

55
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.35/3 of 2021

Date of institution: 21.12.2021

Date of decision: 15.09.2022

The State

...Versus...

1. Sami Ullah son of Sabir Gul, resident of Qaum Utman Khel, Tappa Branka Khel, Teshil Lower and District Orakzai.
2. Farman Ullah son of Habib ur Rehman, resident of Qaum Utman Khel, Tappa Bazran Khel and District Orakzai..... (**Accused facing trial**)

**Case FIR No.136, Dated 08.11.2021 u/s 9-D of KP-CNSA, 2019
registered at Police Station Kalaya Orakzai.**

JUDGMENT

Accused named above faced trial before this Court in case FIR No.136 dated 08.11.2021 u/s 9-D of Khyber Pakhtunkhwa Control of Narcotics Substance Act, 2019, registered at Police Station Kalaya, Orakzai.

2. Facts of the case are such that Muqadar Khan ASHO along with other police officials of Police Station Kalaya Orakzai, laid barricade on spy information regarding the smuggling of chars. Two persons travelling on Motorcycle, unregistered, Chassis No. EA485602, Engine No. 9003394, appeared from Utman Khel side and were stopped by the complainant for the purpose of checking. The Motorcycle was driven by accused Sami Ullah. On personal search of driver of the Motorcycle, the complainant recovered 10 packets of chars from the waist coat of such person, which were wrapped in yellow scotch tape. On weighing the recovered packets, each packet came out

SAYED FAZAL WAHDOOD
Addl. District & Sessions Judge
Orakzai at Hangu

1200/1200 grams with total quantity of 12000 grams chars. Upon personal search of the person sitting behind the driver of Motorcycle namely Farman Ullah, the complainant also recovered 10 packets of chars from the waist coat of such person. On weighing, each packet came out 1200/1200 grams with a total of 12000 grams chars. Both the accused were arrested on the spot. 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. They were summoned through Zamima Bay being in custody and on appearance they have been provided prescribed documents of case in line with Section 265-C of the Code of Criminal Procedure-1898. Charge against the accused was framed to which they pleaded not guilty and claimed trial.

4. Prosecution was directed to produce evidence. The prosecution in order to prove its case against the accused, produced and examined as many as six (06) witnesses. The prosecution evidence is sketched below for ease of reference and determination of guilt or innocence of accused:

5. Muhammad Shafiq SHO, PS Kalaya Orakzai, was examined as PW-1, who stated that *“during relevant days I was posted as SHO at Police Station Kalaya. On 11-11-2021, I submitted complete challan against the accused Sami Ullah after the completion of investigation”*.

SAYED FAZAL WADOOD
 Addl. District & Sessions Judge
 Orakzai, Hangu

6. PW-2 is the statement of Ali Hussain Constable of Police Station Kalaya Orakzai, who deposed that *“during relevant days I was posted as constable at Police Station Kalaya. On 10-11-2021, SI Menhaz Mehdi handed over to me parcel 1 to 10 and parcel No. 12 to 21 for onward submission to the FSL Peshawar for chemical examination. After submission in FSL Peshawar, I came back to the PS Kalaya on same day. My statement was recorded by the IO under section 161 Cr.PC in the PS.”*

7. Muqaddar Khan, ASHO Police Station Kalaya Orakzai, was examined as PW-3, stated that *“during the period of occurrence I was posted as ASHO Police Station Kalaya. On 08-11-2021 at about 16:00 hours I was along with the other Police officials on routine patrolling of the area. I was informed that two persons on the motorcycle smuggling the chars from Utman Khel. I rush to the place of occurrence and made out Nakabandi. Motorcycle was stop having two person were riding on it, both were deboarded from the motorcycle; during personal search one person who disclosed his name as Sami Ullah; 10 packets*

