. 1-25 procured from the recovered contraband and sent to FSL Peshawar for chemical analysis within 72 hours of the recovery of contraband also provides that physical appearance of the contraband was brown solid, which speaks volume that the recovered chars was in powder form and the samples sent to laboratory were different from the alleged recovery because it is hardly possible that chars sent to laboratory in powder form shall change its shape in a couple of days and 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 not powder but chars.

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13. The complainant has also failed to mention in the murasila report that as to who has made search of the car. Likewise, complainant (PW-3) has explicitly mentioned that at the time of arrest and seizure of the contraband, constables Tanveer Ali and Mehtab Ali were also accompanying him at the barricade, which fact is not only endorsed by Zulqaid Ali (PW-4), the marginal witness to recovery memo, and the investigation officer (PW-5) in their statements but Zulqaid Ali also deposed that those two police officials have also assisted the complainant in preparation of all parcels; therefore, they were also important witnesses of the case but this is strange to note that they have neither been cited as witnesses of the case nor their positions have been marked/shown in the site plan, which proves the whole proceedings of prosecution to be doubtful. Similarly, complainant deposed that he has prepared all the documents on the spot while sitting on road side, whereas, Zulqaid Ali negated him stating that complainant has prepared the documents inside the check-post, which creates doubt about accompanying the marginal witness to the recovery memo with complainant to the spot or at least his presence there at the time of occurrence.

14. Complainant (PW-3) also deposed that on preparation of recovery memo, card of arrest and the murasila, he has delivered it to Zulqaid Ali, who took it to police station and after handing over the same to Muharrir of police station, he has returned to spot at 1730 hours, which is also endorsed by Zulqaid Ali (PW-4) but Ainullah (PW-1) negated them stating that murasila carrier remained with him in the police station having availed that he did not return to the spot.

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15. The presence of complainant and marginal witness to the recovery memo at same time on the spot is also doubtful from the fact that complainant stated that In-Charge of Tazi Khel Police Check Post was Tahir Khan, however, he was on leave on that day, nevertheless, Zulqaid Ali (PW-4) contradicted him saying that when they had reached to the spot, two police officials along with In-Charge Tahir Khan were present there and they had also taken tea with him, which infers that either complainant had not gone to spot or the marginal witness has not accompanied the complainant or both of them had not gone to the spot and completed the proceedings in the police station. The conducting the whole proceedings in the police station can further be envisaged from the point that when investigation officer (PW-5) was questioned as to whether he had gone to Tazi Khel check-post, he straightaway answered that he did not visit the Tazi Khel check-post i.e. the place in front of which the occurrence has taken place. All this further reflects that if the investigation officer of the case has not visited place of occurrence, then, how he conducted the investigation without going to the spot; therefore, whatever, the investigation officer or the witnesses have deposed cannot be relied on this score alone.

On similar footings, deposition of Zulqaid Ali further transpires that the police party present on the spot had furnished full assistance to the complainant in preparation of parcels, which raises a question that if all of them were busy in preparation of parcels, then, who have witnessed them separating the chars and preparing the parcels.

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17. Similarly, in reply to a question, complainant deposed that only Tanveer Ali and Mehtab Ali remained on the spot i.e. check-post, whereas, they had returned to the police station, which means that all police officials, who have accompanied the complainant from police station to spot, including Zulqaid Ali have returned to police station after proceedings were concluded on the spot, which is also evident from daily diary report no. 12, however, Zulqaid Ali first stated that on completion of proceedings they returned from the spot and he was sitting beside the accused but on recollection of facts added that he did not accompany the accused at the time of leaving the spot. On the other side, investigation officer (PW-5) contradicted both of them stating that complainant along with police officials including Tanveer Ali and Mehtab Ali has left the spot for police station at about 1840 hours in the official vehicle, which further creates doubt in the prosecution story that if Tanveer Ali & Mehtab Ali had also left the spot for police station then who was left behind in the check-post.