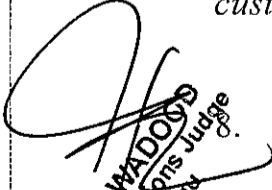
of chars each packet containing 1200/1200 grams total 12000 grams from the waist coat grey color were recovered. The other person who was present on the rare seat of the motorcycle disclosed his name as farman ullah, during his person search 10 packets of chars each packet containing 1200/1200 grams chars were recovered from his waist coat, the chars were weighed through digital scale. I separated 10/10 grams from each packet were separated for FSL the chars recovered from the possession of accused Sami Ullah, which

SAYED FAZAL WAJID
 District & Sessions Judge
 Orakzai at Hangu

(58)

were sealed into parcel 01 to 10. Out of which the remaining 11900 grams and waist coat grey in color belong to accused Sami Ullah was sealed into parcel No.11 which is Ex.P-1 of each packet were sealed into parcel No. 12 to 21. Similarly, I also separated 10 grams from each packet for FSL the chars recovered from the possession of accused Farman Ullah which were sealed into parcel No. 12 to 21 while the remaining 11900 grams chars along with waste coat belong to accused Farman Ullah were sealed into Parcel No. 22 which is Ex.P-2. I also took into possession the motorcycle without Chassis No. EA485602, Engine No. 9003394. The motorcycle is Ex.P3 in this respect I prepared the recovery memo which is Ex.PW3/1 in the presence of marginal witness; the sealed parcels were duly stamp with Mono gram MS which correct and correctly bear my signature. I arrested both the accused on the spot and prepared card of arrest which is Ex.PW3/2. Similarly, I also prepared the Murasila which is Ex.PA and sent murasila, card of arrest and recovery memo to the PS through constable Gul Hussain No. 529 for registration of FIR. After the arrival of the IO the site plan was prepared on my pointation. I then left to the PS and I handed over both the accused along with case property for safe custody."

PW-4 is the statement of Gul Hussain constable PS Kalaya, Orakzai, who deposed that "during relevant days I was posted as constable at Police Station Kalaya. On 08-11-2021 I was present with Muqaddar ASHO on patrolling upon the information we were present on Naka Bandi one Motorcycle without No. red color came towards us. Two persons/accused were setting on the said


SAYED FAZAL WADOOD
Addl. District & Sessions Judge
Orakzai at Hanga

Motorcycle. The accused stopped by the complainant/ASHO for the purpose of checking. Both the accused wore waist coat. During the search the complainant/ASHO were recovered 10 packets of chars wrapped in yellow scotch tape from the separate pockets of the waist coat of the accused Sami Ullah, each packets weighing through digital scale found 1200/1200 grams total 12000 grams while 10 packets chars wrapped in yellow scotch tape were recovered from the separate pockets of the waist coat of accused Farman Ullah each packet weighing through digital scale found 1200/1200 grams total 12000 grams. 10/10 grams separated from each packet for FSL. Which were sealed into parcel No. 1 to 10, 12 to 21 while the remaining 11900/11900 grams chars along with waist coat sealed in parcel no. 11 which is already Ex. P-1 and parcel no. 22 which is already Ex. P-2 by affixing by 3/3 seals and put 01 seal inside the parcel with the monogram in the name of MS. The Motorcycle without number in red color model Honda-125 which is already Ex. P-3 also took into possession through recovery memo by the complainant/ASHO. After drafting the recovery memo by the ASHO I and other marginal witnesses signed the recovery memo. Similarly, the complainant handed over to me the recovery memo, Murasila and card of arrest to the PS. The same were handed over to the Muharrir Asmat Ali of the PS. My statement was recorded by IO u/s 161 Cr.PC. Today I have seen the relevant document which are correct and correctly bears my signatures”.

SAYED FAZAL WADOOD
 Addl. District & Sessions Judge
 Orakzai at Habesh

9. Mehdi Hassan OII, Police Station Kalaya, Orakzai, was examined as PW-5; stated that “during those days, I was posted as OII in the PS Kalaya. Copy of FIR along with recovery memo, card of arrest and Murasila report were handed over to me and I then proceeded to the spot and prepared the site plan on the pointation of complainant Muqaddar Khan ASHO. The site plan is Ex.PW-5/1. The complainant shown to me the recovered contraband along with

Motorcycle on the spot. I recorded the statement of PWs on the spot. On dated 09-11-2021, I produced the accused before the Illaqa Magistrate for physical custody, the accused was sent to Judicial Lockup vide my application Ex.PW-5/2. I recorded the statement of accused u/s 161 Cr.PC. Letter of FSL was prepared by me which is placed on file and is Ex.PW-5/3. On dated 10-11-2021 I handed over the parcels from 1 to 10 and from 12 to 21 to the constable Ali Hussain for FSL. In this respect, receipt road permit No. 198 is prepared by me which is placed on file and is Ex.PW-5/4, the Naqalmad No.5 Daily Diary 08-11-2021 was prepared by me. Muharrir of the PS which is placed on file and is Ex.PW-5/5. Naqalmad No. 18 daily Diary 08-11-2021 is also prepared by the Muharrir of the PS which is placed on file and is Ex.PW-5/6; similarly, the entry has been made by the Muharrir of the PS in register No. 19 which is placed on file and Ex.PW-5/7. I also applied for the verification of Motorcycle to the excise office Hangu. My application in this respect is placed on file which is Ex.PW-5/8. I also applied for the FSL of Motorcycle vide my application Ex.PW-5/9. FSL report is received by me which is placed on file and is Ex.PK. Statement of Muharrir and constable took the samples to the FSL laboratory Peshawar were also recorded by me u/s 161 Cr.PC. After completion of investigation I handed over the file to SHO for challan."

10. PW-6 is the statement of Asmat Ali AMHC Police Station Kalaya, Orakzai, who deposed that "during the days of occurrence, I was posted as AMHC to the PS Kalaya. On 08-11-2021, I was present on my duty at PS Kalaya. I received the Murasila, Card of arrest and recovery memo from Muqaddar Khan ASHO through constable Gul Hussain. I incorporated the contents of Murasila into shape of FIR and signed the same which is Ex.PA/1. Thereafter, I handed over the copy of FIR, Murasila, recovery memo and card of arrest to the IO for investigation. When SHO returned to the PS he handed


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

over to me the case property consist of Motorcycle and 1 to 22 parcels of chars in sealed condition having the monogram in the name of MS and accused. I locked the accused in the PS lockup and also entered the details of the case property in register No.19 which is already Ex.PW-5/7. I kept the case property in the Malkhana of the PS for safe custody. To this extent my statement under section 161 Cr.PC was recorded by the IO. On 10-11-2021, I handed over the parcel No.1 to 10 and 12 to 21 for the FSL to the IO and my statement to this extent was also recorded under section 161 Cr.PC. Today I have seen the relevant document which are correct and correctly bears my signature.”

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

12. Learned APP for the State argued that accused are directly charged in the contents of FIR followed by spot arrest and recovery. The evidence available on file is sufficient to establish a proved case of the commission of offence by the accused. He added that the offence is heinous in nature for which prosecution has adduced ocular evidence supported by corroboratory evidence and thus proved its case beyond doubt entailing conviction of the accused.


13. On the contrary, learned counsel for the accused contended that evidence available on the file is deficient and the story advanced by the prosecution is not appealable to prudent mind. It was added that there is no independent witness of the occurrence and the evidence available on the file is full of


SAYED FAZAL WAJOOD
Addl. District & Sessions Judge
Orakzai at Hangra

contradictions. He submitted that prosecution has not been able to prove the case beyond shadow of doubt and requested for acquittal of the accused.