18. If it is admitted for a moment that complainant has made recovery of huge quantity of chars i.e. recovery of 25 packets from the secret cavities made beneath the driver and front seats of the car and in this respect photograph of both cavities were taken, however, still neither complainant nor the investigation officer of the case has brought on record the size i.e. length and width of the cavities to make this believe that the alleged recovered 25 packets of chars could have actually been placed in those cavities. Even, the complainant did not bring on record that how he opened the secret cavities because he admitted that those could not have been opened with bare hands.

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19. Above all, contents of murasila report provides transporting of the recovered contraband through secret cavities of the car but complete record is silent as to what happened to the car after the complainant and the police party returned to police station because complainant (PW-3) stated that they had returned from the spot to police station through official vehicle, whereas, he was occupying the front seat with the driver and Tanveer Ali and Mehtab Ali had remained in the check-post. Even, investigation officer (PW-5) of the case did not bother to investigate nor still in knowledge of fact that as to who has brought the car in question from spot to police station and handed over to Muharrir of police station. Investigation officer, however, then contradicted complainant stating that latter has brought the car to police station.

20. 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 the case and the FIR is registered. In the instant case, perusal of recovery memo and card of arrest of the accused provide that it contains FIR number, which is not possible before registration of case and therefore apprehends that recovery memo and card of arrest of the accused were prepared in the police station and not on the spot specially when Muharrir of the police station denies any tampering (addition etc.) in recovery memo and card of arrest and thus creates doubt about the mode and manner about the recovery of contraband from accused.

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21. Although safe custody and transmission of test samples/parcels of chars are proved from evidence, whereas, Muharrir of the police station has also admitted the handing over the case property to the investigation officer of case for its production before learned Judicial Magistrate and making its entry in the register, nevertheless, whole record is silent about handing over parcels no. 26-50 to investigation officer of the case for its production before the learned Judicial Magistrate within the meaning of section 33 of the Act. Muharrir (PW-1) also later on admitted that he has not made any entry about arrival and departure in register no. 19 about handing over the case property to investigation officer from the *maalkhana* for producing before the learned Judicial Magistrate along with the accused, which further puts dent on prosecution version.

22. More so, investigation officer has admitted that there is no detail mentioned on top of register no. 19, Exh.PW 1/1, to show that as to which police station it belongs. Importantly, the investigation officer has though brought on record extracts of daily diaries and register no. 19 in his evidence; however, those were photocopies and were objected by learned defense counsel on ground that original registers of the same were not produced before the court. Even, PW-1 also admitted non production of original daily diary register and register no. 19 before the court and this failure of prosecution to produce the register no. 19 before the court infers that the case property was never received and kept in the *maalkhana* of police station. The wisdom is drawn from judgment passed by august Peshawar High Court in Criminal Appeal No. 1253-P of 2019.

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23. It is also on record that one of the prosecution witnesses namely, Shakeel Khan Constable, who was second marginal witness to the recovery memo, was abandoned by the prosecution for reasons best known to them on the pretext that he was also witness of the same facts. Likewise, non-citing the names of Tanveer Ali and Mehtab Ali as witnesses of the occurrence and recovery proceedings also 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 they 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 and the judgment passed by august Peshawar High Court in Criminal Appeal No. 1253-P of 2019 on 06.10.2022 in case titled Shakeel Ahmad versus The State.

24. 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 case would be extended to the accused being favorite child of law. It is, therefore, held that prosecution has

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failed to bring home the guilt against accused beyond shadow of reasonable doubt: hence, accused Naveed Ali 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.

25. Case property i.e. chargs be destroyed after expiry of period provided for appeal/revision.
26. File consigned to record room after completion and compilation.



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CERTIFICATE

It is certified that this judgment of consists of thirteen (13) pages and each page is duly signed by me after necessary corrections.



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01.02.2024

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