14. Perusal of case record would reveal that according to FIR the accused were intercepted during routine patrolling of the area at barricade established on spy information on 08.11.2021 at 1600 hours and contraband/chars weighing 24000 grams were recovered from personal possession of both the accused in the presence of marginal witnesses namely, Constable Gul Hussain and Constable Abdul Sattar Vide Recovery memo (Ex. PW 3/1). The latter marginal witness (PW-4) was examined; whereas, the former marginal witness was abandoned. According to (PW-4), he was present with seizing officer on the eventful day. He stated that on search of both the accused, 10/10 packets of chars from their waist coats measuring 24000 grams of chars were recovered from possession of both the accused.

15. With respect to proceedings conducted by the IO on the spot, the stance of the prosecution as per Murasila Ex. PA, FIR Ex. PA/1 and recovery memo Ex. PW-3/2 is; that after drafting of Murasila, recovery memo and card of arrest of the accused by the complainant, the same were handed over to PW-4 constable Gul Hussain who took the same to the PS and handed over to Asmat Ali AMHC PW-5, who registered FIR Ex. PA/1 on the basis of such Murasila. He handed over copy of the FIR, Murasila, card of arrest and recovery memo to the IO Mehdi Hassan PW-5. The said PW proceeded to the spot where he prepared site plan Ex. PW-5/1 on the pointation of the complainant and


SAYED FAZAL WADOOD
District & Sessions Judge
Jalalpur Jhang


recorded the statements of witnesses u/s 161 of the Code of Criminal Procedure, 1898. In order to prove its stance, the prosecution has produced constable Gul Hussain as PW-4, Mehdi Hassan IO as PW-5 and Asmat Ali Moharrir as PW-6. All the three witnesses narrated the aforementioned story and the sequence of different events in their statements. Constable Gul Hussain as PW-4 in his statement has confirmed that he left the spot and reached the PS and handed over Murasila, card of arrest and recovery memo to the Moharrir of the Police Station. Asmat Ali Moharrir as PW-6 has confirmed that the Murasila, card of arrest and recovery memo were handed over to him by Constable Gul Hussain and he drafted the FIR. Similarly, Mehdi Hassan OII as PW-5 has confirmed that the case was handed over to him for investigation at 1730 hours; where after, he left the PS and reached the spot. That the case property was shown to him on the spot by the seizing officer in sealed condition. He has also confirmed that the site plan Ex. PW-5/1 was prepared on the spot and the statements of marginal witnesses were also recorded by him on the spot. The witnesses are also unanimous on the points of arrival of the IO on the spot, his departure and return to PS and the time of arrival of the complainant party to the PS. The statements of all the three witnesses are consistent regarding proceedings conducted by the IO on the spot, their statements could not have been shattered in cross examinations and the prosecution has proved its stance regarding proceedings conducted on the spot in the mode and manner as alleged by it, without shadow of any doubt.


SAYED FAZAL WADOOB
 Addl. District & Sessions Judge
 Orakzai at Hangu

16. Chain of custody of the recovered material plays 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, transportation to FSL and other material questions are points for determination in accordance with the evidence.

17. The case of the prosecution regarding the chain of the custody of the representative samples, their transmission to the FSL within the prescribed period of time and following full protocols of the tests applied in the FSL, is; that after seizure of the contrabands by the complainant containing 20 packets, 10 grams from each of the packet has been separated and sealed by him on the spot with affixing of three monograms of 'MS' on each of the parcel. The complainant, after his arrival in the PS, has handed over the representative samples to PW-6 Moharrir Asmat Ali, who has made entry of the case property in Register No. 19 and has kept the samples in safe custody. On 10.11.2021, the Incharge investigation has collected the samples from Moharrir and has handed over the same to constable Ali Hassan PW-2 for transmission to FSL,

who has transmitted the same against a road permit certificate and deposited the same in FSL against proper receipt, which on return has been handed over by him to the IO. After receipt of FSL report, the same has been placed on file by the IO. The prosecution in order to prove its stance has examined the complainant as PW-3, Moharrir Asmat Ali as PW-6, Mehdi Hassan, the IO of the case as PW-5 and Constable Ali Hussain as PW-2. All the four witnesses


SAYED FAZAL WADOOD
Advt: District & Sessions Judge
Orakzai Hangu

have narrated the aforementioned story in their statements. Nothing contradictory could be extracted from the witnesses in their cross examinations.

18. As far as objection of not associating private witnesses is concerned, the police witnesses are also believed to be good witnesses as private witnesses unless some malafidi is shown on behalf of police witness. Similarly, Section 103 of Criminal Procedure Code , 1898 has specifically been excluded in the cases under the Khyber Pakhtunkhwa CNSA Act, 2019 vide Section 231 of the ibid Act; therefore, the failure of the seizing officer or the investigating officer to associate any private witness with the occurrence does not adversely affect the case of prosecution. As per Daily Dairy, the complainant was accompanied by constables Abdul Sattar and Gul Hussain who had already been examined in the Court.


19. In view of what is discussed above, it is held that the statements of the complainant and the eyewitness are consistent regarding the date, time and place of occurrence as well as the mode and manner of the recovery. The scientific evidence in shape of FSL report and other circumstantial evidence available on file as that of sufficient degree of cogency; therefore, the commission of offence is proved by the prosecution beyond shadow of reasonable doubt. Moreso, the witnesses of prosecution are unanimous regarding all material facts; therefore, the minor contradictions between the statement of PWs, cannot be taken to defeat the case of prosecution and in no way create reasonable doubts to shatter the case.

SAYED FAZAL WADOOD
Asstt. District & Sessions Judge
Orakzai at Hangu

(66)

20. In view of what is discussed above, it is held that the prosecution has proved case beyond shadow of reasonable doubt, establishing the chain of the custody of the representative samples; that too, within the prescribed period of time, from the spot till these are received in the FSL. Similarly, as per report of FSL Ex. PZ, the representative samples no. 1 to 10 and 12 to 21 were found positive for chars after following full protocols of the tests applied. Hence, the case of the prosecution is substantiated by the report of FSL.

21. In circumstances, it is held that the prosecution has successfully proved its case against the accused facing trial without any shadow of reasonable doubt. Consequently, the accused facing trial, Sami Ullah and Farman Ullah are held guilty for having in their possession 12000/12000 grams each of chars. They are convicted u/s 9 (d) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 and accordingly sentenced to suffer rigorous imprisonment for life and also to pay fine of Rs. 500,000/- (five lac). In case of default of the payment of fine, the accused shall further suffer simple imprisonment for six (06) months; however, the amount shall be made recoverable as arrear of land revenue. The benefit of Section 382-B of Code of Criminal Procedure, 1898 is, extended to accused. The case property i.e., chars be destroyed after the expiry of period provided for appeal/revision while the motorcycle be returned to its lawful owner, if not required in any other case. Copy of the judgement be delivered to the accused today free of cost and their thumb impression to this effect shall be obtained at the margin of the order


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

sheet; besides, the copy of Judgement shall also be issued to the District Public Prosecutor in line with Section-373 of the Code of Criminal Procedure, 1898 free of cost. Case file be consigned to District Record Room, Orakzai, after completion within specified time.

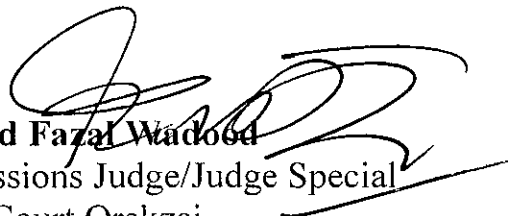
ANNOUNCED
15.09.2022



Sayed Fazal Wadood
Additional Sessions Judge/Judge Special
Court Orakzai

CERTIFICATE:

Certified that this Judgment is consisting upon thirteen (13) 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